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The Quiet GOP Campaign Against Government Regulation

By Peter M. Shane The Atlantic January 26, 2017 4 Comments

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5893 Administrative law will never have the attention-grabbing power of the new president's tweetstorms or international cyber intrigue. But congressional Republicans are poised to revolutionize federal public administration in ways that could affect the country long after Donald Trump leaves office. Yet their efforts are largely shielded from public scrutiny because of the obscurity of the subject matter and a longstanding conservative campaign against the supposed burdens of government regulation.

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Virtually all of the progressive social movements of the last hundred years or so have brought change in the form of federal legislation. Some federal laws operate directly to govern public behavior, such as barring employment discrimination by race or sex or outlawing many kinds of commercial fraud. Many statutes, however, do their work by authorizing administrative agencies to issue regulations that carry out the statutes' general goals and create public benefits.

The function of such statutes is less to spell out the details of regulation than to set the boundaries within which government agencies will then have to operate. In fact, even laws like the Civil Rights Act of 1964 or the Americans with Disabilities Act, which set out definite regulations, rely on administrative agencies to enforce those rules and fill in many of the necessary details of implementation. Congress leaves detailed implementation to the executive branch because administrative agencies can address

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issues with often greater expertise, and because, in the face of changing circumstances, it is easier for agencies to respond flexibly through new regulations than it is for Congress to write new statutes.

The achievements of the modern regulatory state in advancing human welfare are profound. Thanks to administrative regulation, Americans breathe cleaner air, drink cleaner water, eat healthier food, drive safer cars, work in safer environments, and have fairer and more secure access to education, housing, employment, telecommunications, and the ballot box. Regulations help protect consumers and investors from fraudulent and unfair practices in trade and finance. Some regulations may be imperfectly designed, or do too little or too much in trying to advance Congress's public-interest goals. But the process for crafting and issuing such rules is arguably more painstaking, more transparent, and more accountable than the ordinary legislative process itself.

It seems a safe bet that few Americans, however, have a clear understanding of how federal rules come to be. First, Congress has to give some agency the authority to issue rules as a means for addressing whatever problem or public need Congress has identified. Then, after what is often a lengthy process of research and deliberation, both internally and in consultation with interested parties, the agency has to publish a so-called notice of proposed rulemaking. That notice may or may not include the actual text of a proposed rule. But it has to be detailed enough to alert the public as to how the agency contemplates proceeding, the alternatives it faces, and the issues under consideration.

After publishing its notice, agencies will hold a public comment period during which all Americans—not just experts or lobbyists—are entitled to submit input for consideration. (The Federal Communications Commission, for example, received [over four million comments](#) when it proposed its net-neutrality rules.) Following the comment period, the agency, if it wants to proceed, has to publish its final rule along with a public explanatory statement. The agency does not have to follow or even respond to every individual comment it received on its original proposal. But courts may overturn the agency's handiwork if the explanatory statement ignores or fails to respond meaningfully to some significant issue that the comment period brought to the agency's attention.

This barebones description considerably understates the checks and balances that shape agency rulemaking. Except for the 20 or so governmental bodies that are called "independent agencies," the offices and departments that issue rules have to clear their proposed and final regulations through a White House unit called the [Office of Information and Regulatory Affairs](#), or OIRA. To the extent Congress permits it, OIRA reviews the cost-benefit analyses that presidents require most agencies to perform in order to demonstrate that public benefits outweigh the costs of regulatory implementation. That pressure has undoubtedly intensified the efforts within government agencies to subject their proposals to careful economic and scientific analysis. Since 1981, every administration, Republican and Democrat, has worked assiduously to document the degree to which expected regulatory benefits exceed anticipated regulatory costs.

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After a rule is issued by any federal agency, any person, firm, or organization whose activities would be impeded by the rule or whose costs would increase because of it may challenge the rule in federal court. Federal courts will subject the agency rule to a thorough and independent analysis, making sure that the agency has reasonably interpreted its statutory authority, proceeded on the basis of rational fact-finding, and taken reasonable account of arguments both for and against its regulatory approach. Courts show agencies far less deference than they would show to Congress if Congress enacted the very same regulations, but in the form of a statute.

What congressional Republicans would like to do is to virtually shut this process down. Offered under the label of regulatory “reform,” what is being contemplated is complicating the rulemaking process even further so that the machinery of public administration produces few new regulations and courts have even more power to rebuff those rules that do emerge. This campaign against regulation comes chiefly in the form of two proposed statutes that hardly any non-lawyer knows about.

The shorter and easier-to-read of the two bills is called the “[Regulations from the Executive in Need of Scrutiny Act of 2017](#),” or REINS Act, which passed the House in early January. If enacted, no agency could issue a new regulation unless it amended or repealed some other rule or rules “to completely offset any annual costs of the new rule to the American economy.” In other words, if implementing a new safety rule imposes costs on the economy of \$10 million per year, then the agency would have to rescind enough existing rules to offset those costs fully. But—and this is significant—it must do so even if the social benefits of the new regulation, say, \$50 million in annual savings from reduced health-care costs, far outweigh the costs of rule compliance. This is cost-benefit analysis without due attention to the benefits.

Arguably even more consequential is a requirement in the REINS Act that any regulation that falls under the category of a “major rule” would not go into effect at all unless Congress adopted a subsequent statute specifically approving the rule. In other words, before an agency could issue a rule that could result in “a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions,” Congress would have to legislate twice—once to authorize an agency’s rulemaking process and once to approve its output.

Finally, and most radically, the law envisions that, every year, each agency that makes rules would designate 10 percent of its existing regulations to be treated under the REINS Act as if they were newly promulgated. Within 10 years, Congress would have to approve every major regulation currently on the books, and any rule not so approved would no longer be in effect. Even assuming a Congress intent on evaluating all existing regulations in good faith, there is not even a remote possibility that Congress would complete this work on time. Under its current procedures, Congress, for example, is supposed to enact just 12 appropriations bills by October 1 of each year. In the last four decades, it has managed to meet that deadline [exactly four times](#). It’s highly unlikely that Congress could or would conscientiously review all the major regulations of over 100 federal agencies on a timely basis.

The cross punch in this one-two sequence is the yet-more-complex proposal for the “[Regulatory Accountability Act of 2017](#),” or RAA, some form of which has been a staple of the ultraconservative Republican wish list for decades. Its basic thrust is to load the rulemaking process with so many additional preliminary procedural requirements as to make an already cumbersome process interminable. It passed the House on January 11.

The portion of the proposed RAA that has received the most academic attention is Title II, itself called the “Separation of Powers Restoration Act.” This section is intended to curb the practice of federal courts showing some deference to federal agencies in interpreting the statutes they administer to the extent those statutes are legally ambiguous. Professors of administrative law differ among themselves as to the likely impact of Title II. My own prediction is that Title I—the intentional clogging of the rulemaking process, known to administrative lawyers as “paralysis by analysis”—would be far more impactful at impeding further rulemaking in the public interest.

Debates over the merits of federal regulation are not new. When Congress in 1838 first undertook the regulation of steamboat safety—exploding boilers were often fatal for passengers—steamboat owners and operators were outraged. Why impose the cost of new technology on them when more people died from the sinking and wreckage of unregulated sailing vessels? Only after the seeming failure of 14 years of mandatory self-regulation did Congress in 1852 adopt the first program of national safety regulation and lodge it with a government board that reported to the secretary of the treasury. As a result, the number of deaths from steamboat accidents in the first five years of the law’s implementation dropped fivefold.

This history is worth remembering amid businesses’ howls over the burdens of federal rules. It also helps explain why interests antagonistic to federal regulations resort to measures like the REINS Act and Regulatory Accountability Act to defeat them. They do not try to repeal statutes like the Clean Air Act or the Clean Water Act outright.

To engage in an honest debate centered on the substance of any particular regulatory objective would focus public attention on questions as accessible as, “Do we want cheaper steamboat tickets or fewer exploding boilers?” Arguments about process, analysis, and the mechanics of judicial review in general are far less galvanizing. But they shouldn’t be. What is at stake are regulations and a regulatory process that Americans have long depended on for their safety and well-being.

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