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The Administrative Law of Deregulation: The Long Road for the Trump Administration to Undo Obama-Era Regulations

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by Daniel Lyons

Legal Analysis

Dysfunction among Washington's elected branches has thrust the administrative state—the alphabet soup of federal agencies that together do the day-to-day work of governing the republic—into the nation's political spotlight. Frustrated by his inability to get the Republican-led Congress to pass his legislation, President Obama **governed by "pen and phone,"** leaning on the administrative state to accomplish much of his second-term agenda. From immigration reform to transgender rights to climate change, agencies became the primary engines driving the White House's policy agenda.

Unsurprisingly, President Trump has focused on undoing many of these agency initiatives. As a candidate, Trump campaigned on a platform of deregulation, arguing that agency regulations inhibit economic growth. And as president, he moved quickly to reverse certain Obama-era administrative initiatives and **established agency-level task forces to identify others for repeal. White House advisor Stephen Bannon described these efforts as** a fight for the "deconstruction of the administrative state."

But how, precisely, can an agency conduct an about-face and reverse a policy decision that it only recently adopted? The answer is surprisingly complex, turning in part upon the way the agency formulated its policy and how long it has been in effect. The answer is also extremely important. Each year, agencies enact more rules than Congress and hear far more cases than the federal court system.

Administrative process is the primary legal check on what is often called the “headless fourth branch of government.” The Trump administration’s deregulation campaign will withstand court challenges only to the extent that it gets agency process right.

Policy Statements

The easiest agency decisions to reverse are so-called interpretive rules and policy statements. These are agency statements that, in theory, create no new rights or responsibilities for regulated entities, but rather simply clarify what the agency currently believes that existing law already requires. Because these so-called “nonlegislative rules” do not change the law, they are exempt from the Administrative Procedure Act’s notice and comment process. As a result, agencies are generally free to issue or revoke these statements at will, subject only to the agency’s own procedures for doing so.

Perhaps the most high-profile interpretive rule in President Trump’s crosshairs was the Education Department’s guidance regarding transgender students. In January 2015, the Department of Education’s Office of Civil Rights **issued an opinion letter** explaining that under the agency’s regulations implementing Title IX, schools are permitted to separate bathroom facilities by sex, but “must treat transgender students consistent with their gender identity.” The agency followed this with a **second letter**, in May 2016, explaining that a student’s sex under the statute equates to his or her gender identity. The opinion letters had legal consequences. The Fourth Circuit deferred to the first letter in *G.G. v. Gloucester County School Board*, a 2016 decision reversing the dismissal of a transgender student’s suit for bathroom access.[1] Four months later, a **federal district court in Texas** enjoined the letter on the ground that it changed the law and therefore was not merely an interpretive rule.[2] In October 2016, the Supreme Court granted certiorari in *Gloucester County*. [3]

On February 22, 2017, the agency issued a new opinion letter that withdrew and rescinded the earlier two letters. It explained that the earlier letters “do not contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.” The Supreme Court then **vacated and remanded *Gloucester County*** back to the Fourth Circuit to reconsider its decision in light of the new letter. In the meantime, several states including Massachusetts have stepped up to fill the void in transgender rights left by the agency’s most recent action.[4]

Recent Regulations: The Congressional Review Act

Regulations enacted during the final months of the Obama administration were susceptible to rescission via the **Congressional Review Act**, a 1995 law enacted as part of Newt Gingrich’s Contract with America to encourage greater legislative oversight of agency rulemaking.[5] The Congressional Review Act requires agencies to report to Congress whenever enacting a rule with a \$100 million impact on the economy. Congress then has 60 legislative days to pass a joint resolution disapproving the rule. The Act provides expedited debate procedures, including a prohibition on filibusters. If both houses pass the resolution and either the president signs it or Congress overrides a presidential veto, the rule is voided and the agency is prohibited from issuing any rule “substantially the same” as the rejected rule.

In theory, the Congressional Review Act gives Congress greater oversight of agency action, restoring some of the power lost in *INS v. Chadha*[6] (which invalidated the legislative veto, a process that permitted the House or Senate to unilaterally invalidate certain agency action). But in practice, a successful joint resolution is exceedingly difficult to achieve, because absent a veto-proof majority, it requires the approval of the president, who is unlikely to agree to repeal one of his agencies’ major rules. In fact, prior to President Trump’s inauguration, the Congressional Review Act had been successfully

deployed only once, to invalidate a 2001 Department of Labor ergonomics rule passed in the twilight moments of the Clinton administration and repealed shortly after President George W. Bush's inauguration.

But the current Congress successfully passed, and President Trump signed, a record fourteen resolutions of disapproval.[7] One of the most far reaching of these was the voiding of the Department of the Interior's **Stream Protection Rule**, which took effect on the final day of Obama's term. The rule would have prohibited mining practices that adversely affected streams and water supplies and would have required mining companies to restore streams and mined areas such that they could support all uses that they could have supported prior to mining activities. Congress passed a **resolution of disapproval** in January 2017 and President Trump signed it on February 16. As a result, **the agency reports**, the rule was nullified and "the regulations that are now in effect are the same as those that were in effect on January 18, 2017," the day before the new rule would have taken effect. The agency is "in the process of amending all the regulations altered by the Stream Protection Rule back to the form in which those regulations existed on January 18, 2017. When complete, these amendments will be published in the Federal Register."

Older Regulations: Notice and Comment Rulemaking

Older regulations may be rescinded primarily via the notice and comment process outlined in the Administrative Procedure Act—the same process the agency went through to enact the regulation.[8] First the agency must promulgate a notice of proposed rulemaking, which usually includes an explanation why the agency seeks to take action and the text of the rule the agency proposes to adopt (but in the deregulatory posture, it could instead identify the text the agency proposes to delete). The agency then must invite public comment, which occurs in two rounds: an initial comment period and a reply comment period. After the comment period has closed, the agency must review the comments filed and will ultimately issue a final rule, which becomes binding after publication in the Federal Register (and expiration of the 60-day Congressional Review Act clock).

Deregulation via notice and comment rulemaking differs in two important ways from the other avenues discussed above, both of which can potentially derail the agency's plans. First, the public has the opportunity to provide input into the agency's process. One need not be a lawyer to comment on a proposed rule, including a proposal to rescind an existing rule. Most open agency proceedings are listed at www.regulations.gov, where one can file a comment by uploading a document or even simply by typing into a text box and pressing "submit." This comment process is not merely window-dressing. By law, agencies must review and respond to these comments in its final rule. More specifically, while an agency need not address every point in every submission, it must respond to significant comments in a reasoned manner to show that the major policy critiques were considered by the agency.

Second, opponents can seek judicial review of the agency's decision. Like all final agency action, a decision to revoke or modify an existing rule is subject to review under the Administrative Procedure Act's "arbitrary and capricious" standard. In the deregulatory context, the touchstone case is **Motor Vehicle Manufacturers Association vs. State Farm Insurance Co.**, in which petitioners challenged the Reagan administration's rescission of a Carter-era rule mandating that cars contain either automatic seatbelts or airbags.[9] The Supreme Court explained that both adopting a new rule and repealing an existing rule change the legal baseline, and therefore in both cases the agency must "examine the relevant data and articulate a satisfactory explanation for its action." [10] Furthermore, because repeal involves a reversal of the agency's previous views on the issue, this explanation should include a discussion of why the agency had changed its position.

In *State Farm*, the Department of Transportation justified the repeal by arguing that, contrary to the agency's original estimate that 60% of cars would have automatic seatbelts and 40% would have airbags, the agency now believed that over 99% of cars would choose the seatbelt option. And this was problematic because new studies showed that most Americans would deactivate the automatic seatbelts, meaning the regulation would not measurably improve automobile safety. The Supreme Court unanimously vacated this repeal because the agency failed to explain why it did not simply adopt an "airbags only" rule instead, which, from a safety perspective, would seem to be a logical response if automatic seatbelts were deemed ineffective. The Court explained that the agency could repeal the rule completely, but it had to explain why it chose that path rather than the other options that were on the table.

Learning from *State Farm*, the Trump administration is beginning the notice and comment process to repeal select Obama-era regulations. One of the first out the gate is the Federal Communications Commission's **notice of proposed rulemaking** to repeal the classification of broadband providers as common carriers. In a series of orders between 2002 and 2005, the Commission had classified broadband access as a lightly-regulated "information service" under the Communications Act. In 2015, to bolster its legal arguments in support of net neutrality, the agency reversed those orders and instead classified broadband access as "telecommunications service" subject to common carriage regulations. The Commission's 2015 decision was a 3-2 party-line vote. The two dissenting Republican commissioners now constitute a 2-1 majority, and have proposed to repeal the 2015 decision. Consistent with *State Farm*, the notice of proposed rulemaking stresses the unintended consequences of the 2015 order, including a decline in broadband investment and a weakening of privacy laws. It also stresses that repeal would restore the agency's original classification, and thus draws upon the agency's prior deliberations to justify its current decision. Unsurprisingly, many of the comments have challenged these factual assertions, and the final rule must address these comments if the Commission decides to proceed with the repeal.

Politics and the Administrative Law of Deregulation

Of course, adhering to *State Farm* is a bit of a fiction. Ultimately, in these cases the agency has not suffered a change of heart, but of personnel. The Trump administration's decision to repeal Obama-era regulations stems from a change to a political regime that favors less regulation. The same was true of the Reagan administration's deregulation efforts, which drove the agency's position in *State Farm*. In partial dissent in that case, then-Justice Rehnquist suggested that the Court should call a spade a spade and allow politically driven reversals. He would have held that "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."^[11] The majority did not directly respond to this point, although one might argue that if it worked reciprocally, such an explanation would eviscerate judicial review of agency action. A general regulatory or deregulatory mood may explain an agency's broad goals, but it says nothing about why any particular rule is justified on the facts relevant to its merits. The Court was right to require a policy, rather than political, explanation for an agency's action.

Lessons for the Trump Administration

By reversing policy statements with which it disagreed and passing Congressional Review Act resolutions against Obama's eleventh-hour initiatives, the Trump administration has identified the low-hanging fruit in its deregulatory project. The lesson of *State Farm* is that repealing other, longer-standing

policies will not be as easy. It will require agencies to undergo the same time-consuming process as they did to enact the rules that they seek now to undo—and to overcome similar opposition from those who support the status quo.

And this is where the Trump administration's focus on short-term gains may hurt its longer-term goals. As an initial volley against the administrative state, President Trump announced a government-wide hiring freeze.^[12] As Obama-era employees departed, this attrition has left agencies short of the personnel needed to do the blocking and tackling required under *State Farm*. His proposed agency budget cuts compound the problem, by denying agencies the resources they need to implement deregulation.^[13]

As he left office, President Harry S. Truman remarked of his successor, "He'll sit there and say, 'do this' and 'do that' and nothing will happen. Poor Ike—it won't be a bit like the Army." The Trump administration may soon learn a similar lesson the hard way. If the White House is serious about achieving lasting deregulatory change, it must do so methodically, on an agency-by-agency, regulation-by-regulation basis, and avoid securing minor budget victories at the expense of losing the agency resources necessary to effect that change.

[1] *G.G. ex rel Grimm v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), vacated and remanded, *Gloucester County School Bd. v. G.G. ex rel Grimm*, 137 S.Ct. 1239 (2017).

[2] *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016).

[3] *Gloucester County School Bd. v. G.G. ex rel Grimm*, 137 S.Ct. 369 (2017).

[4] See Massachusetts Session Laws 2016 c.134, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter134><https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter134>

[5] 5 U.S.C. § 801 *et seq.*

[6] 462 U.S. 919 (1983).

[7] Pub.L. 115-4 (Feb. 14, 2017) (SEC Disclosure Rule); Pub.L. 115-5 (Feb. 16, 2017) (Stream Protection Rule); Pub.L. 115-8 (Feb. 28, 2017) (SSA Rule implementing NICS Improvement Act of 2007); Pub.L. 115-11 (Mar. 27, 2017) (NASA rule on government contracts); Pub.L. 115-12 (Mar. 27, 2017) (DOI rule on land use plans); Pub.L. 115-13 (Mar. 27, 2017) (Education Department accountability rule); Pub.L. 115-4 (Mar. 27, 2017) (Education Department teacher preparation rule); Pub.L. 115-17 (Mar. 31, 2017) (DOL Drug Testing Rule); Pub.L. 115-20 (Apr. 3, 2017) (DOI Rule on Alaska Wildlife Refuges); Pub.L. 115-21 (Apr. 3, 2017) (DOL employee injury recordkeeping rule); Pub.L. 115-22 (Apr. 3, 2017) (FCC Data Privacy Rule); Pub.L. 115-23 (Apr. 13, 2017) (HHS Title X rule); Pub.L. 115-24 (Apr. 13, 2017) (DOL rule on municipal savings plans); Pub.L. 115-35 (May 17, 2017) (DOL rule on state savings plans).

[8] See 5 U.S.C. § 553.

[9] 463 U.S. 29 (1983).

[10] *Id.* at 30.

[11] *Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part).

[12] See Presidential Memorandum Regarding the Hiring Freeze, January 23, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-hiring-freeze>.

[13] See President Trump's Taxpayer First Budget, available at <https://www.whitehouse.gov/taxpayers-first>; see Gregory Kreig and Will Mullery, Trump's Budget By the Numbers: What Gets Cut and Why, CNN.com, May 23, 2017, available at <http://www.cnn.com/2017/05/23/politics/trump-budget-cuts-programs/index.html>.

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