

**Testimony of NRDC's David Goldston before the House Committee on the Judiciary
Subcommittee on Courts, Commercial and Administrative Law**

March 8, 2011

Chairman Coble, Ranking Member Cohen and Members of the Subcommittee,

I appreciate the opportunity to testify before you today. I am currently Director of Government Affairs for the Natural Resources Defense Council (NRDC), but I worked on Capitol Hill for more than 20 years as an aide to Rep. Sherwood Boehlert of New York, the last six of those (2001- 2006) as the Chief of Staff of the House Committee on Science. My testimony draws on that experience as much as on the views of NRDC. (I must say that despite, or perhaps because of my years on Capitol Hill, it is a daunting prospect to sit on the witness side of the dais.)

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.

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. If anything, the rationale for granting authority to federal agencies has only become stronger over the years, as science has become more complex, the Congressional docket more crowded, and the Congressional political horizon more short-term and focused on fundraising.

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 is a summary rejection of the hard-earned knowledge that led to the creation of agencies and of 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, drawing on their own experts in science and economics, empanelling outside 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 legislative days to second-guess each and every decision covered by the Act.

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 in which it probes issues that it has little capacity to evaluate. I urge Members to think about whether anyone comes away from hearings that revolve, say, around statistical methodology better informed or with a greater appreciation of Congress. Worse still, Congress could forgo hearings and race the clock with even less information and debate. And then on the House floor, debate is limited to two hours – hardly an open rule.

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. At the same time, the outcome of the regulatory process would become less certain, denying industry the one thing it always wants most – predictability.

The one group sure to gain from REINS would be campaign fundraisers. With each major regulation dependent on Congressional action, every industry group would feel the need to ante up to be sure they had access when rules affecting them were sent up to the Hill. 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.

And one could easily see the rulemaking system becoming more arbitrary still, as political calculations will add an element of randomness to the votes. A Member might think, “Well, I can’t be seen as always pro-regulation, so I have to find at least one or two regulations to vote against” – or vice versa. Or, “I better vote with Rep. X on this regulation because I’m going to need her vote on my bill next week.” This kind of standard political calculus is especially ill-suited to deciding among regulations that will come from a wide variety of agencies handling a wide variety of public concerns. But Members will no doubt end up trading, say, a vote on a Food and Drug Administration safeguard against one from the Environmental Protection Agency (EPA).

This tendency will be exacerbated because, no doubt, groups will be keeping a tally of votes under the REINS Act without regard to their content.

The REINS Act would do nothing to improve how the nation is governed, but it would torque the regulatory process in industry’s favor. Every feature of the bill is biased against public protections. All an industry would have to do to derail a safeguard is to convince a bare majority in one House of Congress to vote against it. There is then nothing the other body could do to resurrect the safeguard. And the Administration’s role – under any President – would be limited, in effect, to advising the Congress on what a detailed regulation should say.

The assumption behind this bill – that every public protection is suspect – has led to bill drafting that flies 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 until 2013 even if there were agreement on what it should contain. In the meantime, the EPA would be unable to carry out its legal responsibility to update protections against smog.

Even more perversely, the bill would allow courts to overturn rules even after Congress had voted to approve them. This is bizarre, especially given complaints about “activist” courts.

But under the REINS Act, courts are required to ignore the Congressional vote and debate, presumably so that industry would have one more chance to block any safeguard. This seems to assume that Congress’ judgment can’t be trusted if it decides to allow a rule to go into effect.

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. Statutes could be made dead letters without ever going through the Constitutional process of repealing them.

All this is entirely unnecessary because Congress already has all the authority it needs to exercise oversight and control the regulatory system. Congress 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. Congress is hardly powerless to intervene in the rulemaking process, and agencies already keep that in mind.

It's hard not to conclude that the complaint that the REINS Act's champions have is not with the Congressional process, but with the results. In line with public opinion, agencies carry out their legal responsibilities to protect the public, and Congress has generally allowed the agencies to do their work under the law. Since the normal, time-honored processes of government have not resulted in the outcomes one ideological faction would like, they have proposed to change the rules in a manner that favors their faction. This may be the oldest political impulse there is, but it has not been a recipe for good government.

This is clear even if one just looks at the mechanics of carrying out this bill. Does Congress really want to be the arbiter of every significant rule? Does it want to adjudicate every scientific dispute, or the validity of every claim a PR shop dreams up each time an industry is asked to consider the public interest? Congress is already incapable of carrying out its most basic budget-writing responsibilities in the allotted time. Does it want to add hearings and floor debate on 80 or so rules a year to its docket?

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. Administrations under both parties have reviewed the aggregate impact of regulations and found their benefits to have exceeded their costs (and not all benefits are quantifiable). The mere existence of regulations in a complex, modern nation of more than 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.