

Regulatory Reform

A new approach for the Trump era

BY CHRISTOPHER DEMUTH SR.

President Trump may not be a full-spectrum deregulator in the Ronald Reagan tradition. He hasn't had much to say about the Food and Drug Administration or Federal Communications Commission—two favorite targets of regulatory reformers—and he sometimes sounds like an antitrust activist. But he has made it clear that economic growth and job and business formation will be his first domestic priorities, and that reforming taxation and regulation will be his primary paths to these objectives. In regulatory policy, his administration will be ambitious and results-oriented. It will focus on dramatic reductions in energy, environmental, and labor market controls; on easing permitting restrictions on transportation, pipeline, and other infrastructure projects; and on reforms to financial regulation to encourage business lending.

The Trump administration's initial regulatory steps will be executive actions, while Congress begins with tax and Obamacare legislation and perhaps Dodd-Frank reform. President Trump is likely to do some immediate things on his own, such as approving the Keystone and Dakota Access pipelines. These will be akin to President Reagan's instant decontrol of petroleum prices in January 1981, demonstrating his personal resolve and differences from his predecessor. He will issue a passel of new executive orders, one of them beefing up the review of agency regulations by the Office of Management and Budget under a cost-benefit standard and adding a requirement that agencies withdraw two existing rules for every new one they impose. There will be directives to the regulatory agencies to postpone the effective dates of late-term Obama administration rules, and to review these and other inherited rules with an eye toward revision or rescission.

At the agencies, the new managements will take immediate aim at the Environmental Protection Agency's Clean Power Plan, the Labor Department's overtime rule, and others that are legally dubious, at odds with President Trump's economic goals, or both. They will mount

a concerted effort to liberalize federal permitting, environmental impact statements, and restrictions on energy exploration and development. Several Obama-era initiatives lying outside the immediate jobs-and-growth agenda will be caught in the initial sweep. One hopes these include the Education Department's rules to maintain control over K-12 schools in defiance of the 2015 Every Child Succeeds Act, and the havoc its Office for Civil Rights has wreaked through intimidating "Dear Colleague" letters to college administrators and school boards.

In these endeavors, the Trump administration will be aided by a feature of American government that conservatives have been complaining about for years—Congress's delegation of expansive lawmaking authority to executive agencies. Most of the regulatory measures President Trump has already telegraphed are well within the bounds of existing statutory authorities (some will pull back Obama administration rules that actually exceeded the statutes, such as its Clean Power Plan). Current statutes afford many further opportunities for executive actions that would profoundly improve economic performance. *National Affairs*, the quarterly journal edited by Yuval Levin (a contributing editor to this magazine), has just published a splendid booklet propounding such reforms for the FDA and FCC as well as energy regulation.

It is likely, however, that executive actions to eliminate growth-inhibiting and other harmful policies will fall short of President Trump's ambitions. Many of the worst regulatory excesses are deeply embedded in prescriptive statutory laws and in agency cultures that those laws have fostered. The EPA's preferred approach to environmental protection is command-and-control regulation of every jot and tittle of industrial production, an approach that freezes technology and suppresses private economic incentives and innovation. The Obama administration's devotion to green energy and suspicion of private markets greatly reinforced these tendencies, and the EPA has sometimes exhibited a shocking indifference to economic and public health evidence and individual rights. So Scott Pruitt, the new EPA administrator, will be contending with a hostile workplace environment from day one. And no matter how well he masters the bureaucratic ropes, he will still be dealing with decades-old, badly outmoded statutes, such as the Clean Air and Clean Water acts, which greatly limit the possibilities of

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constructive reform. The same is true of the energy, labor, interior, and transportation agencies and statutes.

In these circumstances, the Trump administration's regulatory relief ambitions will eventually require legislative collaboration. The Gingrich-era Congressional Review Act (CRA) may be used to dispatch a few Obama "midnight regulations" but is of little use beyond that. There is interest on Capitol Hill in enacting something like the REINS Act, which passed the House twice in recent years and again in early January—but REINS, like CRA, is designed for blocking regulatory excesses rather than empowering positive reforms. The Administrative Procedure Act (APA), which sets the framework for agency rulemaking and judicial review, is due for a major upgrade—but that will not help with the immediate priority of revising embedded regulations. Something more is needed for the task at hand. Let me suggest a variant of the REINS proposal, one geared to executive initiative rather than legislative reaction.

REINS stands for Regulations from the Executive In Need of Scrutiny. The REINS bills require that major agency regulations be approved by both houses of Congress, under expedited legislative procedures

and up-or-down floor votes, before they can take effect. REINS has been styled as an effort to rein in unaccountable bureaucrats through the threat of a legislative veto. But what happens when Congress *approves* an agency rule? Here the procedure has a feature that has so far been little noticed. A REINS-approved rule would have been issued by Act of Congress (with the president's signature, as for all statutes, but that is a foregone conclusion for a rule the president's administration had drafted). It would be more than a mere agency pronouncement interpreting and applying one of its "organic" statutes such as the Clean Air Act. That means the procedure could short-circuit the lengthy and unpredictable legal challenges that invariably confront major regulations as soon as they are issued.

The REINS bills treat this feature as an avoidable complication. They say that an affirmative vote does not approve the substance of a rule, much less incorporate its policies into statutory law, but only permits the agency to *issue* the rule—still subject to full-fledged judicial review. The effect of this hair-splitting is uncertain. Administrative law is about agency discretion under the organic statutes. It is doubtful that a court would hold that a rule issued with Congress's formal review and approval was, as the

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APA puts it, “arbitrary, capricious, [or] an abuse of discretion.” On the other hand, if a REINS-approved rule clearly violated an agency’s organic statute, a court would probably strike it down.

I propose that this feature be adapted for a new procedure that, just for fun, I will call REFORM—Referrals from the Executive For Regulatory Modernization. Under REFORM, the president would refer selected regulatory reforms to the House and Senate and urge their prompt consideration and approval. Where an agency rule departed from a reasonably clear statutory provision, or from judicial interpretations of a broad or ambiguous provision, the agency would explain the departure and the reasons for its new approach. The reasons could not, for the REFORM procedure, be sheer policy preference—rather, they would be limited to improving the agency’s pursuit of the missions Congress had already assigned to it. Such reasons might be to vindicate broader policies of the statute in question; to eliminate confusions arising from conflicting statutory provisions; to clear away obsolete provisions; to improve agency performance based on its experience and evidence with the existing provisions; to better reconcile the agency’s missions with each other or with other congressional policies; or to overturn errant court decisions.

Under REFORM, Congress would approve the rule itself, not just its issuance. And, in cases of uncertain statutory authority, the submitted rule would be accompanied by suggested, surgical statutory revisions, and Congress could enact the revisions along with its approval of the implementing rule. REFORM-approved rules would still, of course, be subject to judicial review on constitutional grounds. So if the FCC submitted a rule prohibiting broadcasters from criticizing the Trump administration, and Congress approved the rule, it would still be vulnerable to First Amendment challenge, with a sure and certain result. But if the FCC submitted a rule abolishing its own “net-neutrality” Internet controls, and Congress approved, that would be the end of the matter as far as the courts were concerned.

The REFORM procedure in this simple form would not require expedited congressional consideration and up-or-down floor votes. These have been important features of the REINS bills and of several successful precedents in executive-legislative collaboration—the military base-closing and trade liberalization exercises of recent decades. All have been based upon Congress’s committing itself in advance to waiving customary legislative procedures for specified executive submissions, especially the requirement that bills be passed by authorizing committees before moving to the floor, and the usual rules permitting floor amendments.

A REFORM initiative without expedited procedures would be fine with me. I would like to strengthen the congressional committee structure rather than weakening it further, and reforms of the sort I have in mind should be supported by the authorizing committees. There is already a bit of precedent for a president’s asking Congress to share responsibility for important regulatory policy decisions, even in the absence of congressional precommitment. Mitt Romney, in his 2012 presidential campaign, said he would submit major rules for congressional approval even in the absence of a REINS statute. And there is talk of President Trump’s submitting the Paris climate change agreement to the Senate for treaty consideration rather than withdrawing or seeking to revise it on his own. But REFORM, to be effective, would require some advance consultation between the administration and congressional leaders, and this could certainly involve some procedural precommitment on executive submissions limited to mission-enhancing reforms such as those I’ve listed.

The REFORM proposal is geared to President Trump’s bold ambitions and businessman’s impatience with bureaucratic delay. If it worked, it could achieve reforms that were both deeper and faster than solely executive actions limited by the installed base of regulatory statutes and judicial decisions.

But it also holds promise for two larger improvements in Washington politics and national policy. First, it would be a stab at developing a new form of executive-legislative interaction—one that balances the executive’s advantages of initiative and policy specialization with Congress’s advantages of representation and the citizen’s perspective. The controversies and failures of President Obama’s unilateral actions to circumvent Congress, on matters ranging from immigration to fossil fuels to transgender bathroom rules, illustrate the need for such innovation. The REINS proposal, and the antecedent base-closing and trade-liberalization programs, were efforts to contrive more productive modes of interaction. REFORM would build on them. (But President Trump may not wish to emphasize the trade-liberalization precedent.)

Second, many energy, labor, and environmental regulatory statutes are archaic and counterproductive, and barnacled with court decisions over disputes now long forgotten—yet efforts to modernize them have repeatedly failed. Several years ago, Professor David Schoenbrod of New York Law School and several academic colleagues collaborated with environmentalists and business executives to develop a promising consensus upgrade to the Clean Air Act. But when he described the proposal to congressional leaders, they seized up in terror at the thought

of Congress's taking on a task so herculean and fraught with political symbolism. Reforming the Clean Air Act *tout court* will be as legislatively complex as tax and health care reform, and is not going to find its way onto the congressional must-do agenda any time soon.

There are, however, many specific provisions of the Clean Air Act that have kept the EPA from pursuing incentive-based environmental policies and that are at war with other parts of the act. Some provisions permit the balancing of benefits and costs and the institution of "cap and trade" marketable permit programs, and have been used to mediate environmental and economic goals with great success, as in the gasoline lead-phasedown program in the 1980s. Other provisions either forbid such approaches or have been read by courts (rightly or wrongly) as doing so, and have upended the agency's efforts to achieve important statutory goals such as reducing "downwind" interstate pollution. One of the many counterproductive results of conflicting statutory language is that the EPA's "New Source Review" program has evolved into a *de facto* ban on new industrial facilities in some parts of the country, even those that would incorporate sophisticated control technologies that were inconceivable at the time the statutory provisions were adopted. EPA rules to harmonize the act's provisions in favor of consistently weighing costs and benefits, and harnessing market incentives to pollution reduction, would be perfectly suited to the REFORM procedure. This is a case where an agency's well-documented successes with some statutory provisions would make a compelling empirical case for reforming others that have hobbled its pursuit of Congress's environmental protection mission.

Today's regulatory statute books are rife with similar opportunities, many of them central to the Trump agenda. Environmental impact statements and other permitting hurdles have become—with the aid of incessant litigation that a REFORM procedure could largely foreclose—obstacles to the most benign and urgent infrastructure improvements. Gasoline ingredient standards have produced a Boschian carnival of self-serving economic interests and policy perversions. Energy efficiency standards have been triumphs of green symbolism over actual results, and are increasingly out of step with progressive energy technologies. For bipartisanship, nothing could

beat repealing the complex statutory ban on the incandescent light bulb, enacted in George W. Bush's 2007 energy legislation, which has been left in the dust by LED and other new lighting technologies. The ban is in abeyance for now, thanks to an appropriations rider, but it should be abolished outright to permit the current, market-driven advances to proceed unencumbered.

And here is a REFORM for correcting a particularly regrettable instance of judicial legislating. "Disparate impact" policies in employment and finance have turned America's historic civil rights achievements of the 1960s into anti-opportunity bludgeons. They subject innocent, effective, nondiscriminatory job and lending criteria to regulatory attack based on crude, post hoc racial regres-

sion analyses—or even, in a notorious recent Consumer Financial Protection Bureau action, to regressions against last names that are deemed statistically more likely to belong to African Americans. The result is to discourage meritocracy and business development wherever minorities may be involved. Disparate impact was fashioned by judges—freely improvising on the civil rights statutes with no doubt the best of intentions—but has since found its way into several agency rules and a few statutes. Returning nondiscrimination policy to its statutory roots would be a noble as well as job-propelling cause.

As my last for-instance suggests, REFORM could address highly controversial regulatory problems as

well as those more narrow and technical. But the larger point should not be missed. Proceeding with statutory reform incrementally, and at an intensely practical level, would hold significant advantages. Excessive abstraction and symbolism go hand in hand with excessive partisanship and legislative gridlock. Reforms in the form of specific rules that demonstrate concretely how agencies will implement them, accompanied by empirical evidence and argumentation addressed to goals congressional majorities have already embraced, could narrow disagreements and pave the way for both political and policy progress. They could also help to improve bureaucratic cultures—for there are many in our regulatory agencies who are sincerely devoted to their statutory missions, who realize better than anyone how bad laws and court doctrines entangle and confound those missions, and who would welcome the opportunity to be judged by results rather than rhetoric. ♦

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