

# Embracing Ossification

*With Donald Trump in the White House, pro-regulation forces are changing their view on regulatory procedure.*

✦ BY STUART SHAPIRO

In 1992, University of Texas law professor Thomas McGarity coined the phrase “the ossification of the rulemaking process” to describe the challenges agencies face in promulgating regulations. These challenges include procedural steps required by law and by executive order, and judicial review of regulations by the courts. Because of the increased difficulty of issuing regulations, McGarity claimed, agencies were turning to nonregulatory means of setting policy.

Supporters of government regulation now commonly say that requiring agencies to follow certain procedures when issuing new regulations is stifling government attempts to improve public welfare. Among the requirements they often criticize are the conducting of benefit–cost analysis of regulations, demonstrating the quality of the information used in rulemaking, and virtually any new regulatory reform statute that Congress considers.

As McGarity noted, the concerns about ossification extend to judicial review. Regulatory supporters bemoan the lack of deference in the courts to agency expertise. Finally, even the requirement that agencies solicit public comment before finalizing a regulation, which dates back to the 1946 Administrative Procedure Act, has been criticized as disproportionately helping business interests and not living up to its promise of encouraging broader participation in regulatory decisions.

Meanwhile, opponents of regulation frequently champion these requirements—particularly judicial review, benefit–cost analysis, and the Information Quality Act—as necessary to ensure that regulatory policy is rational and democratic. The continual efforts in Congress to reform the regulatory process, many of which would add new procedures, are generally sponsored by Republicans concerned about the growth of the regulatory state.

## NEW FANS, NEW OPPONENTS

These debates have been going on for decades. But in 2017, something dramatic happened: the Trump administration entered the

White House and made deregulation a stated priority. Arguably this administration has given the elimination of existing regulations a more significant place in its rhetoric than any previous administration. President Trump has continually emphasized his desire to cut regulations.

He has also dramatically exaggerated his administration’s accomplishments in this regard, claiming at one point to have eliminated 22 regulations for every new one the agencies have issued. (See “Deregulation through No Regulation?” Fall 2017.) One of the reasons this claim is an exaggeration is that it counts attempted deregulatory actions as actual deregulation. These actions include proposed repeals that have not yet been finalized, delays of regulations that may or may not be repealed, and announcements of intent to repeal regulations.

Most importantly, many of the attempts at deregulation have been found wanting by the courts. Why have the courts held up Trump’s deregulatory efforts? Because the administration has, by and large, carelessly managed the procedural requirements of the regulatory process.

This has led to a shifting political dynamic. Groups that customarily support regulation, including the Barack Obama administration’s regulatory efforts, have taken to the courts to stop the Trump administration’s attempts to deregulate. Their arguments before the courts have been myriad, but in many cases they have cited the failure of President Trump’s agencies to follow the strictures of the regulatory process.

The Trump administration has tried to delay the implementation of regulations for long periods of time without accepting notice and comment on the delays. Presumably the administration is hoping to repeal these regulations eventually. In numerous cases, however, often at the behest of environmental advocacy groups, courts have ruled that these delays violate the Administrative Procedure Act. In these decisions (e.g., *California v. Bureau of Land Management*, *Becerra v. Department of Interior*), courts have told agencies that in order to delay enforcement of a regulation, notice and comment are necessary.

As the Trump administration moves from delays to attempts at

actual repeal of Obama administration regulations, one can fully expect this litigation to continue. Because the Obama administration spent years building a legal record to support its regulations, attempts to repeal them will need to be similarly constructed and detailed. Repeals will have to meet the standard of not being arbitrary and capricious and the existence of a rulemaking record supporting the original regulation may make that a particularly high barrier to overcome. Initial efforts by Trump's subordinates cast doubt on whether they are capable of doing this.

While the short-circuiting of notice and comment by the Trump administration has been one target for pro-regulation interest groups, it is far from the only one. Allegations surfaced that the Trump Department of Labor had initially conducted a benefit-cost analysis of a proposed regulation designed to repeal an Obama rule that had outlawed the practice of "tip sharing"—employers requiring service-sector workers to pool their tips. The analysis was never made a part of the public record (presumably because it showed the politically unpalatable conclusion that employers would likely profit and workers would lose money) when the proposed rule was made public. Interest groups that

typically criticized benefit-cost analysis called for the release of the analysis or the withdrawal of the Trump proposal, while traditional supporters of benefit-cost analysis were conspicuously silent. In addition, pro-regulatory plaintiffs have cited benefit-cost analyses in support of lawsuits to stop regulatory delays. (See Earth Justice's brief in *Air Alliance Houston v. EPA*.)

The Northern District of California cited another regulatory procedure often criticized for hobbling regulation in a decision striking down a Trump attempt to deregulate. The Regulatory Flexibility Act (RFA) requires agencies to assess the effect of their regulations on small businesses. Trump's Department of the Interior ignored this requirement when attempting to reverse an Obama administration rule to reduce methane emissions from oil and natural gas production on federal lands. The court found that ignoring the RFA (along with other procedural requirements) was sufficient justification to enjoin the deregulatory effort.

The Information Quality Act (IQA) directs the Office of Management and Budget, as well as some other agencies, to issue guidelines for "maximizing the quality, objectivity, utility, and integrity" of data and other information used in rulemaking. When imple-

mented early in the George W. Bush administration, there were concerns that it would hobble agency rulemaking. It has turned out that the complaint process that is the primary enforcement mechanism of the act has been rarely used and easily deflected by agencies. Still, the group Democracy Forward made notable use of the IQA to dispute an analysis by the Trump Treasury Department of the tax bills being considered by Congress. Those who supported the IQA have not used it at all to challenge the myriad questionable assertions by the Trump administration in support of its deregulatory policies.

#### HISTORY OF CHANGING SIDES

This shifting dynamic over procedural controls of the bureaucracy has happened before. When Congress began to debate administrative reform in the 1930s, opponents of the New Deal pushed for strict judicial review of agency action in order to curb the flow of power to the executive branch. Not surprisingly, President Franklin D. Roosevelt opposed such efforts. Still, one bill passed in 1940, known as the Walter-Logan Bill, which focused particularly on restricting agency adjudicative processes, then the primary source of executive branch decisions. Roosevelt vetoed the bill and Congress failed to override the veto.

As President Harry Truman took office,



## REGULATORY REFORM

however, the politics of administrative procedures shifted. Supporters of the New Deal became concerned that the president would not win reelection. They also had growing confidence that the judiciary, now staffed largely with Roosevelt and Truman appointees, would uphold administrative actions. The result of these changing preferences for oversight over the executive branch was the Administrative Procedure Act, the statute that set the modern standards for judicial review of agency action and created notice-and-comment rulemaking.

Similarly, in 1984 the Supreme Court handed down *Chevron v. NRDC*, one of the most important decisions in the history of regulatory policy. The decision argued for greater deference to administrative agencies, particularly citing presidential control of agencies as a reason for such deference. The ruling was applauded by conservatives at the time because the president who then controlled the agencies in question was Ronald Reagan, and the sentiment was that the decision would allow for more flexible regulatory policies (the case itself involved an EPA regulation granting greater flexibility to industry). Now *Chevron* is regularly a target of conservative advocates who bemoan the deference given to administrative agencies.

In a recent paper, Brigham Young University law professor Aaron Nielson coined the term “sticky regulations.” He points out that just as it is hard to put regulations in place because of procedural requirements, it is also hard to remove them. Nielson focuses on the benefits of sticky regulations to agencies looking to make their work-products permanent and to regulated entities seeking certainty in the regulatory environment. The reactions to President Trump’s attempts to deregulate show that those who benefit from regulations and the interest groups that represent them also may prefer regulations that are sticky or a regulatory process that has at least some degree of ossification.

The empirical question of whether the regulatory process is ossified is an open one. Numerous scholars have cast doubt on McGarity’s original hypothesis. (See “What Regulatory ‘Ossification?’” Winter 2015–2016.) Regardless of whether the regulatory process has become crippled by the implementation of regulatory procedures and stringent review by the courts, it is clear that each procedure makes rulemaking harder or costlier for agencies. The Trump effort at deregulation has shown that the cost of deregulating has similarly increased. Procedures enhance the standing of the regulatory status quo.

This has scrambled attitudes toward judicial review and procedural control of rulemaking. It turns out that these attitudes depend not only on one’s sentiment regarding the existing stock of regulations (if we have too many, then rulemaking should be harder; if we have too few, then rulemaking should be easier). They also depend on the direction of regulatory preferences of

the current administration; see Table 1. Miles’ Law, “Where you stand depends on where you sit,” appears to apply to ossification.

As debates over regulatory reform continue, this shifting politics of procedural controls is important. Many of the bills being considered by Congress will add procedures to the regulatory (and deregulatory) process. Arguments about how such bills will make it harder to regulate should take a backseat to debates about whether the procedures being contemplated can stand on their own merits. Do requirements for participation increase the likelihood of useful information being brought before regulators and

TABLE 1:

## Should I Favor Ossification?

	President prefers deregulation	President prefers regulation
Interest group wants more regulation	Judicial review should be stringent and procedures are good: pro-ossification.	Judicial review should be deferential and procedures are burdensome: anti-ossification.
Interest group wants less regulation	Judicial review should be deferential and procedures are burdensome: anti-ossification.	Judicial review should be stringent and procedures are good: pro-ossification.

meaningfully give a sense of involvement to affected parties? Will requirements for analysis lead to demonstrably “better” regulations and increase the transparency of the regulatory process? For requirements such as formal rulemaking, how will they improve the decisions made by regulatory agencies?

These are all very much open questions. Whether such procedures ossify the regulatory process is also an open question. But the deregulatory efforts by the Trump administration have shown that procedures have similar effects on attempts to deregulate as well as on attempts to regulate. Advocates on all sides of regulatory debates should therefore hesitate before using ossification arguments. Making it harder for agencies to create new policies cuts both ways. R

## READINGS

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