

The REINS Act: Why Congress Should Hold Its Horses

Adapted from a blog by NRDC's David Goldston, originally published in 2011.

The House is poised to begin the 115th Congress with the Regulations from the Executive in Need of Scrutiny (REINS) Act—intended as a body blow to the regulatory process. The bill would require Congressional approval of any rule that would impose compliance costs of more than \$100 million a year; if Congress failed to approve a rule in 70 days after its promulgation, it would be null and void.

The REINS Act is a proposal that may seem benign and appealing on the surface, but in fact, it is radical in concept and would be perilous in execution. The bill could, in effect, impose a slow-motion government shutdown, and it would replace a process based on expertise, rationality and openness with one characterized by political maneuvering, economic clout and secrecy. The public would be less protected, and the political system would be more abused. Indeed, it is hard to imagine a more far-reaching, fundamental and damaging shift in the way the government goes about its business of safeguarding the public.

How could such a seemingly technical change in process have such significant consequences? How could a bill that its sponsors claim is just an exercise of Constitutional authority and oversight be so detrimental? The answers become clear as soon as one thinks through how the REINS Act system would actually work. I worked as a Republican staffer on Capitol Hill for more than 20 years, and I have a deep respect for Congress as an institution, but that includes understanding its limitations.

For more than a century—going back at least to the creation of the Food and Drug Administration—Congress has established federal agencies and empowered them to make decisions to protect the public. Congress did not do this because it was lazy or interested in abdicating power or responsibility. Instead, Congress rightly concluded that some kinds of decisions required deep technical expertise and a balanced, judicious decision process somewhat insulated from political horse-trading and power plays.

Under the current system, Congress still plays the central role by deciding what kinds of tasks the regulatory agencies should undertake, which is a fundamentally political decision. For example, in dealing with clean air, Congress sets policy—deciding, for example, that the government should limit pollutants that endanger public health—but agencies determine what level of a pollutant poses a danger. Congress requires that mandated pollution control technologies be available and affordable, but agencies determine which technologies meet those criteria.

The REINS Act sponsors summarily reject the hard-earned knowledge that led to the creation of agencies and a century of bipartisan experience. The Act radically repositions Congress, the most political branch of government, as the place to make the ultimate decisions that involve detailed technical matters.

How would this actually work? Agencies often take several years to formulate a particular safeguard, reviewing hundreds of scientific studies, empanelling expert advisors, gathering thousands of public comments, and going through many levels of executive branch review. Under the REINS Act, Congress, with its limited and largely inexperienced staff, and its broad and unfocused agenda, would have 70 days to second-guess each and every decision covered by the Act. (And the Act's \$100 million threshold is not such a high number in an \$18 trillion

economy, and the number does not take into account the costs a rule might save by, for example, reducing hospital visits.)

So what would Congress do? It couldn't decide it didn't have the time, expertise, energy or interest to review a rule; failure to take action would kill any safeguard. No, it would have the kinds of hearings at which Members embarrassingly ask technical questions that they often garble, and which they are incapable of following up because they can't evaluate the answers. Or worse still, it could forgo hearings and race the 70-day clock with even less information and debate. (Floor debate is strictly limited under the bill.)

Lobbyists would descend on Congress with even greater fervor than is currently the case to pressure Members to take their side on individual regulations. Industry would no longer have an incentive to work with regulatory agencies to craft sensible regulations because they could instead just hold off and try to get Congress to overturn any rule they disliked. Campaign finance, already a national disgrace, would become even more corrupting, as industry groups would feel the need to ante up to be sure they had access when rules affecting them were being debated. (And Members of Congress would be given yet another enticement to use when soliciting donations.) The result? The agency process, which is required by law to include public information on interactions with those trying to influence regulations, would be replaced with closed-door meetings with Members of Congress and backroom deal-making.

Is this a way to protect the public? Would this be an improvement in governance? Under the REINS Act, Congress might hold the reins over the regulatory process, but it would be industry cracking the whip.

The REINS Act would do nothing to improve how we are governed, but it would torque the regulatory process in industry's favor. Almost every detail in the bill would create situations that

fly in the face of sensible governing principles. For example, the bill prevents Congress from considering more than one rule “relating” to the same subject in a single Congress. If the REINS Act ever became law, there would no doubt be much haggling over what was to be considered related. But let’s take the simplest case. Let’s say this month, Congress rejected a rule to protect the public from smog, but the debate indicated there were compromises that would make the rule acceptable. Under the REINS Act, no revised version of such a smog rule could be taken up again for one to two years even if there were agreement on what it should contain.

Even more perversely, the bill would allow courts to overturn rules even after Congress had voted to approve them. This is bizarre, especially given Republican complaints about “activist” courts. And usually, if Congress approves a particular action (unless it was unconstitutional), a court could not rule that the action somehow did not comply with the law, which after all Congress writes. But under the REINS Act, courts are required to ignore the Congressional vote, presumably so that industry would have one more chance to block any safeguard. This can also be seen as an inadvertent admission that Congress’ own actions on regulations are likely to be “arbitrary and capricious.”

More oddly still, the REINS Act is likely to lead to situations that amount to a Constitutional crisis. Let’s say a court rules that under a statute a rule limiting, say, mercury emissions must be issued by a certain date (to take a real example). What happens if the agency then issues a rule to comply with the court ruling and Congress rejects it? Who is then in violation of the law? Under the Constitution, a court presumably can’t require Congress to act, so the statute could not be enforced. But it also would not actually have been repealed. The REINS Act could quickly make a mockery of law by creating these Escher-like puzzles.

Which brings us to the ultimate point: Congress already has all the authority it needs to control the regulatory system. It writes the laws that determine what activities get

regulated and what criteria are used to write those regulations. It has the authority through normal procedures, the expedited Congressional Review Act, and control over the public purse to block or amend any rule it sees fit. Rulemaking does involve policy calls as well as scientific determinations, but Congress is hardly powerless to intervene.

Proponents of the REINS Act complain that Congress hasn't blocked as many rules as some would like. Maybe that's because the public actually turns out to support safeguards once they are focused on one and because the public distrusts rules being reviewed in the political maelstrom of the Congress. Or proponents might argue that it's hard getting anything through the Congress. But that's the point. Even with the expedited procedures of the REINS Act, the inherent undertow of the legislative process will work against safeguards no matter how sensible and necessary they may be.

And does Congress really want to be the arbiter of every significant rule? It's already incapable of carrying out its most basic budget-writing responsibilities in the allotted time. It's hard to see how turning Congress into a kind of 535-member Court of Claims would improve the operation of government.

The burden of proof ought to be on the authors of the REINS Act to demonstrate exactly how the current system is broken and why their bill would be an improvement. The mere existence of regulations in a complex, modern nation with a population exceeding 300 million people is not proof of a problem. Is the problem simply that industry does not always get its way? Is the goal simply to move all decisions into whichever venue industry is most likely to triumph?

From the bill itself, all one can conclude is that the REINS Act sponsors want to change the regulatory process in the worst way.

