Sunrises without Sunsets

Can Sunset Laws Reduce Regulation?

Vern McKinley

The pattern is familiar: a statute is passed, an agency is created, a regulation is promulgated. At the same time, a narrow constituency is created that benefits from the statute, works for the agency, or receives favorable treatment under the regulation. The remainder of the citizenry does not have enough time, energy, or interest to focus on this small corner of the political landscape. Thus, citizens cannot continually reexamine why the statute, agency, or regulation originated in the first place and compare that to its current status. Meanwhile, the narrow constituency offers undying support for Congress's regulatory creation. Budgets grow and covered classes are expanded, creating ever-larger and ever-stronger constituencies. As former secretary of commerce Peter Peterson aptly notes in his book, *Facing Up*, we now have a "vending-machine government that doles out consumption to entitled interest groups, each one an entrepreneur for its own private advancement."

Sunset laws have been promoted by the new, Republican-controlled Congress as a means of ending this cycle of statutory debasement. A sunset law is a statute or provision in a law that requires periodic review of the rationale for the continued existence of the particular law, administrative agency, or other governmental function.

This approach is certainly not new. A long line of legal scholars including Thomas Jefferson, Justice William O. Douglas, Guido Calabresi, Judge Abner Mikva, and Judge Robert Bork have offered it, in a variety of forms, as a solution to obsolete agencies and regulations. Most recently, Congress has used sunset provisions in a few narrow contexts. For example, the 1994 Crime Bill's controversial assault-weapons ban sunsets within 10 years. Also, the end of 1995 will mark the sunset of an entire federal agency, the Resolution Trust Corporation (RTC), after six years of existence.

Though sunsetting may appear to be an effective tool for limiting the size of government, in practice sunset provisions have not been very effective, and likely will do little to slow the growth of statutes, agencies, and regulations.

Background

Regulations are estimated to cost the U.S. economy in the range of $500 billion, or about $2,000 per person, per year. Presumably, some form of sunset provision would limit the cost and burden of regulation by eliminating those statutes, agencies, or regulations that are obsolete. Sunsetting is one of a number of alternatives for Congress to

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choose from in dealing with what is called the problem of legal obsolescence, which is a term used to describe the reduced applicability and usefulness of a statute, regulation, or agency. Other options for Congress include statutory repeal or amendment.

The phenomenon of statutory obsolescence is not surprising in light of this past century's obsession with passing laws, a phenomenon that Grant Gilmore in *The Ages of American Law* called an "orgy of statute making." One reason why some laws, and the regulations and agencies they created, become obsolete is that the problem or crisis that spawned them, often short-run in nature, dissipated or ceased to be a problem—as was the case with the short-term "oil crisis," which spurred the creation of the Energy Department.

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A second reason that laws become obsolete is that problems with particular solutions do not manifest themselves for decades, at which point interest groups that benefit from the status quo are well entrenched. Such is the case with the creation of the Social Security system during the 1930s—the system has since proven itself to be unsound from an actuarial standpoint, largely due to changes in demographics since that time.

A third reason is articulated in a 1994 report from the National Policy Forum, a Republican-influenced think tank. The report notes that a regulation can quickly become obsolete in today's world, where international competition and fast-moving technology can rapidly change the assumptions on which the regulation was based. To use a Newt Gingrich-style analysis (per Alvin and Heidi Toffler), we are moving headlong into a third-wave, information economy that is still constrained by the old rules formulated during the second-wave, industrial age. Yet once a regulation is in place, both the bureaucracy and benefiting interest groups have strong incentives to keep the regulation in place. An automatic sunset provision could help to overcome these natural political forces and ensure that a regulation remains in force only if it is justified and necessary.

The analysis of obsolescence has increased in importance of late given the electorate's seeming frustration with and skepticism concerning the efficacy of regulatory solutions formulated at the federal level. More broadly, it might be said that the whole idea that the federal government can be looked upon as the solver of all problems is in many ways becoming obsolete.

Who Will Do the Sunsetting?

If sunsetting is accepted as an appropriate solution to the problem of legal obsolescence, Congress would seem to be the most obvious, although not the only, branch of government to sunset a statute, agency, or regulation—using the legislative powers granted it under Article I, Section I of the Constitution. However, some scholars and policymakers suggest other alternatives.

The Judicial Branch. In his book *A Common Law for the Age of Statutes*, Guido Calabresi argues that the courts should be granted the authority to determine whether a statute is obsolete. This would create a common-law process of renovating the obsolete law via judicial review. Calabresi makes a compelling argument that Congress as well as the regulatory agencies have been derelict in their duties to repeal statutes and update regulations. But judicial sunsetting would result in a divesting of authority and a shifting in the balance of political power from the legislature and executive to the judiciary. The end result would be that the individual biases of judges would dictate the sunsetting of a statute. The courts would abandon their current role of determining what the law is and would assume a new role of determining what they think the law should be.

The Executive Branch. The executive branch has the option to implicitly sunset a statute by choosing not to aggressively enforce it. However, this is generally applicable only in those instances where the Congress has delegated a broad range of discretion to act to the executive, for example, in the enforcement of the antitrust laws. Thus, the executive branch's ability to sunset is limited to such circumstances in which the executive is given a wide degree of discretion to enforce a statute.

The Congress. Since Congress is the branch of government that should take the lead on sun-

setting, it is useful to review that body's experience with sunset provisions. The National Policy Forum argues that for the same reasons that regulations should be subject to sunsetting, the acts creating the myriad regulatory agencies and programs of the federal government should themselves be subject to automatic sunset provisions. Such provisions would make Congress responsible, and therefore accountable, for periodically reviewing these acts. That would encourage Congress to either downsize or eliminate those agencies whose goals and purposes no longer serve the public interest.

The height of efforts by the Congress to impose upon itself a broad-based system of sunset provisions occurred in the late 1970s, shortly after the post-Watergate wave of cynicism toward government. Common Cause was one of the strongest backers of sunset provisions, calling them an action-forcing mechanism that would create an incentive for periodic and comprehensive executive and legislative evaluation of existing programs and agencies. Bruce Adams of Common Cause identified 10 principles for any workable and responsible sunset law in an article from that period in the *Administrative Law Review*:

1. Programs and agencies should automatically terminate at a date certain unless affirmatively recreated by law.
2. Termination should be periodic (e.g., every seven or nine years) in order to institutionalize the program-evaluation process.
3. All significant innovations should be made slowly, so introduction of the sunset mechanism should be phased in gradually.
4. Programs and agencies in the same policy area should be reviewed simultaneously, in order to encourage coordination, consolidation, and responsible pruning.
5. Existing agencies (e.g., OMB, CBO, GAO) should undertake the preliminary program-evaluation work, but their evaluation capacities must be strengthened.
6. Sunset proposals should establish general criteria to guide the program-evaluation process.
7. Substantive preliminary work must be packaged in manageable decisionmaking reports so that top decisionmakers can exercise their common-sense political judgments.
8. Substantial committee reorganization, including adoption of a system of rotation of committee members, is a prerequisite to meaningful sunset review.
9. Safeguards must be built into the sunset mechanisms to guard against arbitrary termination and to provide for outstanding obligations and displaced personnel.
10. Public participation in the form of public access to information and public hearings is an essential part of the sunset process.

Before the recent Republican proposals on sunsetting of regulations, the broadest-based effort to effect a sunset scheme involved the proposed Sunset Act of 1977, which was sponsored by then-senator Edmund Muskie (D-Maine), and senators William Roth (R-Del.) and John Glenn (D-Ohio). The bill would have eliminated programs by terminating their budgetary authority.

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A program would be continued only if the Congress acted to provide new budget authority, after reviewing the effectiveness of the program, including a review by the comptroller general. The bill would also have provided for a sunset review of programs by the appropriate congressional committees before their scheduled termination dates. The sunset reviews would have been systematic evaluations of the programs to determine whether their merits justified their extension, and if so, whether the programs should be continued at the same level of funding as before. In Senator Muskie's words, "With this reform, at least we can begin to identify programs that overlap one another—that no longer have a valid public purpose—or that simply cost more than they deliver. . . . We can no longer afford a government that is so complex, expensive and unresponsive that it drags down one good program after another. . . . I see sunset as our one hope to get us out of this rut—to eliminate programs that don't help the people they are intended to help—to free us from the deadwood that severely limits our impact on deep social problems—and to direct our limited resources where they can do the most good."

However, the Sunset Act of 1977 was never

signed into law.

The current congressional effort at sunsetting of regulations is contained in the House's proposed "Regulatory Sunset and Review Act of 1995" (H.R. 994). But under this act's approach, Congress does not actually mandate sunsetting of any regulation; nor does it require a positive vote of Congress to keep a rule in place. Rather, the agency that administers a regulation would decide whether a rule should be kept as it is, modified, or allowed to expire.

The proposed bill would require agencies to review "significant" rules under two timeframes. Rules in place before the act is passed would have to be reviewed within four to seven years, depending upon their priority, as determined by the Office of Management and Budget. Rules passed after the act would have to be reviewed within three years of taking effect. The agency would then make recommendations to terminate, continue in effect, modify, or consolidate rules. A regulatory-review officer within each agency, reporting to the head of the agency, would be responsible for implementing the extensive procedures required by the act. Those procedures include conducting a systematic review of all regulations issued by the agency; issuing preliminary and final reports based on such reviews; and reviewing comments solicited from the public and private sector after publishing those reports in the *Federal Register*.

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The bill also sets forth factors the agency must consider throughout the entire review process, including the direct and indirect costs of the rule; whether the rule is outdated, obsolete, or unnecessary; the extent to which requirements of the rule overlap or conflict with those of other agencies' rules; the risk addressed if the rule is health or safety-related; the impact of the rule on market forces; whether the rule is worded simply and clearly; whether the rule creates negative unintended consequences; and the extent to which the rule has contributed positive benefits.

The administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget would review the reports to assure that the criteria set forth in the statute are being followed. Congress would also be involved in the process by requesting that certain "non-significant" rules be subject to sunset and by participating in the comment portion of the agency review.

Case Studies in Congressional Sunsetting

Although no government-wide sunsetting statute has as of yet been approved by Congress, sunsetting has been utilized in a few examples of administrative agencies. A review of three such case studies is useful in formulating a vision of how they might work on a more widespread basis.

The Civil Aeronautics Board. In what has been described as perhaps the most dramatic turnaround in regulatory policy, there is the example of the Civil Aeronautics Board (CAB), a turnaround that culminated with the eventual elimination of the agency. Congress began regulating the airline industry when it enacted the Civil Aeronautics Act of 1938, creating the Civil Aeronautics Authority which later was renamed the Civil Aeronautics Board. The CAB closely regulated airline routes and fares for nearly 40 years. It restricted entry of new firms into the industry and awarded routes without even trying to determine which carrier could serve the route at the lowest cost. As Roger Noll and Bruce Owen noted in an article on regulatory reform, the CAB appeared to have only one purpose—the cartelization of the airline industry (See *Regulation*, March/April 1983). It refused even to process applications from new companies seeking to enter the interstate airline business, and it attempted to organize collusive agreements among airlines to reduce service in competitive markets, so that airlines could earn higher profits.

Through an odd coalition of interests that included the likes of Sen. Edward Kennedy (D-Mass.) and CAB chairman Albert Kahn, the agency was transformed into a decidedly more pro-competitive agency and eventually eliminated with some residual functions passed to the Department of Transportation. Pursuant to the Airline Deregulation Act of 1978, Congress enacted the Civil Aeronautics Board Sunset Act of 1984. Rep. Harold Johnson, chairman of the Committee on Public Works and Transportation, the committee with jurisdiction in this area, noted during the passage of the Deregulation

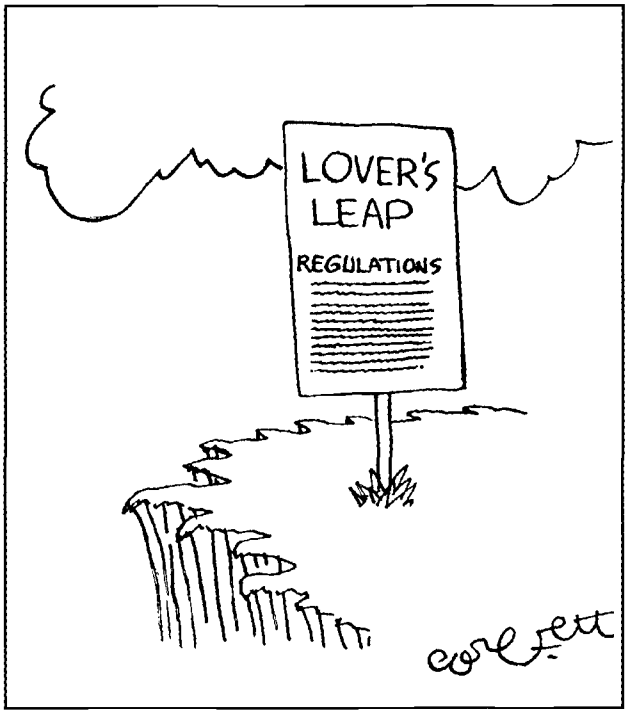
Act: "The Airline Deregulation Act frees the airlines from economic regulation on a phased and orderly basis. Following the basic approach of the House bill, the act includes a sunset provision which ends most economic regulation of domestic air service in 1985. . . . The Deregulation Act represents a comprehensive and carefully thought-out plan for freeing the airline industry from excessive economic regulation. It should result in a more efficiently operated industry, able to respond promptly to the needs of consumers."

Labeling the elimination of the CAB as an example of sunsetting is somewhat inconsistent with the manner in which the concept is usually understood. No periodic review took place as in the textbook case of sunsetting.

The CFTC. The most extensive experiment with a "pure" agency sunsetting is the experience with the creation and review of the Commodity Futures Trading Commission (CFTC). The CFTC, which has exclusive jurisdiction over the nation's commodities markets, was created in 1974, taking over functions that were previously performed by the Department of Agriculture. However, the new agency was only given a temporary authorization for its activities; its enabling legislation required a sunset review of the commission after four years. This was done in order to insure that the new commission would not become an inflated bureaucracy unresponsive to the original intent of Congress. The action was also taken, in the words of Sen. Patrick Leahy (D-Vt.), "to make the CFTC's reauthorization process a model on which to base future 'sunset' reviews."

A member of the staff at the CFTC during this period, Mark Young, noted in an article in the *Emory Law Journal* that by the time of the first reauthorization in 1978, many of the fears expressed during the process leading to the commission's creation in 1974 had been realized. The CFTC had moved into new headquarters in a private office building in downtown Washington, D.C. with furnishings that were more elegant than those of other agencies; leased automobiles were made available to commissioners and high-level personnel; the agency was criticized for an inability to develop a coherent approach to its management and planning; and the CFTC's management was hampered by extensive turnover in high-level personnel after only 18 to 24 months of the commission's existence.

During the consideration of reauthorization,



critics were not shy in their assessments of the new agency. Sen. Thomas Eagleton (D-Mo.) noted at his subcommittee's hearing on the CFTC, "I think your commission is one of the most confused and disorganized in the entire Federal Government. . . . It is inept and inefficient. The CFTC is the most messed-up agency in the Government, bar none." Sen. Orrin Hatch (R-Utah) added, "The CFTC has been pompous, self-righteous, brazen and ill-informed. It does not deserve a vote of confidence."

Sen. Jesse Helms (R-N.C.) considered introducing a bill to abolish the CFTC: "Maybe abolition of the CFTC would serve two useful purposes: (1) It would tell the people of this nation that once a bureaucratic agency is created, it does not necessarily have to continue in existence if its functions are no longer needed or can be dealt with elsewhere; (2) it would place those legitimate functions now performed by the Commission in agencies that well may be able to perform them better."

Joining the chorus of criticism was the General Accounting Office, which conducted an analysis that was highly critical of the CFTC. However, it stopped short of calling for the agency's elimination, instead suggesting a number of modifications to the CFTC's jurisdiction, passing many of its functions to the more entrenched Securities and Exchange Commission.

President Carter signed the reauthorization bill into law in 1978, and the CFTC was reauthorized for another four years. The fact that the agency survived despite such heavy criticism signaled a disappointing test of the sunset mechanism. Mark Young of the CFTC noted: "The Congressional verdict allowing the Commission to remain virtually intact might suggest that sunset will generally cause little change in the structure of federal agencies and programs."

When the next reauthorization of the CFTC occurred in 1982, there was little discussion, let alone serious consideration, of the possibility of eliminating or downsizing the agency. The 1982 reauthorization is most prominently known for the Shad-Johnson accords, an agreement between John Shad, then chairman of the SEC, and Philip Johnson, then chairman of the CFTC. The agreement allocated jurisdiction between the two agencies for the approval and regulation of new, hybrid products being offered by the financial industry. So, in contrast to the 1978 reauthorization process, where the CFTC was fighting for its very existence for much of the process, the 1982 reauthorization process saw the agency engaging in one of the commonest of activities for an entrenched agency—turf wars.

The regulatory state has grown exponentially since the New Deal in part because Congress has passed legislation that contains broad policy pronouncements, but then delegates to agencies the power to take on the day-to-day details.

As the years have passed since the 1982 reauthorization, the sunset process has done little to rein in the agency. The CFTC's staff continues to grow, doubling in size since its creation. In fact, in a recent article, Wendy Gramm, chair of the CFTC from 1988 to 1993, provides an extensive discussion of her tenure at the agency but does not even mention the reauthorization process (*Regulation*, 1994 No. 4). Finally, one of the first acts passed by the Republican Congress was the CFTC Reauthorization Act of 1995, signed into law by President Clinton, which reauthorized the CFTC through the year 2000.

The Resolution Trust Corporation. Another recent example of the use of a sunset provision concerned the Resolution Trust Corporation (RTC), which was created in 1989, in the wake of the savings and loan crisis. Its enabling legislation, the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), charged the agency with managing and resolving all cases involving depository institutions insured by the Federal Savings and Loan Insurance Corporation (FSLIC). FIRREA contained two sunset provisions: a sunset date of August 9, 1992 through which the RTC would continue to accept insolvent savings and loans from the Office of Thrift Supervision (OTS), the chartering authority for savings and loans; and a sunset date of December 31, 1996, through which the RTC would operate but then would sunset with its assets and liabilities being absorbed by the FSLIC Resolution Fund. These dates were later amended to July 1, 1995 for accepting savings and loans from the OTS and an agency sunset date of December 31, 1995, respectively.

The RTC's sunset date forced it to utilize employment practices that are nearly unprecedented in the federal sector outside of the RTC's sibling agency, the Federal Deposit Insurance Corporation (FDIC). This was accomplished by hiring a mix of experienced employees of the FDIC, the former FSLIC, and the private sector, many on a temporary basis. Flexible hiring practices allowed the agency to increase its workforce to sell the nearly $500 billion of book value of assets that came its way as a result of the thrift failures throughout the 1980s and early 1990s. The RTC's workforce increased from zero employees at its inception in August 1989 to its peak employment of approximately 8,600 in 1992. This flexibility also allowed the agency to shrink its workforce as the level of assets under its responsibility declined. The number of employees ultimately absorbed into the FDIC will be around 2,000, many of whom were originally FDIC employees.

In many ways, the example of the RTC is an aberration that does not fit neatly into the analysis of the sunsetting experiences of the CFTC and CAB. The RTC was not a regulatory body, but instead was a liquidation entity that had a finite number of institutions that it was responsible for liquidating. This led to the imposition of a definitive sunset date by the Congress in the RTC's enabling legislation. This is in contrast to the CAB, which was eliminated decades after it became an entrenched agency, a result that

makes its demise all the more impressive. The RTC's mission of spending billions to clean up an insolvent government deposit-insurance fund was also not a particularly popular one, as is illustrated by the *Wall Street Journal* editorial page's characterization of the agency as the "RTC tar baby." Few constituent groups outside of the agency itself were willing to defend the agency against such attacks. So with such scorn heaped upon the agency it is not surprising that the RTC not only was able to go out of business within a fairly short timeframe, but was actually eliminated a year earlier than dictated by its enabling statute.

Evaluating the Agency Sunsets. The two major sunsetting cases, the CFTC and the CAB, were dramatically different. The form of sunsetting used in the case of the CAB can best be described as a "drop-dead sunset" or "delayed repeal." The agency was given a clear date of termination by the Congress, and was downsized accordingly. This form of sunset resulted in a clear reduction in the regulatory burden on the targeted industry. For those interested in utilizing the sunset mechanism to reduce the regulatory burden, rather than maintain the status quo, it is the preferable model.

This form is in stark contrast to the case of the CFTC, where a "pure" sunset approach was utilized. Other than the first time the agency was reauthorized, the process was not looked upon as a serious attempt to eliminate or in any way reduce the power of the agency. There is little evidence that the sunset provision reduced the federal regulatory burden on the industry.

Regulatory Sunset and Review Act of 1995

Proponents of the current sunset act before the House of Representatives would do well to learn from the shortcomings of the past and to head off potential inefficiencies and problems with this approach. For example, in the time period leading up to the sunset review, policymakers might have a tendency to defer a careful analysis of regulations. The status quo will largely be locked in until that time arrives. Proponents of the regulation will argue that an analysis should be deferred until sunset. In the case of the CFTC, this was a four-year period. For regulations under the proposed bill, this will mean up to a seven-year period.

Further, as the time approaches for a regulation to undergo the sunset review, the bureaucracy and special-interest groups that currently keep regulations entrenched will know for certain that it is time to marshall their forces to preserve the regulation.

Ironically, the sunset bill, which aims at reducing constituency-group inertia by providing for the automatic termination of regulations, will actually create a constituency made up of government-agency sunset lawyers. The complex process of requiring the agencies to track the sunsetting of innumerable rules, review comments by outside parties, write summary reports for each and every significant regulation, and meet and discuss such reviews with staffers from the appropriate congressional committees, even to make minor reforms, promises a veritable gravy train for federal-agency lawyers. The incentives will be put in place to maintain the status quo, thus preserving the jobs of those keeping close tabs on all the agency's regulations.

Congress would do best to counteract what has been an orgy of statute-making with an orgy of statute repeals (a ready source of suggestions is available in the *Cato Handbook for Congress*).

Once the sunset process has passed, a certification that the regulation is not obsolete will have the effect of being a seal of approval and will provide ammunition for those who have an interest in maintaining the regulation. In the case of the CFTC, an interesting cycle regarding the number of employees at the agency is evident from the period from 1974 (the year of its enabling legislation) to 1990 (the scheduled date for its fourth reauthorization). As the year of a sunset review approached, the number of employees remained flat or actually dropped. But, in the year immediately following reauthorization, a noticeable boost in employees is discernible. It was as though after each reauthorization process was completed, the agency was rejuvenated by having its mission verified by the Congress. Of course, the trend of the number of employees was always upward during this period, increasing from 240 in 1975 to 527 in 1990.

Some organizations, most prominently the Competitive Enterprise Institute, a Washington-

based think tank, have suggested that the House bill falls short because it does not carve out a strong enough role for the Congress in the sunsetting process. However, a stronger role for the Congress in the review process is anathema to the reason it created many government agencies in the first place. In creating these agencies, Congress sought to avoid its responsibility to cope with the intricacies and details of regulation. The regulatory state has grown exponentially since the New Deal in part because Congress has passed legislation that contains broad policy pronouncements, but then delegates to agencies the power to take on the day-to-day details. This allows the Congress to take credit for passing high-minded legislation while simultaneously bashing faceless "bureaucrats" for implementing the details. Such a sunset process essentially dumps back in Congress's lap oversight of regulatory minutiae and details that it sought to avoid when it delegated power to agencies in the first place. Thus, there is little reason to expect that the Congress would be willing to undertake the extensive and detailed review that would be required.

Sunsetting is merely one of a number of options to counteract the phenomenon of statutory obsolescence. Congress would do best to counteract what has been an orgy of statute-making with an orgy of statute repeals (a ready source of suggestions is available in the *Cato Handbook for Congress*). If advocates of sunset laws know some programs that need termination, they should go out and terminate them. As noted by Robert Behn, a critic of sunset laws, nothing could do more to reverse the assumption that all programs automatically continue than to have a few well-publicized examples to the contrary.

Selected Readings

Adams, Bruce. "Sunset: A Proposal for Accountable Government." 28 *Administrative Law Review* 511 (Summer 1976).

Behn, Robert E. "The False Dawn of the Sunset Laws." *Public Interest* (Fall 1977).

Young, Mark D. "A Test of Federal Sunset: Congressional Reauthorization of the Commodity Futures Trading Commission." 27 *Emory Law Journal* 853 (1978).