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The War on Regulation

Under Trump, it's open season on health, safety, labor, financial, and environmental measures—that protect people who voted for him.

BY RENA STEINZOR APRIL 17, 2017

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A cornerstone of Donald J. Trump's presidential campaign was his declaration of war on regulation and the agencies that write it. He has promised repeatedly to get rid of 75 percent of rules now on the books. More recently, Steve Bannon, the chief policy guru in the Trump White House, defined the mission of the war

more accurately as "deconstruction of the administrative state."

Ten days after taking office, Trump issued an executive order to accomplish his regulatory pledge by requiring agencies to kill two rules for every new one they propose, and has held a press event to announce further attacks almost every day. Another major tool is the legislative veto of so-called "midnight" rules issued by the Obama administration in its last five months in office and the passage of "regulatory reform" legislation that would make future rulemaking very difficult. All of these changes are a dream come true for corporate lobbyists. The oil and gas industry alone spends \$300 million annually to lobby Congress, and fields three lobbyists per member.

Legislative vetoes are permitted under a 1996 law, the Congressional Review Act, enacted by the Gingrich Congress, aimed at thwarting President Bill Clinton's efforts to regulate prior to a presidential election that Republicans hoped to win. The first midnight rules to fall in the Trump era included a Securities and Exchange Commission requirement that oil and gas companies disclose how much they paid foreign governments for drilling rights—a provision of the Dodd-Frank bill enacted to detect illegal bribery; a Department of Interior prohibition on coal companies dumping mountaintop removal debris in streams; and a requirement that the Social Security Administration support gun control enforcement by sending to the attorney general the names of severely disturbed people receiving disability benefits.

As this article goes to press, two more repeals await Trump's signature: a rule that requires states to assess individual school performance and report those results to parents, and a rule developed by the Bureau of Land Management to give the public more say in whether to

allow drilling, mining, and logging on 250 million acres of public land. Oil and gas interests, coal and other mining companies, and the gun lobby led the scrum, but electric utilities, federal contractors, bankers, payday lenders, and the chemical industry were not far behind.

The abbreviated Congressional Review Act process applies only to rules issued by the Obama administration after June 13, 2016. Unraveling older rules will be quite time-consuming,



(PHOTO: AP/MATT ROURKE)

presenting deregulators with a fundamental dilemma. The most effective, long-lasting, and (not incidentally) transparent gutting of rules would require legislative revisions of the statutes that created the programs and gave agencies authority to write rules. But this approach would invite far stronger political backlash than obscure procedural changes that can be made to sound relatively innocent.

The House has already passed legislation written in this vein, called the Regulatory Accountability Act. A revised version is likely to be the main vehicle of deregulation used in the Senate. The bill would add several dozen steps to the rulemaking process, including a requirement that agencies call witnesses during rulemaking and allow opponents to cross-examine them. The regulatory process is already glacial. The Occupational Safety and Health Administration managed to complete just two significant rules reducing workplace exposures to hazardous materials in eight years, and one has midnight status.

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Much of the 2010 Dodd-Frank Act has not yet been implemented because a process intended to be fair-minded invites industry delaying tactics. Additional procedural reforms will force underfunded agencies to abandon rulemaking. The only viable alternatives are case-by-case enforcement or inaction.

The House also passed the REINS Act (Regulations from the Executive in Need of Scrutiny), which would prevent any regulation from going into effect unless Congress acted affirmatively to approve it. If enacted, it would accomplish a seismic shift in power from the president to Congress, turning the terms of their relationship back as far as before the New Deal. Another bill would require courts to consider regulators' decisions "de novo," or without any deference to the special expertise available within agencies, further demeaning their stature. Supreme Court nominee Neil Gorsuch has endorsed this change.

As usual, House Republicans legislated by rolling over Democrats and ignoring public-interest groups. The stream of legislative missiles landed with a crash in the Senate quite early in the current session. How fast the Senate acts depends on an explosive brew of other crises, such as Russian interference in the 2016 election, radical changes in immigration policy, the confirmation process for Gorsuch, appropriating money to keep the government running, various international crises, and, perhaps most important of all, the volatility of the Trump White House.

Since some of this legislation can be filibustered and therefore requires 60 Senate votes to pass, the fate of broad regulatory revision is likely to depend on a core of

conservative Democrats, including Senators Heidi Heitkamp (North Dakota), Joe Manchin (West Virginia), Claire McCaskill (Missouri), Bill Nelson (Florida), and Jon Tester (Montana), who face tough challenges in states that went red last November. McCaskill and Heitkamp are already in negotiations with Republican Senators Rob Portman (Ohio) and James Lankford (Oklahoma) to develop bipartisan compromises that might be less damaging, but still potent enough to congeal future rulemaking.

Two powerful categories of interest groups have combined forces to support deregulation. The first is led by the Freedom Caucus, the loose organization of House Tea Party members, which fiercely opposes the regulatory state. Dismantling rulemaking represents low-hanging fruit that, in the immortal words of Grover Norquist, president of Americans for Tax Reform, reduces government "to the size where I can ... drown it in the bathtub." The caucus sent Trump a list of 228 rules in need of destruction. The list identified 73 separate rules addressing climate change.

The second category of participants is the long list of trade associations, exemplified by the Chamber of Commerce and the National Association of Manufacturers, that represent industries subject to proposed or existing rules. As a whole, this category of participants is both more eclectic and more pragmatic, without any unifying agenda other than saving money by blocking regulation. Bridging the gap between the two categories are conservative think tanks such as the Heritage Foundation and the Competitive Enterprise Institute.



(PHOTO: FLICKR/LORIE SH
AULL)

Midnight Rules

When Congress gave itself authority to kill rules if both the House and the Senate passed a "resolution of disapproval," it exempted such resolutions from filibuster, a significant advantage for the majority party. But consideration of a resolution of disapproval still requires ten hours of debate under Senate rules. The ten hours are equally divided, so Republicans can speed matters along by giving up their five hours and letting Democrats talk to an empty chamber for the remaining five. Still, leaders must pick carefully which rules deserve top billing.

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The Congressional Review Act requires agencies and departments to forward each "major" rule (those imposing costs of \$100 million or more) to Congress, but only gives the House and Senate 60 subsequent legislative days to pass a resolution. This feature means that the law's power is at its apex when the executive and legislative branches are controlled by the same party, when the incoming president is of a different party than the outgoing one but the same party that dominates Congress, and when the outgoing president waited until the end of his administration to get controversial rules out the door. Until last month, this veto authority was invoked only once, at another notable turning of the political tables, when incoming President George W. Bush signed a resolution killing a rule to prevent ergonomic injuries issued by the Clinton

administration's Occupational Safety and Health Administration.

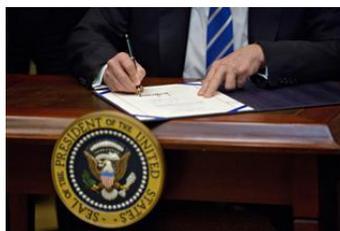
Obama's legacy rules, finalized before June 13, 2016, including one to cut greenhouse gas emissions from power plants in order to slow climate change, were issued before this deadline, removing them from the legislative veto threat, although they remain a juicy target for congressional conservatives. But when Hillary Clinton lost the election,

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Obama decided to fast-track rules that were nearly final, exposing approximately 150 to possible veto. The list includes everything from routine, minor rules to controversial big-ticket targets.

What critics have dubbed "Obama's historic midnight surge" was risky because the law also says that once a resolution of disapproval is enacted, the agency cannot issue a "substantially similar" rule, in effect depriving regulators of some as yet undetermined amount of legal authority to revisit the problems addressed by the vetoed rule. In lobbyist lexicon, legislative vetoes have the potentially enormous advantage of "salting the earth"-destroying future agency efforts to address a problem.

For a courageous agency, writing a new rule that is not substantially similar to the vetoed version but still advances the public interest should be



possible. But few agencies are courageous these days. OSHA, for example, has never taken another run at the severe problems of ergonomic injury in the workplace, even as researchers have continued to document the severity of such hazards, especially in industries, like poultry processing, that depend on the Hispanic and African American working poor. Obama must have calculated that getting the rules on the books and making it harder to roll them back was worth the risk that some would be vetoed, potentially barring future action on the problem.

(PHOTO: ANDREW HARRE
R/PICTURE-ALLIANCE/DP
A/AP)

As this article goes to press, in addition to the five resolutions of disapproval already adopted, 53 resolutions to disapprove 32 rules are pending-34 in the House and 19 in the Senate. Among the more blatant are resolutions killing the following:

- A Bureau of Land Management rule compelling reductions of methane leaks from oil and gas wells drilled on public lands. Methane is a potent greenhouse gas that causes climate change. Despite improved technology, the standards had not been updated in 30 years.
- A rule issued jointly by the Department of Defense, the General Services Administration, and NASA, designed to improve federal contractors' compliance with labor laws by requiring firms to disclose past violations. A federal district court judge in Texas has stayed implementation of this requirement, which contractors have helpfully nicknamed the "blacklisting rule," but Congress stands ready if the courts do not take care of this nasty business.
- Consumer Financial Protection Bureau controls on exploitative terms of prepaid credit cards.

- A Department of Labor rule requiring financial advisers to put their individual clients first when giving investment advice.
- An Environmental Protection Agency rule requiring consideration of renewable fuel sources. This rule was targeted by Freedom Partners, which was organized by the Koch brothers, in a document entitled "A Roadmap to Repeal: Removing Regulatory Barriers to Opportunity."

Others that may end up on the chopping block include an EPA standard to reduce greenhouse gases from heavy-duty trucks and tractor trailers, which would cut 1.1 billion tons of carbon dioxide over the life of the covered vehicles; another EPA rule requiring chemical companies to implement controls to prevent and respond to leaks; and Department of Energy rules to increase the efficiency of furnaces, commercial boilers, and portable air conditioners, which over the lifetime of the appliances would save as much energy as one-fifth of the total amount consumed in the United States in a single year.



Special interests are gleeful about the speed and ruthlessness of these victories.

Robert Murray, owner of one of the largest U.S. independent mining companies, gloated over the veto of the stream-protection rule, telling a Politico reporter: "It's gone. Hillary's gone. It's gone. Obama, the greatest destroyer in America, will soon be gone." It remains to be seen if Murray's assumption that rules designed to end the Obama administration's so-called "war on coal" will increase the use of the heavily polluting fuel. Analysts have pointed out that the reason coal

production has waned has far more to do with market pressures such as the availability of less-expensive natural gas and renewable energy and declining demand in Asia.

Attacks on environmental protections may play well in coal and oil country, but public opinion is trending in the opposite direction. A Reuters/Ipsos poll found that 60 percent of Americans supported maintaining and even strengthening the EPA's authority. A Gallup poll reporting on historical trends in public attitudes toward the threat of climate change found that in 2016, 40 percent of respondents thought that the seriousness of climate change was "generally underestimated," while 25 percent thought the warnings were "generally correct."

The White House Piece of the Action

A coalition of labor and environmental groups led by Public Citizen has challenged Trump's proposed two-for-one executive order in court, arguing that if Trump wants to take down rules, he cannot do so by decree.

In an ironic twist that demonstrates the difficulties involved in implementing two-for-one, the Trump administration exempted its first significant regulation—an effort to stabilize health insurance markets—and continues to publish new rules in the Federal Register. Of course, most agencies will not enjoy this favored treatment. Those assigned to protect public health, worker and consumer safety, and the environment will internalize the president's order and



(PHOTO: AP/CANADIAN PRESS/PAUL CHIASSON)

table new rules unless they are specifically required by the authorizing statute.

An as-yet poorly defined universe of rules has simply disappeared into the bowels of bureaucracy, raising the possibility that the administration plans to abandon them without saying another word, an approach that legal experts say may be vulnerable to legal challenge.

They include a final rule from the Federal Railroad Administration that would have required two engineers on duty in trains pulled by large locomotives. The rule is in response to a horrific accident in the Canadian town of Lac-Mégantic, where a train slid down a hill because the sole engineer could not secure it effectively, derailed, and burst into flames, killing 47 people.

The Trump administration, through budget cuts and the appointment of agency heads who are hostile to agency missions, is likely to accomplish at least as many lasting changes, if not substantially more than Congress will accomplish anytime soon. It's much easier for a president to deny an agency funds and thereby cripple its mission than to shut it down.

The EPA is the most prominent poster child for "hollow government," the vivid term used to signify the yawning gap between mandates and money. In constant dollars, its \$8.1 billion budget for 2016 is less than half what the agency received in 1978, before many environmental laws were enacted. Now, Trump has proposed a budget that would cut EPA funding by 31 percent, bringing it to its lowest level since its creation in 1970.

The Consumer Product Safety Commission, responsible for the safety of all consumer goods except motor vehicles, food, drugs, and cosmetics, had 786 employees when it was first created in 1982, but had only 567 in 2016—a cut that is especially disturbing because the nation is increasingly dependent on imports from Asian

countries where regulation is nonexistent or erratic. Other agencies have undergone comparable downsizing. Further cuts could push them beyond the boundary between viability and dysfunction.

What budget-cutting cannot accomplish, officials hostile to an agency's mission can. Take, for example, former Oklahoma Attorney General Scott Pruitt, the new administrator of the EPA. Not only is he a climate change denier, he was a proud participant on the side of regulated industries in 14 lawsuits challenging the agency's authority over everything from the cleanup of the Chesapeake Bay to the relative safety of mercury and arsenic emissions from coal-fired power plants. The EPA's career staff had two reactions to his imminent arrival: dread and resistance. Pruitt is expected to cooperate with regulated industries' requests that major rules be rescinded or drastically trimmed back.

Similar problems exist at the Federal Communications Commission, where new Chairman Ajit Pai is reconsidering net neutrality; the Department of Health and Human Services, where Secretary Tom Price will lead the charge on rolling back the Affordable Care Act; and the Securities and Exchange Commission, where new Chairman Jay Clayton is expected to lead the effort to repeal major provisions of Dodd-Frank.

The president has not advanced any coherent theory for the rollbacks other than the litany that deregulators have advanced for decades: Regulations are bad. They take away jobs and destroy the economy. To make America great again, we need to kill them. When Trump is on a roll, he seems able to convince voters that the issue is not their health and welfare but rather the frustrations of dealing with the Department of Motor Vehicles in our most dysfunctional state.

Yet at some point, President Trump will be held responsible for the inevitable regulatory failure that will follow from his policies, especially if his pledge to grow the economy by an unattainable 4 percent falls flat and his supporters realize that deregulating is not the silver bullet he promised. The occurrence of catastrophes like the Deepwater Horizon blowout, the collapse of the Upper Big Branch coal mine, the sale of eggs contaminated by salmonella, or the marketing of compounded drugs tainted by fungal meningitis will be laid at the White House doorstep, and no amount of deregulatory bluster will distract from the bad publicity.

by Rena Steinzor