New Federal Initiatives Project

The Regulations from the Executive In Need of Scrutiny (REINS) Act

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Last year, the REINS Act was introduced in the U.S. Senate and House of Representatives (as H.R. 3765 and S. 3826, respectively) to prevent federal agencies from implementing major regulatory initiatives without Congressional approval. Equivalent legislation is virtually certain to be considered in the 112th Congress. As part of their "plan to rein in the red tape factory in Washington, DC" in the "Pledge to America," Republican congressional candidates promised to "require congressional approval of any new federal regulation that has an annual cost to our economy of $100 million or more."[1] The purpose of this requirement is to ensure that significant regulatory initiatives are approved by both Congress and the Executive Branch. As explained in the "Pledge": "If a regulation is so 'significant' and costly that it may harm job creation, Congress should vote on it first." [2]

The central provision of the REINS Act provides that new major rules cannot take effect unless Congress passes a Joint Resolution approving the regulation within 90 session or legislative days of the rule's submission to Congress.[3] "Major rules" are defined as those regulations that are anticipated by the White House Office of Management and Budget to impose annual economic costs in excess of $100 million or otherwise have significant economic or anticompetitive effects.[4] The Act further sets up an expedited procedure to ensure prompt consideration of resolutions of approval. In effect, the REINS Act amends pre-existing regulatory statutes to remove federal agency authority to unilaterally adopt regulatory measures, instead requiring agencies to forward "final" rules as proposals for congressional review.

This proposal is a response to concerns that federal regulatory agencies are imposing substantial costs on the American economy without sufficient Congressional oversight or political accountability. Federal agencies routinely issue thousands of regulations every year. In 2009, for instance, federal agencies issued over 3,503 final rules.[5] REINS Act supporters note that many federal regulations are promulgated pursuant to statutes that were passed years, if not decades, ago. Key portions of the federal Clean Air Act, for example, were enacted in 1970 and have not been amended since 1990. These provisions remain the source of substantial regulatory authority, including regulations recently adopted by the Environmental Protection Agency to control emissions of greenhouse gases. These regulations were promulgated to address the threat posed by global warming. According to the EPA, it is obligated to adopt these regulations even though Congress was not focused on global warming when the relevant provisions of the Clean Air Act were adopted over twenty years ago. Under the REINS Act, economy-wide regulatory measures of this sort could only be adopted with subsequent Congressional assent.

In 1996, Congress enacted the Congressional Review Act, creating an expedited process for consideration of joint resolutions to overturn regulations of which Congress disapproved. To be effective, such resolutions must be passed by both Houses and presented to the President for signature. In effect, the CRA created a framework for Congress to enact new laws to overturn or correct administrative implementation of previously enacted laws. This process has only been used once, however, and is not widely considered to have increased Congressional accountability for regulatory initiatives. The REINS Act takes the idea of the CRA one step further by requiring affirmative legislative action for new major rules.

Congress previously attempted to control administrative agency decision-making through the adoption of legislative veto provisions. Between the 1930s and 1980s, Congress enacted legislative veto provisions into nearly 300 statutes. These provisions enabled Congress to delegate broad legislative-like authority to administrative agencies while retaining the unilateral authority to overturn administrative decisions through legislative action, but without Presidential assent or a super-majority vote.

A typical legislative veto provision was contained in the Immigration and Nationality Act, which authorized either House of Congress to invalidate a decision by the Attorney General to allow an otherwise deportable alien to remain in the United States with a simple resolution passed by majority vote. The Supreme Court invalidated such unicameral legislative vetoes in *INS v. Chadha* on the grounds that a single House of Congress could not overturn an administrative action.[6] Under Article I of the Constitution, legislative action of this type requires bicameralism and presentment – the concurrence of both Houses of Congress and presentation before the President for his signature or veto, the latter of which could be overturned by super-majorities in both legislative chambers.

As then-judge Stephen Breyer explained in a 1984 lecture, a congressional authorization requirement could replicate the function of the legislative veto invalidated in *Chadha* without the veto's constitutional infirmity.[7] By observing the formal requirements for legislation in Article I, he asserted, congressional oversight of agency activity could be maintained without violating constitutional principles of separation of powers. In addition, unlike the legislative veto, requiring Congressional approval for the adoption of new regulatory initiatives "imposes on Congress a degree of visible responsibility" for new regulatory initiatives.[8]

The presentment clause in Article I, section 7 of the Constitution provides that, for a bill to become law, it must be passed by a majority of both the House and Senate and signed into law by the President or, if vetoed by the President, repassed by two-thirds majorities in each house. It further provides that "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States" for his signature or veto. Proponents conclude that the REINS Act fully complies with this requirement. Just like any other bill, a Joint Resolution requires the approval of both houses of Congress and is presented to the President.[9]

In some respects the REINS Act is more limited than Breyer's suggested proposal for congressional resolutions of approval for regulatory measures or the unicameral legislative vetoes, as the REINS Act would only require congressional approval for major rules. The unicameral legislative veto often operated as a replacement for targeted "private bills" affecting the interests of a few.[10] Those regulations subject to the REINS Act would, by definition, only be those that would impact many, if not the nation as a whole. Only those rules deemed to be "economically significant" – so-called "major rules" – are covered, and such rules are a small, but important, portion of federal regulatory activity. From 1998-2007, the number of major rules promulgated by federal administrative agencies ranged between fifty and eighty per year.[11]

One objection to requiring Congressional approval before major rules may take effect is that regulatory initiatives could be subject to procedural delays, particularly in the Senate, and that

such a requirement would make it too easy for a determined minority or special interest group to block desirable regulations. The REINS Act seeks to address this concern by creating an expedited process for consideration of a joint resolution approving major rules in both the House and Senate. A joint resolution of approval is automatically introduced into both houses within three days of a federal agency's submission of a major rule to Congress, and legislative committees have only fifteen days to consider the resolution before it is automatically discharged. Debate on the resolution is limited, and other motions that could postpone or prolong debate are prohibited, as are amendments to the rule, so as to ensure that each House votes up-or-down on the resolution shortly after it is presented to Congress.

The REINS Act does not interfere with the Executive Branch's authority or duty to faithfully execute the law. Federal administrative agencies have no inherent power to adopt legislative-type rules governing private conduct. Rather all such power is delegated to administrative agencies by Congress. The Supreme Court has explained: "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."[12] Regulation governing private economic conduct for public benefit is arguably a quintessentially legislative power, and Article I, section I vests "all legislative powers" in Congress. Under current doctrine, Congress is allowed to delegate broad regulatory power to administrative agencies, but it is not obligated to do so, and there is no constitutional prohibition against Congress deciding to curtail – or, as act supporters might say, "rein" in –federal agency authority to impose regulatory mandates, particularly where such mandates will affect large portions of the American economy.

The Republican Congressional leadership has endorsed the REINS Act, but the act is also likely to draw considerable opposition. Among other things, critics of the REINS Act are concerned that requiring Congress to approve major regulatory proposals will erect yet-another hurdle for federal regulations, particularly those that are necessary to protect health, safety, or the environment, and create another opportunity for business interests to block regulatory initiatives. Proposed federal regulations are already subject to substantial procedural requirements and judicial review to ensure they comply with relevant legal requirements and comport with existing statutory authorities. Regulations that impose substantial costs on corporations may produce equally substantial benefits for consumers. Critics are also likely to argue that Congress is already responsible and accountable for delegating regulatory authority in the first place, and that the public benefits from substantial delegation of such authority to expert administrative agencies.

Federal regulation reaches nearly all aspects of modern life and is pervasive in the modern economy. Much of this regulation may be necessary or advisable, and nothing in the REINS Act would hinder a sympathetic Congress from approving new federal regulations. In all likelihood, however the REINS Act's congressional approval process would prevent the implementation of particularly unpopular or controversial regulatory initiatives. The primary effect of the legislation would be to make Congress more responsible for federal regulatory activity by forcing legislators to voice their opinion on the desirability of significant regulatory changes.

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[1] *See* "Pledge to America," *available at* http://pledge.gop.gov/resources/library/documents/solutions/a-pledge-to-america.pdf.
[2] *Id.*
[3] A draft version of the legislation to be introduced in the 112th Congress shortens this period to 70 days. *See* http://geoffdavis.house.gov/UploadedFiles/REINS_Act_Bill_Text_112th_Final.pdf.
[4] The version of the REINS Act introduced in the 111th Congress exempted monetary policy proposals by the Board of Governors of the Federal Reserve System and Federal Open Market Committee, rules of "particular applicability," rules "relating to agency management or personnel," and "rules of agency organization, procedure, or practice" that do not "substantially affect the rights or obligations of non-agency parties."
[5] *See* Clyde Wayne Crews, *Ten Thousand Commandments A Snapshot of the Federal Regulatory State* (2010 edition), at 2.
[6] 462 U.S. 919 (1983).
[7] *See* Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785, 793-96 (1984).
[8] Breyer, at 794.
[9] The only exception to this rule is a Joint Resolution used to propose a constitutional amendment. Such a resolution is instead One exception to this rule is Joint Resolutions which are instead submitted to the states for ratification. *See* http://www.senate.gov/reference/glossary_term/joint_resolution.htm.
[10] In *Chadha*, the House of Representatives voted to overturn six of 340 cases in which the Attorney General had concluded an otherwise deportable alien should be allowed to remain in the United States.
[11] Crews, at 28.
[12] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 208 (1988); *see also* Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)("an agency literally has no power to act . . . unless and until Congress confers power upon it.").

Related Links:

H.R.3765 - Regulations From the Executive in Need of Scrutiny Act of 2009
http://www.opencongress.org/bill/111-h3765/show

S.3826 - Regulations From the Executive in Need of Scrutiny Act of 2010
http://www.opencongress.org/bill/111-s3826/show