

2-10-2010

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Recommended Citation

Noah M. Sachs, When It REINS It Pours, *New Republic* (Feb. 10, 2010), <http://www.newrepublic.com/article/politics/83195/reins-act-congress-veto-gop>

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NEW REPUBLIC

When It REINS, It Pours

by Noah M. Sachs | February 10, 2011

Imagine if the board of a Fortune 500 company required the company's vice presidents to obtain board approval before implementing any decision. Now imagine that the board is highly polarized and its members are at each other's throats. A recipe for corporate gridlock, right?

Amazingly, House Speaker John Boehner, Senator Jim DeMint, and other prominent Republicans are embracing this dubious chain-of-command for the federal government. They are promoting a bill called [the REINS Act \(Regulations from the Executive in Need of Scrutiny\)](#), which would stop any major regulation issued by any federal agency from taking effect until it receives approval from both houses of Congress and the president. Boehner justifies the bill as a “transparency” and “accountability” measure, but it clearly takes aim at the White House, which, with the GOP now in control of the House, is relying heavily on agency rulemaking to advance its agenda in areas such as health care, financial regulation, and clean energy.

Since the Progressive era, U.S. administrative law has operated from the premise that agency action should be somewhat insulated from political pressure and horse trading. The REINS Act would mark a radical abandonment of that goal, an attempt to correct an oversight problem that doesn't even exist. It would deliver a body blow to the already-sluggish agency rulemaking process by politicizing it and entangling it in the congressional morass. And, over the long term, it would do serious damage to American health and prosperity—stopping agencies from promulgating important rules that, among other things, would help prevent bank failures, ensure the safety of the food we eat, and control toxic pollution in the air we breathe.

The REINS Act is built on the faulty premise that the regulatory state is out of control. It's easy to mock government rules, of which there are many, if you focus only on their costs and ignore their benefits. But, in reality, every major federal rule is already subject to extensive cost-benefit analysis by the Office of Management and Budget (OMB), and, under President Obama and President Bush, OMB has consistently concluded that the benefits of federal regulations far outweigh the costs. Last year, it concluded that the annual cost of major rules issued between FY 1999 and 2009 was \$43 to \$55 billion, while the annual societal benefits of those same regulations ranged from \$128 billion to \$616 billion—an excellent return on investment by any standard.

To see why the REINS Act would jeopardize these benefits, take a look under the hood. The bill would apply to any agency regulation with an expected annual economic impact of \$100 million or more. Between 50 and 100 of these “major rules” are issued annually. Boehner dismisses them as “red tape,” but most are critically important, governing everything from food safety and housing discrimination to airline pilot training, accounting standards in financial statements, and air pollution control. Under the REINS Act, if just one house were to reject a rule, or simply didn't act on it within the prescribed time period—70 legislative working days—the rule would be dispatched to the regulatory graveyard. Or, put another way, the bill would provide one house with veto power. (The bill now has 115 Republican co-sponsors in the House—and no

Democrats. Jim DeMint introduced a Senate version this week.)

The results would likely be devastating. In the near term, the REINS Act could be a back-door means of gutting health care reform. The GOP lacked the votes in the Senate to repeal the Patient Protection and Affordable Care Act, but, under the REINS Act, it could do serious damage to the statute. The law has more than 40 different provisions that call on the Department of Health and Human Services (HHS) to enact implementing regulations. These forthcoming rules, most of which will be considered “major,” will cover issues such as prevention of Medicare fraud and extending dependent coverage to people as old as 26. With the REINS Act in effect, they could be quashed if the House objects to them, or if Republicans simply stall a floor vote on them beyond 70 days.

The consequences of the REINS Act could reach further still, by opening up a second front for corporate lobbyists to negatively influence policymaking. Consider the January 2010 [Department of Transportation \(DOT\) regulation on Positive Train Control](#)—GPS systems and computerized track controls that can help prevent train-to-train collisions and derailments. The rule was explicitly mandated in a 2008 statute signed by President Bush in the wake of a train collision in Los Angeles that resulted in 25 deaths and more than 135 injuries. To this day, however, the rule is opposed by major freight haulers and the Association of American Railroads, who object to the cost of the system. In all likelihood, had the REINS Act been in effect when the regulation was being considered, major railroads would have flooded Congress with campaign contributions and arguments against the rule, in hopes of killing it.

The problem with this scenario is that, unlike a federal agency, which will always have to publicly justify its decisions with scientific and economic data, Congress could use the REINS Act to kill rules on virtually any premise it wanted—and do so behind closed doors or without much substantive debate. Politics, not sound policy, could rule the day.

Or, perhaps more accurately, politics *and* scheduling. REINS Act supporters know full well that Congress would never be able to debate and vote on 50 to 100 major federal regulations each year (certainly not within the 70 day window for each one). Already, budget negotiations drag on for months, while battles over confirming a single federal judge can rage for a year or more. And, although the Act includes some “fast-track” procedures, such as requiring that each house of Congress take an up-or-down vote on a regulation without amendments after two hours of debate, those hardly solve the problem: That’s still a lot of floor time devoted to regulations—too much, in fact, for most of them to stand a chance of survival. For REINS Act proponents, of course, this is all for the good: Under the guise of oversight, they *want* Congress’s notorious inability to act quickly to help kill important agency rules.

But perhaps the most preposterous aspect of the REINS Act is that it purports to fix a problem that doesn’t really exist. Despite Republicans assertions to the contrary, Congress already has plenty of power to monitor agency regulations. Fundamentally, as the Supreme Court held in 1986, “an agency literally has no power to act ... unless and until Congress confers power upon it.” In other words, Congress already dictates what rules agencies can enact in the first place. Then, there’s the [1996 Congressional Review Act](#) (originally a part of the GOP’s Contract With America), which allows Congress to reject rules before they become final. Moreover, Congress retains the plenary power to modify an existing rule or override it by passing a new statute. And Congress also keeps tabs on agencies through appropriations, hearings, and subpoena power.

This system of governance makes sense, and there is no evidence that the balance between Congress and federal agencies is somehow out of whack. Just like a Board of Directors, Congress sets broad policy and

delegates the detailed rule-making and implementation to agencies. It works this way because the agencies have the time and expertise to make calls about what level of pollutants are permissible in public drinking water supplies, how many hours of training are adequate for airline pilots, or what percentage of eggs should be sampled for salmonella contamination—while Congress does not. The REINS Act would turn this sensible division of roles on its head, by mixing congressional politics with agency decisions that, ideally, should be data-driven technical judgments.

House passage of the REINS Act is probable, while its fate is uncertain in the Senate. But even discussing the bill diverts attention from far more important issues. A Congress that considers itself business-savvy should focus on the most pressing economic problems facing the country and not hamstringing agencies to which it has already delegated its authority.

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