
“We Can End up Winning”

An Interview with Rep. David McIntosh

On February 7, 1996 Regulation interviewed Rep. David McIntosh (R-Ind.), member of the congressional class of 1994 and long-time champion of deregulation. Representative McIntosh is the current chairman of the Economic Growth, Natural Resources and Regulatory Affairs Subcommittee of the Government Reform and Oversight Committee; during the Bush administration he served as executive director of the President's Council on Competitiveness. The interview was conducted by Edward L. Hudgins, senior editor of Regulation.

Regulation: I will start by asking about the Republican-controlled Congress, which so far has not passed the major regulatory proposals in the Contract with America, nor any other substantive reform. Basically, the question is, “What happened—why haven’t you been able to get the reform so far?”

McIntosh: As you know, we passed the Contract planks on regulation in the first 100 days of the Congress in the House of Representatives. One of these would require the federal government to pay citizens compensation when the use of their property is curtailed through regulations. Another would require consideration of the costs of new regulations and the risks supposedly being targeted. This latter proposal is ready for action on the Senate floor. But they’ve stalled over in the Senate. To cut off a filibuster requires

60 votes, so we need to pick up enough Democratic senators to stop the filibuster. A lot of them tell us they will support bipartisan efforts to cut back on the excesses of regulation, but when it comes down to voting, one or two of them always find a reason not to vote with us to pass the bill. I think it has a lot to do with presidential politics at this point. The Democrats do not want to give Senator Dole, the legislation’s major Senate sponsor, credit for reducing regulations, even if they have a lot of constituents in their states telling them that it is the right thing to do. So it is going to be difficult to get reform this year. There is a broad consensus for using cost-benefit analyses and risk assessment to reduce unnecessary regulations and to make existing regulations more efficient by targeting them to real health and environment risks.

Regulation: There seem to be two approaches to regulatory reform. One is the process-reform approach, for example, the use of cost-benefit analysis and risk assessment. The other approach is to either reform or get rid of bad regulations; for example, if we do not need a Superfund or if we need to make major changes—why not just go make those changes? Do you have a preference for one or the other approach? Or do you see a political reason why it is necessary to go in one direction now rather than in the other direction?

McIntosh: I think you’re going to see Congress

pass a few of the reforms that are procedural in nature and have broad support. I have a bill that would sunset regulations, forcing a review after seven years for existing regulations, so that outdated and unnecessary regulations could be looked at and removed from the books.

Senator Nickles has a procedural bill that allows the Senate and the Congress to look at rules when they first come out so that there is more accountability in the legislative branch. Those things I think go through; the larger bill will still be held up.

But to your question of process reform versus substantive reform—the two are inextricably linked. Both are necessary to do a good job of correcting the problem of excessive regulation. You need the process reform because there is a political force that works in a bureaucracy. I call it the “bureaucratic imperative,” whereby the agency will seek to increase its authority; will seek to preserve its reputation by defending past decisions when they’re proven to be incorrect decisions, or simply no longer appropriate because of changes in technology. That political force will lead to excessive regulation by the executive agencies even if we change the laws in Congress.

Let’s make substantial changes in the Clean Air Act. Let’s go in and redo the Endangered Species Act so that we use property rights as a way of preserving species. Let’s fundamentally change the Occupational Safety and Health Administration to offer rewards for companies that have a good safety record and target inspections and enforcement to companies that do not have a good safety record. Those types of changes on a statute by statute basis are very important and will take more time. But it is important that the Republican Congress began the reform process and it should see these efforts through to fruition.

Regulation: At least in the public relations area you have had some difficulty. Opponents have tried to portray regulatory reform as a way to water down laws in a way that would endanger public health and safety. What arguments against regulatory reform have been most effective, and do you see a particular way to counter these arguments?

McIntosh: The general claim that we are rolling back safety, health, and environmental regulation is fundamentally not accurate. The important controls or regulations in those areas are

being preserved, strengthened, or changed in ways that I think are actually more effective in accomplishing those goals. I have encountered what I call scare tactics. During the 1992 campaign critics said “David McIntosh is in favor of regulations that allow cancer-causing chemicals in the workplace.” The average person knew that was so extreme and untrue that they did not pay any attention to it. But President Clinton has so far successfully maintained that there would be danger to the environment if the Republican reforms went through. And I do think that is a challenge for us—one that we can and should take head-on. What I think we need to do is articulate a free-market vision for preserving and protecting the environment—one that starts with property rights and individual responsibility, using market forces and incentives as a way of accomplishing social goals, reducing the command-and-control approach to regulation, and allowing flexibility and more local autonomy in making decisions. These are the principles we need to apply to the problems of how to save the environment, how to protect key resources, and how to reduce pollution.

I like to make the analogy between progress in the area of environmental quality and economic progress in the Soviet Union. In the 1920s and 1930s the Soviets made great strides in modernizing their economy but at tremendous costs to human liberty; and eventually, the Soviet system collapsed under its own weight. We are starting to see that in the environmental area. We have made great strides by mandating certain technologies and requiring that certain chemicals not be dumped into the waterways. But now we have a command-and-control structure run out of Washington that has become bureaucratic and no longer focuses on real environmental risks. This system is beginning to make it less likely that we will do a good job of protecting the environment.

The example I give is a company in Indiana that has set up a manufacturing facility to take the waste product from Thompson Electronics’ computer-etching process. They etch a computer board that they use in the back of their televisions; the waste product is a fluid containing highly enriched copper from which copper is extracted. That copper is used as a food supplement that is sold to pork and poultry producers in the Midwest. The waste product from the recycling plant is the raw material that Thompson Electronic uses in its

manufacturing process. It is environmentally very sound. There is no waste, essentially, coming from the process. The reason that this extraction process is economically feasible is that Thompson and the company that does the recycling do not have to go through the paperwork and all the other regulatory burdens. They save a lot of money in disposing of that waste. The problem comes when the Environmental Protection Agency says, "This is recycling, and our rules say if it is a recycling program you have to meet all of our regulatory requirements." That is self-defeating. But one solution that they thought about with all the environmental experts in Indiana was to pour 10 percent of the waste stream down the drain as a waste product. Then it is not recycling, and the companies can avoid costly regulatory burdens. When I mention it to audiences, they burst out with laughter because they realize that it is absurd. And it is an example of how the regulatory system is bad for the environment. I think we could use our principles—take that issue head-on—and show that our reforms are actually going to be better for the environment.

Regulation: Are there any approaches to regulatory reform that you think are particularly promising and on which you would like to see more work done, for example, by think tanks?

McIntosh: One thing that I think we absolutely have to do, and it's critical that we have good research in this area, is showing how the cost of regulation affects average persons in their lives. One way to do that is to show the loss of job opportunities, both because of barriers to new job creation and loss of existing jobs, for example, if a company moves its manufacturing facilities overseas or reduces its labor force. That research is very hard to do, but it would be critical in helping build the case for regulatory relief. A second area for research is the cost of regulations for consumer goods. A third area that I think is important to look at is something that I call the standard-of-living question. And that would be looking at areas such as the FDA approval process for pharmaceuticals. What is the result of having twice as long an approval process as Europe and other industrialized countries? How does that affect our standard of living here in the United States? Those are some of the key questions that I think we need to look at and create a solid database in order to make the case for our reforms.

Regulation: To what extent do you find that

businesses can actually hinder deregulation? Maybe because they try to use regulation to restrict market entry of smaller competitors, maybe because they succumb to what we call the Stockholm syndrome, that is, they begin to sympathize with those that are regulating them. When I talk to pharmaceutical manufacturers in private, they will acknowledge that I am right about my criticisms of the FDA, but they are very careful about saying this out loud, since after all, their fate is controlled by a government agency. To what extent do you find that that is a bit of a problem?

McIntosh: I think that both of those are areas of problems. And the Stockholm syndrome, I think, has more to do with the point you have just made—for the regulated industries, oftentimes the federal agencies have so much power over their day to day operations and their business decisions that if they don't cooperate with them, they could find themselves essentially put out of business and lose everything they have invested at that point. As a result, they have to be very careful how they approach those agencies. Some agencies have gone uncontrolled and unchecked by the political process for so long that they have grown arrogant in the way that they use their power. The FDA is a good example of this. It has closed down companies and manufacturing facilities with very little evidence of a danger to public health and for no good cause. And nobody has called them on the carpet for doing this. When that happens, businesses react in a very rational way. They say, "We have to be careful and be on their good side in order to continue operating."

A second point—and I noticed this a lot when I was at the Competitiveness Council—business representatives came in and said to me, "We rather like this set of regulations." I would ask a series of questions aimed at finding out how their competitors would be affected by these regulations, and oftentimes I found that businesses liked regulations that put their competitors at a disadvantage, and they disliked regulations that hurt them in the competitive marketplace. The easy phenomenon to track was that large businesses tended to like more regulation than small businesses. They have the capital and the ability to invest in Washington lobbyists and other advocates in the system where they can adjust their operating procedures to live with the regulatory requirements. However, small businessmen do not have access to a lot of capital and

cannot hire a large law firm to represent them in the regulatory process. They are often confronted with the choice of ignoring regulations that they do not think are essential and hoping nobody closes them down, because they simply couldn't stay in business if they tried to comply with all of the hundreds of thousands of regulatory requirements.

Regulation: As you know there is a lot of talk about the problem of delegation. Over the last couple of decades Congress has given broad power to bureaucrats to, in a sense, make laws contrary to Article I of the Constitution. To what extent do you think restricting congressional power to delegate, forcing Congress to vote on every regulation, would reverse some of the regulatory abuses?

McIntosh: The type of reform restricting congressional authority to delegate broad powers to an unelected regulatory agency would be very helpful. I think it would put a political restraint on unfettered regulations. It would hold the members of Congress accountable to the electorate for decisions that are made by the government, which is what the Founding Fathers intended when they created our form of government. So I'm very much in favor of reversing those delegations of powers both by changing the laws and by procedural reforms, such as Senator Nickles's reform, that bring the issues back to Congress in an expedited procedure.

Regulation: Do you see a lot of support for this approach, or is this something that will require building up support over a number of years?

McIntosh: I think it's going to take a while. Frankly, I suspect that my colleagues in the legislative branch are going to take a look at this reform and start thinking about the consequences for them politically, and be reluctant to embrace that. Right now, legislators have the best of both worlds. They get to take credit for passing a law to protect health, safety, and the environment, but do not have to take any of the political blame when the regulations are harmful to people. They can say, "I didn't pass that regulation—some other fellow did." People are human, so they follow the natural instinct to try to maximize their own benefits, and in the political world that means that legislators like to take credit and avoid blame. We have to structure the system in a way that doesn't allow that to happen.

Regulation: Now what about the other structural issues? Congress is considering returning a lot of issues to the states, such as welfare. To what

extent will holding strictly to Article I, section 8 of the Constitution require the federal government to cede to the states certain areas of regulation that are not in the federal jurisdiction. For example, worker safety is something that states traditionally take care of through workers' compensation laws, this might be an area that the federal government simply does not have jurisdiction over. To what extent can regulations simply be left to the states?

McIntosh: I think that in general we should follow that policy. The police power was placed in the states. They have the ability to be effective in monitoring those areas. They have an incentive because their own citizens are affected by health, safety, and environmental problems. There is one set of issues in which Congress should continue to play a role, and that is when costs of a particular regulation or law would be imposed on citizens outside the state. That is, if you allow those issues to be resolved by the states each state would have an incentive to pass regulations that shift costs outside of its boundaries. On the other hand, that argument is often used to justify federal intervention when it is not needed. We saw the state of California pass labeling requirements that were going to be very burdensome on businesses that sold into the California market. The cost of that was going to be paid almost entirely by the California citizens. But the companies came to Washington, and sought relief from Congress, that is, federal preemption of this labeling requirement. My view was that if the citizens of California wanted it and wanted to pay for it, we in Washington should let them have just that. It may not be the labeling requirement that I might want in my state, but that doesn't mean that Washington should intervene and try to make that decision.

Regulation: When you were at the Competitiveness Council, what were the particular surprises you found when you started to look in depth at the regulatory process? What stuck out as especially problematic, arbitrary, or whatever in regulations?

McIntosh: A couple of different things come to mind: One, the extent to which the government would come onto someone else's private property and take their property, for example, hold them criminally liable in the wetlands area for actions on their own private property. The intrusion on individual liberty and the erosion of property rights was so pervasive that it was a serious threat to our structure of freedom and individual

liberty, and I fought very hard to reverse that. In the wetlands area, we were only partially successful at that. I think we at least pointed the finger at the problem.

The second area was the way in which regulations were written in Washington without any regard to their practical effect on people who had to live under those regulations. One example came out of the HUD application of the Americans with Disabilities Act rules on designing apartments so wheelchairs would gain access, such as making the halls and doors wide enough. All of those were fine from the standpoint of someone who had to live in the apartments and build them. But they had a lot of regulations that just didn't make sense. One of them was called the "flooding balcony" rule. HUD required that the balcony be built on the same level as you raise the doorjamb on an apartment building, so that wheelchairs could have easy access to the balcony. That sounded like a good idea. The problem was when we showed it to people who had experience in constructing these buildings, they said, "If you require that, you are going to ruin these apartments, because the first day it rains, rainwater will collect and flood the building, and it will make it unlivable."

We had another huge fight with regulators when we found the EPA totally ignoring the advice of the fire marshals with some of their regulations on storage tanks. The fire marshals very much wanted the tanks either buried in the ground or covered in concrete, so that it would be difficult for them to rupture or explode and create a bomb on the property. The EPA said that for environmental reasons, it did not want these tanks buried, and that it would not approve a model that is encased in concrete because it wanted to be able to test the lining more easily. Now, to me it was ridiculous that the EPA would ignore the advice of fire marshals—people who were dedicated to protecting lives and increasing safety—when working on that type of regulation. We had hours of meetings and disagreements about that.

Regulation: A final question. Let's look five years or 10 years down the line. What kind of regulatory regime do you see? Would you see, for example, still a fairly substantial federal role? Would you see much of the regulation, both the

setting of standards and enforcement, returned to the states? Would you see the use of private property rights, contract law, and such tort remedies as negligence and reckless endangerment being employed to deal with public health and safety?

McIntosh: I think the ideal would be to give the states and local communities much more control over these issues, to use incentives, to encourage and motivate people, to take care of the environment, protect the safety of their workers, create a healthier community. The political realities are that we are going to have to demonstrate how this works before the general public agrees that particular federal programs should be dismantled. They are going to want to have us demonstrate that these alternatives work. I have a lot of confidence that they will be successful. But I think the challenge for us will be to set up pilot projects and other ways in which we can really demonstrate that to the public and then they will feel confident that we can revamp our regulatory structure along those lines.

Regulation: Any last thoughts? Anything you would like to add?

McIntosh: I've used this analogy with people that come from Indiana: the movie "Hoosiers" has struck me as an appropriate analogy for where we are at in this battle and several others. And I think we are at halftime, where we have got a good strategy, we have a good team. We are up against a lot of the big-league players in Washington and the special-interest groups, but I think if we persevere in articulating our ideas and showing the strength of those ideas, with real research to back them up and show applications to our daily lives, then I think we can end up winning the game even against the odds. For that reason I'm fairly upbeat. I also think that the consensus has shifted towards the realization that there is a real problem of overregulation. You have President Clinton talking about this problem. You have Al Gore, the champion of the environmental movement, talking about the problem of overregulation just as you had Vice President Quayle who headed the Competitiveness Council. So you have got a diverse group of people from political standpoints agreeing that there are serious problems with regulations. That creates a situation where there are a lot of chances to accomplish good results.