

Updated: February 2011

CPR Editorial Memorandum: **The REINS Act: The Conservative Push to Undercut Regulatory Protections for** **Health, Safety, and the Environment**

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Overview: Undercutting the Regulatory System

Congressional Republicans' campaign "Pledge to America" included a number of familiar and thoroughly poll-tested planks of the traditional GOP platform. But one new and sweeping proposal in the document was a call for something called "[The REINS Act](#)" (H.R. 10 sponsored by Rep. Geoff Davis (R-KY), S. 299 sponsored by Rand Paul (R-KY)). Under the legislation, no new "economically significant" regulations would take effect unless affirmatively approved by Congress, by means of a joint congressional resolution of approval, signed by the President. Since the 2010 election, House Republicans have made clear they intend to move such a bill in the new Congress. The proposal is a genuinely radical departure, plainly designed to gum up the regulatory works. Its inclusion in the "Pledge" reflects an escalation in the conservative attack on health, safety, and environmental protections, one that has played out in recent months on the op-ed pages of newspapers across the land.

Currently, federal agencies draft regulations following through on specific statutory mandates included in laws passed by Congress and signed by the President. Congress has adopted this system because it recognizes the necessity of assigning the job of crafting appropriate regulations to the scientific, economic, legal, and other experts in agencies. For example, it is far beyond Congress's ability to determine exactly how lead paint should be removed in residential buildings; scientists and other experts at the EPA develop those regulations, following the mandates Congress has passed.

Congress also adopts this system because agencies are better insulated from the political process than Congress. Although agencies are subject to political influence, they must also have legal justifications for their actions. When agency rules are appealed, the federal courts ensure that regulations are backed up by reasonable policy justifications and are consistent with the statutes passed by Congress.

The REINS Act would instead make Congress the final arbiter of all significant regulatory decisions. While superficially this may seem like a good idea – after all, Members of Congress are elected and regulators are not – the REINS Act would replace what is good about agency rulemaking with what is bad about the legislative process. Neither Members of Congress nor their staffs are likely to have sufficient expertise regarding complex regulations. And, unlike agencies, Congress does not have to have good policy reasons for refusing to approve a regulation. Instead, the approval process is likely to be nakedly political, reflecting the raw political power of special interests and the large campaign donations that they give.

Finally, but hardly least of all, the legislation stacks Congress's procedural deck against approval of regulations. The 70-day deadline is unlikely to give both houses of Congress time to pass a resolution of approval, turning the Act into a type of a congressional pocket veto for significant regulations. Worse, it is not certain that the language of the bill would prohibit a filibuster in the Senate. And, if Congress did engage in the type of careful and time-consuming review that would be required, this would pose a burden on it, diverting members and their staffs from other business.

The bill has been embraced by presumptive Speaker of the House John Boehner, who earlier [called](#) for a halt to all new federal regulations. As of mid-February 2011, the bill had 121 cosponsors in the House, and 24 in the Senate. It is supported by the U.S. Chamber of Commerce, FreedomWorks, and the American Conservative Union. The bill is currently supported only by conservative Members of Congress, and presumably would not get past an Obama veto. But its inclusion in the platform today indicates the radical nature of the Republicans attack on regulation and suggests a larger and longer attack on regulation down the road.

The REINS Act: A Gift to Regulated Industries

The REINS Act is a bad idea for several reasons:

- 1) *The regulatory system allows Congress to chart a policy course, and delegates the task of implementation and enforcement to the Executive Branch, consistent with the Framers' intention that Congress and the President would pass laws that the Executive Branch would then administer.*** The current system of administrative agencies of the federal government began more than 100 years ago, and matured through the 20th century. It was codified in its present form in the Administrative Procedures Act (passed in 1946 and later amended). Congress passes laws with instructions for the administrative agencies to issue specific regulations that become the rule of the land.
- 2) *Congress already has the power to stop regulations if extreme circumstances dictate.*** The Congressional Review Act (1996) requires agencies to submit new final rules to Congress for review, delaying the effective date of those rules to permit Congress to block them, and establishes a fast-track process for legislation proposed to overrule a regulation. Disapproval legislation must pass both houses and be signed by the President. Congress has only used this authority once, in 2001, to overrule an OSHA ergonomics rule.
- 3) *The proposal would make the rulemaking process significantly more political in nature than it already is, giving industry lobbyists an even stronger hand.*** The current regulatory system is intended to ensure that new regulations are the product of each agency's expertise. And the courts act as a check on that: A company or individual or other affected entity can sue to challenge a regulation that does not conform to the laws passed by Congress. The REINS Act would turn this system on its head, opening the door for pure politics to operate even in situations where science indicates that the public is endangered. Corporate lobbyists could ensure that no regulation ever saw the light of day by funneling hundreds of thousands of dollars to legislators who oppose regulations of interest to their clients. In a post-*Citizens United* world, there is no limitation on the amount of money that corporations could spend to defeat legislators who will not do their bidding.

Would regulations we take for granted today have been put into place under these circumstances? Probably not. For example, while 40 years ago rivers and streams were often filled with toxic pollutants, today many more are clean. That's thanks to regulations EPA implemented under the Clean Water Act. At the time, industry representatives claimed that the cost of instituting pollution controls would

destroy their businesses, predictions that nearly always proved grossly exaggerated. Despite these pleas, EPA instituted pollution limits to achieve the mandates of the Clean Water Act. It is difficult to see that happening if the REINS Act had been in place, because polluting industries would have far more leverage over rulemaking than they already do.

4) *The bill's 70-day requirement would make it extraordinarily difficult for Congress to approve regulations, even those that were universally popular.* Under the terms of the bill, Congress has only a 70-day window to approve a regulation, and if both houses fails to do so during that time period, the regulation is deemed to have been rejected, and Congress is barred from subsequently voting to approve the regulation for the remainder of that Congress. The 70-day deadline is unlikely to give both houses of Congress time to pass a resolution of approval, turning the Act into a type of a congressional pocket veto for significant regulations. Even if Congress did have the necessary expertise to review regulations, the type of careful and time-consuming review that would be required would pose a burden on it, diverting members and their staffs from other business. Since this review would have to occur within a short time frame, the REINS Act has the potential to stop (or at least slow) important other business, assuming that legislators and their staffs actually spent the time necessary to understand complex regulations. Finally, it is not certain that the language of the bill would prohibit a filibuster in the Senate.

5) *The regulatory process is accountable even though regulators are not elected. Agencies develop regulations to implement laws passed by Congress,* soliciting comment from affected parties and the public. Drafts of those regulatory proposals are commonly vetted by the White House Office of Information and Regulatory Affairs (OIRA), which has often served as an additional venue for industry to dilute or block needed regulations. Once agencies issue final regulations, Congress has a fast-track opportunity to block them, and Members of Congress can, and usually do, lobby the agency. Thus, under current law, by the time a regulation is finally adopted, two and usually all three branches of government have weighed in, giving advocates on all sides of the relevant issues ample opportunity to affect the outcome.

6) *The Act is counter-democratic.* The current congressional review law requires a majority of both the House and the Senate and a signature by the President to change what a previous Congress and President had approved – a law authorizing an agency to adopt legally effective rules. In the REINS bill, by comparison, less than a majority in either house can block what a previous Congress and President approved – the authority of an agency to adopt legally effective rules. This is not democratic; it is counter-democratic.

7) *The Act gives regulated entities a surprising and peculiar gift.* If the President signs a joint resolution and a regulation becomes a law, regulated entities are authorized to challenge the legality of the regulation on any procedural or substantive ground they might have had if the agency itself still had discretion to adopt the regulation as legally binding. Normally, when Congress passes a law, it can be legally attacked, but only on grounds that the law is beyond Congress' authority to adopt the law, or Congress failed to use the procedures to adopt the law required by the Constitution. Yet, the language of the REINS Act would permit regulated entities to challenge a regulation on grounds that would ordinarily be mooted by Congress' passage of the law. It is unclear how Congress can pass a law approving a regulation and still purport to give that approval no legal effect. But the effort to do so indicates that the sponsors of the REINS Act are unwilling to allow Congress to step forward and take the responsibility for passing a law enacting a regulation into place, despite their professed aim of increasing legislative accountability.

8) The regulatory process is not out of control. Conservative rhetoric about “job-killing” regulations is a fabrication, a reiteration of the same doomsday rhetoric that conservatives have used to oppose virtually every major step forward for health, safety, and the environment. The REINS Act is an attempt by conservatives to appeal to the public by attacking a straw man, while giving industry allies an additional opportunity to kill regulations it finds inconvenient.

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