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HEADLINE: Rule of Law: On Environmental Law, Congress Keeps Passing the Buck

BYLINE: By David Schoenbrod

BODY:

The Republicans' pledge to reduce the regulatory burden on citizens is fueled in large part by widely felt frustration with environmental laws. The Contract With America is clear: Federal environmental regulations, devised by unaccountable bureaucrats, often impose huge costs in return for little benefit.

And so the House has passed and the Senate this week is considering bills that respond to these complaints. Unfortunately the bills, while responding to genuine problems, fail to fix them. None would force lawmakers to do what they are elected to do: make laws.

In the House, the high-sounding Risk Assessment and Cost-Benefit Act seeks to build cost sensitivity into environmental law. Back in the 1970s, Congress and the president delegated to the Environmental Protection Agency and other agencies the power to promulgate environmental laws. The statutes give the agencies impossible instructions, requiring them to protect public health and minimize pollution by certain deadlines. The statutes let lawmakers take credit for their environmental sensitivity while shifting blame to the agencies for missing deadlines and imposing costly regulations.

But instead of doing away with these flawed statutes, the House bill compounds the problem by adding new instructions; it orders agencies to ensure that the costs of a regulation are justified by the risks averted. This sounds sensible, but putting it into practice is another story. The costs and benefits of any given environmental regulation depend upon many highly uncertain variables. Requiring an agency to "prove" that its regulations pass the cost-benefit test makes no practical sense; it can't be done.

By gumming up the lawmaking process, the House bill would prevent changes in regulations needed to make compliance less expensive and to control dangerous pollutants. The bill's Republican sponsors would catch the blame for every environmental risk that agencies didn't get around to regulating. Recognizing these risks, the Senate committee is watering down the House bill to the point where it may do nothing more than pass a slightly different buck to the bureaucrats.

Taking another tack to build cost sensitivity into environmental regulation, various "regulatory takings" bills would require agencies (and therefore taxpayers) to compensate property owners for the cost of complying with environmental laws. The Constitution requires government to pay compensation not only when it literally takes property but also when it regulates property to make an owner confer a benefit on the public rather than to prevent a harm (e.g., requiring an owner to have a lawn and nothing else on its downtown property). But because courts have trouble drawing the line between harms and benefits, property owners get little protection.

The House's regulatory takings bill requires compensation for reductions in property values of more than 20% from regulations under a short list of regulatory programs -- chiefly those to preserve the habitats of endangered species or wetlands, which serve as wildlife breeding grounds and buffers against floods. It is reasonable to see such regulations as conferring a benefit on the public because the government routinely buys property for such purposes. The House bill does not apply to regulations under the Clean Air Act, the Clean Water Act and the great bulk of other environmental statutes.

In contrast, Senate Majority Leader Robert Dole has introduced a bill that would require compensation for reductions in property values of more than one-third under all environmental and nonenvironmental statutes, subject to the caveat that the government does not have to pay for reductions in value needed to prevent common law nuisances. Because the concept of "nuisance" is notoriously open-ended, this bill would create years of uncertainty and be a boon to lawyers. In the short run, however, passing the buck to the courts would allow the Senate to take credit for "protecting" property rights.

Recognizing that the essential problem is lack of accountability, Sen. Don Nickles (R., Okla.) has introduced a bill that would prevent an agency regulation from going into effect for 45 days. In the interim, Congress and the president could enact a statute striking it down if they considered it unwise. This bill is a step in the right direction but a far cry from the accountability required by the real contract with America, the Constitution, which provides that no law go into effect until a majority in the House, a majority in the Senate and the president take responsibility for it.

The Nickles bill offers only a maraschino cherry of accountability. It would allow an agency regulation to go into effect unless the House, the Senate and the president oppose it. Moreover, if the regulation isn't brought to the floor, Congress never has to vote on it and the president never has to sign it.

Instead, Congress should enact a statute that would bar agencies from making laws. Lawmakers should take direct responsibility for laws by enacting them themselves. If they aren't sure what regulations to enact, they can tell the agency bureaucrats to hold hearings and make proposals. That is not only what the Constitution requires, it also makes sense. As James Landis, the New Deal's architect of the administrative agencies, said, "it is an act of political wisdom to put back upon the shoulders of Congress" responsibility for the controversial choices.

Congress's instructions to the agencies could require them to accompany any proposal with the analyses of risk and cost called for in the House bill. But, because these analyses would not determine the outcome and would not be subject to judicial review, less would ride on them and they would not gum up the process. An agency's proposal should go directly to the floor of Congress for a roll call vote.

This review by Congress and the president would take less time than the current coda to agency lawmaking, judicial review, and would fulfill the Contract's promise to "restore accountability to government." President Clinton would look antidemocratic vetoing a bill that required him and legislators to take personal responsibility for each

regulation. In contrast, he could look good by vetoing bills that he could characterize as keeping agencies from protecting the public.

The Constitution's safeguard against unwise laws is to empower voters to kick lawmakers out of office. On environmental (and other) law, Congress has escaped accountability by delegating the hard choices to agencies. It's time for Congress to take responsibility.

Mr. Schoenbrod, a professor at New York Law School, wrote "Power Without Responsibility: How Congress Abuses the People Through Delegation" (Yale, 1993).

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