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Taking the REINS on Regulation

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Should Congress be held accountable for the regulatory policies of the federal government? Most people would say so, and this week the House Judiciary Committee plans to vote on a bill to make Congress explicitly accountable for federal regulations. Introduced by Representative Geoff Davis (R–KY), H.R. 10, the "Regulations from the Executive in Need of Scrutiny" (REINS) Act, would require Congress to approve major new rules before they can take effect. A similar bill, S. 299, has been introduced in the Senate by Rand Paul (R–KY).

REINS would significantly change the way regulations are imposed. Congress would no longer be able to pass hazy legislation and disclaim further responsibility. By increasing Congress's accountability for regulatory policy, it would end the shell game for responsibility that Members have long played. Requiring explicit congressional approval for new rules is no panacea for excessive regulation, but it is a common-sense step forward.

Rising Red Tape. Firm action by Congress to rein in costly regulation is sorely needed. Over the past few years, the cost and number of new regulations have increased dramatically. This increase did not begin with President Obama, but it has accelerated markedly during his tenure. From inauguration day 2009 through March of this year, regulatory agencies imposed some 75 major new regulations (defined as those costing $100 million or more), imposing some $38 billion of new costs annually on the economy and consumers.[1]

This is on top of the continuing burden of the existing stock of red tape, which has been estimated at some $1.75 trillion per year.[2] This burden not only increases costs for consumers but hinders enterprises from growing and jobs from being created.

Delegated Power. Of course, Congress has always had the constitutional authority to control the growth and reach of federal regulations. The thousands of rules and regulations adopted each year originate from the powers delegated through legislation to agencies by Congress itself. These rules can always be revoked or modified by subsequent legislation passed by Congress and signed into law by the President. And Congress has used this power in the past in particularly egregious cases.

The process is a cumbersome one, however. In an attempt to make it easier for the legislative branch to exercise its authority over regulatory policy, Congress in 1996 enacted the Congressional Review Act (CRA). This act created expedited or "fast-track" procedures for voiding proposed rules, ensuring an up-or-down vote in the House and the Senate on "resolutions of disapproval."

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The CRA, however, has been successfully used only once to stop a rule, and that was a decade ago, when a Labor Department rule promulgated by the Clinton Administration was rejected shortly after President George W. Bush was inaugurated. A major problem is that a CRA resolution—like all other legislation—must be signed by the President, and few Presidents are keen on reversing the work of their own appointees. Knowing how hard it is to obtain a President's signature to reverse his own regulators, Members of Congress are reluctant to even attempt to reverse a rule under the CRA.

A deeper problem is that many Members of Congress are reluctant to accept responsibility over rulemaking. Under present practices, they get to take credit for enacting popular but vague legislation, but then can plausibly deny responsibility for the specific regulations that follow. The result is power without accountability—a useful result politically but an abysmal one for policymaking.

The REINS Act would end this game by requiring every major rule (those with an economic effect of $100 million or more annually) to be specifically approved by the House and Senate (as well as the President) before the rule takes effect. This would help ensure not only that regulators are exercising their delegated powers in a way consistent with the intent of Congress but that Congress itself can be held accountable for the regulations and consequences of that result.

Gumming Up the Works? Critics say this is all just a ruse to "gum up" the regulatory works.[3] Reviewing all these rules would be too burdensome for Congress, they say. But there are usually just a few dozen major regulations issued each year—hardly an unmanageable number. At any rate, who will explain to the business owner straining under the weight of regulation that Congress just does not have time to determine if those regulations are appropriate?

Critics also argue that the REINS Act would displace regulators' "expert" judgment with political decisionmaking. For example, Sidney Shapiro of the Center for Progressive Reform writes that congressional action "is likely to be nakedly political, reflecting the raw political power of special interests," while agency actions "are backed up with reasonable policy determinations."[4]

But outside of political science textbooks, that is not how government works. Regulators have their own special interests and political agenda and are hardly objective. Anyone who doubts that should spend an hour at the Federal Communications Commission and watch the lobbyists flow in and out.

This is not to say that regulators and Congress necessarily see the world in the same way. Since Members of Congress must regularly face the voters, they have a different perspective than appointed regulators. Therefore, some rules will be turned back as unacceptable. But that is not a flaw in the process; it is an important feature. Simply put, no rule should be adopted if the American people, as represented by Congress, do not agree that it is appropriate.

Other Reforms Needed. The REINS Act, of course, is also no silver bullet to solve entirely the problems of over-regulation. Other reforms that complement the changes made by REINS are also needed. Among them:

1. James L. Gattuso and Diane Katz, "Red Tape Rising: A 2011 Mid-Year Report," Heritage Foundation *Backgrounder* No. 2585, July 25, 2011, at *http://www.heritage.org/research/reports/2011/07/red-tape-rising-a-2011-mid-year-report.*
2. Nicole V. Crain and W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," Small Business Administration Office of Advocacy, September 2010, at *http://www.sba.gov/advo/research/rs371.pdf* (October 21, 2010).
3. Sidney Shapiro, "The REINS Act: The Latest Conservative Effort to Gum Up the Regulatory Works," Center for Progressive Reform, January 14, 2011, at *http://www.cprblog.org/CPRBlog.cfm?idBlog=84F5CF0B-E804-F8D1-7197786456C5DC4F* (October 12, 2011).
4. *Ibid.*
5. In fact, since congressional approval would be required for any major rule changes—including those that decrease private-sector burdens—it would make such reductions more difficult.

- ***Imposing sunset dates for federal regulations.*** REINS would do nothing to reduce the costs of existing regulations.[5] To ensure that the costs of existing rules are justified, they should be required to expire automatically if not explicitly reaffirmed by the agency through a notice and comment rulemaking. As with any such regulatory decision, this re-affirmation would be subject to congressional review under the REINS Act.
- ***Creating a Congressional Office of Regulatory Analysis.*** In order to exercise its duties responsibly under the REINS Act, Congress needs the capability to analyze proposed and existing rules independently without reliance on the White House Office of Management and Budget or the regulatory agencies. A Congressional Office of Regulatory Analysis—modeled on the Congressional Budget Office—would provide Congress with this ability. Such an office would also help Congress better evaluate the regulatory consequences of the legislation it enacts.

Holding Congress Accountable. Congressional approval of proposed new rules would be an important step toward holding both regulators and Congress accountable for the regulations imposed on the private sector. It is no panacea for the problems of excessive regulation. But, especially if combined with other steps, it would be a significant step forward.

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