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REVIEW & OUTLOOK

The Congressional Accountability Act

A proposal to ban regulation without representation.

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One of the most important political stories of 2011 will be regulation, as the backwash of the outgoing Congress hits the federal agencies and the White House drives its agenda via rule-making rather than democratic consent. Republicans are vowing to thwart these maneuvers, but the coming hostilities might also provide an opening to reform the modern administrative state.

The basic problem is that Congress delegates far too much power to regulators, passing ambiguous laws that convert the agencies into quasi-legislative bodies that aren't politically accountable. Even if President Obama is exploiting this trend like never before, it is hardly new, nor unique to either party. Most politicians support the status quo because, being politicians, they can take credit for popular goals and then blame the bureaucracy for the costs and problems they create.

Yet the Constitution vested Congress with the duty to make laws, not to make vague suggestions about what it might be good for the law to be. And now there is a growing movement to force Members to take responsibility for the laws they pass, and to force Administrations to be accountable for the laws they create through regulation.

The last two years have offered an especially instructive lesson in regulatory excess. "Major" regulations are defined as those with annual effect on the economy exceeding \$100 million, and over the past quarter-century both Democratic and Republican Administrations have averaged between 30 and 40 such rules a year. The Obama Administration promulgated 59 major regulations in 2009 and 62 in 2010. Another 191 are in the works, many of them based on little more than a vague Congressional order.

The Dodd-Frank financial reform is a tabula rasa that the law firm Davis Polk & Wardwell estimates requires no fewer than 243 new rules by 11 agencies over a dozen years. In the mere 10 months since ObamaCare passed, HHS has engineered rules that impose both a ceiling on insurance industry profits and de facto price controls on private premiums. The EPA is abusing the clean-air laws of the 1970s to raise carbon energy prices as a cap-and-tax surrogate. Only last month, the Federal Communications Commission imposed "net neutrality" despite a federal court ruling that the action was outside its purview. There are many other examples.

As the regulatory state climbs to altitudes not seen since the 1970s, some Republicans are starting to think about a more rational system. One promising idea is a bill that would require Congress to approve major regulations. The concept was included in the House GOP's campaign "pledge," and it is codified in the Regulations from the Executive In Need of Scrutiny (Reins) Act, sponsored by Kentucky's Geoff Davis in the House and South Carolina Senator Jim DeMint.

The bill guarantees an up-or-down vote (no Senate filibuster) on \$100 million-plus economic regulations, which would only take effect if Congress passed a joint resolution and the President signed it. Such a procedural change would revolutionize government in practice and help restore the representative democracy the founders envisioned.

Liberals attack the Reins Act as antiregulatory, and it's obviously true that rules would be written differently if they were subject to political give and take. But as New York Law professor David Schoenbrod points out, the bill is really pro-accountability. Congress could no longer get away with open-ended bills that evade the choices that make up public policy, while Administrations would need to seek support of a majority directly answerable to voters.

Liberals also cite the Reins Act as an emblem of tea party ignorance, constitutional division. They claim it is a reprise of the "legislative veto," which the Supreme Court has rightly struck down as a violation of the separation of powers.

After the New Deal, Congress routinely attached veto clauses to legislation, reserving the unilateral right to nullify the exercise of a power that it had statutorily delegated to the President. Those riders ended in 1983, with *INS v. Chadha*. The Supreme Court held that Congress can't intrude on an inherently executive function.

If a bill delegating power passes the House and Senate and the President signs it, the only way to reclaim the power is for both houses to pass another bill that the President also signs. *Chadha* is a mirror of the 1998 decision against the line-item veto, which the Court said gave the executive unconstitutional authority to amend bills passed by Congress.

But *Chadha* didn't limit the other ways Congress can constitutionally

rein in a delegated power. Through the power of the purse, a majority can deny funds to agencies to enforce decisions, as long as the President signs the appropriations bill. It can also stipulate that delegated powers expire every so often, forcing the President to seek Congressional approval if he wants to continue to exercise them.

An alternative to the legislative veto was first proposed by Stephen Breyer of all people, now a Supreme Court Justice. In a lecture at Georgetown in 1983, the then federal appeals judge suggested that Congress condition the exercise of a delegated legislative power on the enactment of a *confirmatory* statute, passed by both houses and signed by the President. It would be perfectly in keeping with the Constitution's language, Mr. Breyer noted, while simulating the function of the traditional legislative veto.

The Reins Act is narrowly tailored to meet the Breyer standard. Like the Congressional Review Act of 1996, which provides a legislative fast-track for disapproving a regulatory measure, the bill involves both political branches as prescribed in Article I of the Constitution. But the Reins act is superior because it requires the active participation of Congress, rather than merely objecting to this or that.

Such a bill wouldn't be necessary if Congress did a better job of writing laws that specify what they mean and aren't as open to interpretation. But with unelected bureaucracies now determining the fate of entire industries and dictating individual behavior, the Reins Act is a constitutional way for Congress to hold itself and regulators accountable for what they do.