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COMMENTARY

Only Congress Can Undo Its Regulatory Mess

Lawmakers seek credit for benefits while evading blame for burdens. Change will require them to act.

By David Schoenbrod

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Candidate Donald Trump vowed to spur economic growth by freeing businesses from burdensome regulation. President Trump has fallen short on this pledge, despite strong rhetoric and some excellent appointments. If he wants lasting reforms of the regulatory state, he'll have to work with Congress to make elected officials accountable again.

"We're cutting regulations massively," Mr. Trump said at the Jan. 30 signing ceremony for an executive order commanding agencies to repeal two regulations for every new one. Conservatives may see this as a move in the right direction, but it won't work: The agencies might have been able to comply before the late 1960s, when they had a freer hand, but not now.

In 1970 Congress passed the Clean Air Act. It was one of the first in a long series of statutes that give citizens the right to regulatory protection, command agencies to do what is necessary to protect those rights, and direct courts to enforce the commands.

This type of legislation allowed elected officials to claim credit for the benefits of regulations while shifting blame to agencies for the burdens. The system became so politically profitable that politicians from both parties showed practically limitless enthusiasm for giving citizens rights to protection. The Clean Air Act contained 940 detailed commands for the Environmental Protection Agency, some of which require it to issue dozens of separate regulations binding businesses.



ILLUSTRATION: DAVID KLEIN

With so many judicially enforceable commands requiring agencies to regulate, Mr. Trump's executive order can keep the feds from issuing new regulations only until courts require compliance with the statutes. The order will postpone new regulations—but at the price of exposing businesses to growth-killing uncertainty. Agencies have some wiggle room to reduce the burdens imposed under existing regulations, but doing so requires time-consuming work to demonstrate compliance with each statute's detailed

requirements. Even if the burden-reducing changes survive judicial review, the process takes years.

An even more daunting obstacle is the demand for regulatory protection, which gives rise to the laws themselves. At its start, the Reagan administration seemed unresponsive to Americans' demand for more environmental protection. Membership in green

organizations surged, the president's popularity took a hit, and in 1983 he was forced to give a free hand to a new EPA administrator with strong environmental credentials. If Mr. Trump wants to reduce regulatory burdens without suffering a similar fate, he needs to find smart ways to reconcile Americans' desire for regulatory protection with their distaste for its burdens.

Making the task even more difficult, the regulatory statutes are ridiculously obsolete. The major environmental laws took shape in the 1970s, and most have not been revised since the 1980s. They fail to take advantage of newer, better ways to produce more protection for the regulatory buck.

I co-wrote a 2009 study that took ideas from environmental experts of all political stripes to propose smarter statutes, "Breaking the Logjam: Environmental Reform for the New Congress and Administration." We showed that the country could get more protection with less cost by having the EPA deal with the most dangerous interstate air-quality problems through a national market-based approach.

In early 2009 I joined other leaders of the project to discuss these proposals with Democrats and Republicans in Congress. They told us they wished the proposals were already on the books because their colleagues would not shoulder the responsibility necessary for reform. Lawmakers didn't want to tamper with a status quo that is perfect for them and bad for constituents.

Americans can get regulatory statutes that give them more protection with less burden only if members of Congress bear personal responsibility for the consequences of the laws they enact. This can be achieved by requiring Congress to vote to approve or to disapprove all major regulations issued by federal agencies. This would create a powerful incentive to revise statutes so they are more balanced.

This idea isn't new. James Landis, a New Deal expert on regulation and later dean of Harvard Law School, proposed it nearly 80 years ago. Before he joined the Supreme Court, Stephen Breyer wrote a 1984 law review article about how it could work in practice.

Earlier in this Congress, House Republicans passed the Regulations from the Executive in Need of Scrutiny Act, or Reins Act. Republicans on the Judiciary Committee wrote in a statement that Congress would have to vote on agency actions "that cost the economy \$100 million or more."

They say nothing about actions that *reduce* regulatory protection. The Reins Act thus looks more like a poke in the eye to Democrats than a serious reform—guaranteeing it won't get the 60 Senate votes to overcome a filibuster. Again, lawmakers claim credit while shifting blame: Supporters of the Reins Act can assert they fought burdensome regulations while avoiding responsibility for votes on specific regulatory protections that many constituents want.

Members of Congress willing to shoulder responsibility should change the bill's title to the Responsibility for Regulation Act and make substantive changes so the bill is pro-responsibility rather than antiregulation. To start, the statute should apply to major regulations that reduce protection as well as to those that add costs.

As a candidate, Mr. Trump said he supported the Reins Act. As president, he told Congress he wants to reform regulation and work with Democrats. If he reaches across the aisle for an alternative to the Reins Act, he might be able to keep his promise.

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