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THE LIMITS OF EXECUTIVE ORDERS IN ENVIRONMENTAL DEREGULATION

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INTRODUCTION

President Donald Trump has placed a strong emphasis on overhauling the sprawling regulatory state. Both he and many of his administration's officials have declared that efforts to roll back regulation and reduce federal agency budgets will bring the bureaucratic machine in line with a vision of smaller government and unbridled economic growth. Accordingly, one of his first actions after taking office was to sign Executive Order 13771, or the "one in, two out" proposal for new regulations.

As new Environmental Protection Agency (EPA) Administrator Scott Pruitt put it:

> Regulations ought to make things regular. Regulations exist to give certainty to those that they regulate. Those that we regulate ought to know what we expect of them, so they can plan and allocate resources to comply. That's really the job of the regulator.[1]

Indeed, in terms of the new administration's efforts in this regard, few policy areas have seen more aggressive focus on deregulation than the Obama administration's Climate Action Plan. This composite suite of regulations, executive orders, private-sector partnerships, grant programs, research investments and other commitments across government was a sweeping effort to cut greenhouse emissions from all corners of the economy, increase the share of renewable energy and promote efficiency. However, its narrow pursuit of a low-carbon future was predicated on sometimes-questionable legal foundations and required large sums of resources, which made it hugely controversial.

In view of this, it is perhaps unsurprising that the Trump White House set the Climate Action Plan in its crosshairs. Today, the bulk of those programs have been largely blotted out. As one supporter of these efforts described it, "conservatives and libertarians have already achieved fiscal and regulatory victories that they were told would be impossible."[2]

However, such an approach has its limits. While this administration can certainly roll back and revoke programs and regulations, any action by this president remains vulnerable to the particular politics of future ones. As R Street has previously argued, "sole reliance on executive orders is unlikely to produce lasting deregulatory change."[3] This is especially true with respect to rewriting regulatory authority and approaches to greenhouse gas emissions. For this reason, Congress must do its job to hit the reset button.

THE WAR ON THE 'WAR ON COAL'

The coal-mining industry has shrunk dramatically over the last decade. Three major mining companies – Alpha Natural Resources, Arch Coal and Peabody Energy – have filed for bankruptcy. Employment has been reduced by more than a third to just over 50,000 people.[4] The impact on communities that depend upon mining has been devastating, particularly in Appalachia, which has suffered a disproportionate percentage of the sector's job losses. This has plunged many American communities into crisis, as collapsing incomes and dwindling tax revenues make it difficult for local governments to maintain basic services like public schools and sanitation.

To many coal advocates, the blame for the industry's decline falls squarely on government regulation. They argue that President Barack Obama's agenda favored renewable sources of energy, emphasized coal emissions reductions, attempted to decarbonize the electric-power sector and expanded EPA authority over rivers, streams and wetlands in ways that made it more difficult and expensive for coal mines to operate.

This gave rise to a political platform that pledged to eliminate regulations and bring back coal. Even before he announced

his run for the White House, President Trump tweeted: "Obama's war on coal is killing American jobs, making us more energy dependent on our enemies & creating a great business disadvantage."[5]

As president, this rhetoric shifted to action. In late March, while flanked by coal miners, President Trump signed an executive order "on Promoting Energy Independence and Economic Growth."[6] It called for a review of all agency regulations and policies that burden domestic energy production; eliminated the prior administration's policies to emphasize climate adaptation and mitigation strategies; rescinded the Climate Action Plan report; and called on the EPA administrator to review all regulations that limit greenhouse gas emissions from the electric power sector. "Our administration," Trump said, "is putting an end to the war on coal."[7]

As powerful as the deregulatory rhetoric is for the president's supporters, it is not powerful enough to create permanent change. This is because, notwithstanding such strong talk, the EPA is currently required by law and jurisprudence to limit greenhouse gas emissions from the electric-power sector, including coal. Quite simply, the White House cannot circumvent that obligation on its own.

THE EPA'S OBLIGATION TO ACT

Federal policy regarding air pollution is defined by the Clean Air Act (CAA), a piece of bedrock legislation that was last amended in 1990. It directs the EPA on how to set standards for air quality, industry best practices, even the installation of specific types of technologies in order to limit emissions that diminish air quality or harm the atmosphere. The legislation does not specifically address regulating emissions because of their impacts on climate change, but does direct the EPA administrator to regulate emissions that may "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."[8]

In the late 1990s, such broad and ambiguous language encouraged consumer and environmental advocates to petition the EPA to begin regulating greenhouse gas emissions on public health and welfare grounds.[9] In its 2006 decision, *Massachusetts v. EPA*, the Supreme Court sided with the petitioners and charged the EPA to issue regulations under the CAA if greenhouse gas emissions, "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[10]

This decision set the regulatory ball in motion and in 2009, the EPA issued its "endangerment finding," stating that "elevated concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger the public health and [...] welfare of current and future generations."[11] Later that year, the EPA initiated regulations for greenhouse gas emissions from motor vehicles, which triggered the regulation of similar emissions from other sources of pollution. Ultimately, the result was the highly controversial Clean Power Plan (CPP), which extended emissions limitations to power facilities that burn coal and natural gas.[12]

In practice, this means that presently, the EPA *must* regulate greenhouse gas emissions, but without any clear direction on how to do so. And further, hewed to the court's imprecise interpretation of regulatory authority, the president only has the narrow ability to define the nature and timing of such regulations. For this reason, Obama's climate legacy will prove particularly unremitting, as despite President Trump's regulatory rollbacks, much of its agenda can be easily revived by future administrations if Congress fails to intervene.

LIMITS OF EXECUTIVE AUTHORITY

During a 2014 White House education event at which he bemoaned slow progress with Congress, former President Obama called for a "Year of Action" saying: "I've got a pen to take executive actions where Congress won't, and I've got a telephone to rally folks around the country on this mission."[13] This was two years after the president's "We Can't Wait" initiative, another campaign aimed at mobilizing change through executive authority.[14] President Obama's pen-and-phone strategy worked fairly well while it lasted, yielding substantive changes to a host of domestic policies, including education, immigration, unemployment benefits, prescription drug policies, and energy and environmental policy.[15]

However, in 2017, the presidency changed hands. So far, President Trump has published 40 of his own executive orders, many of which simply reverse those policies issued by the Obama White House.[16]

In addition to specific executive orders targeting discrete Obama era policies, President Trump has also signed a series of high-profile orders that seek to overhaul the regulatory process of federal agencies more generally. For example, in addition to the "one in, two out" requirement, EO 13,771 institutes an additional form of regulatory budgeting for agencies,[17] while EO 13,781 calls for a comprehensive reorganization of the executive branch.[18]

Combined, these efforts have led the president's deregulatory agenda to be described as "the most aggressive campaign against government regulation in a generation."[19] But if history is any indication, significant questions remain as to the efficacy of these orders, particularly with respect to their durability once a new president is elected.[20]

> In addition to the example provided by the current administration, in the 1980s, President Ronald Reagan also embarked on a highly touted campaign of

deregulation. Like Trump, he relied on a landmark executive order as the centerpiece of his agenda. EO 12,291 established a framework for centralized review of agency regulations and required that agencies demonstrate that the benefits of any new ones outweighed their associated costs.[21] While scholars have credited EO 12,291 with making a material dent in the regulatory state, it proved only a temporary victory when Bill Clinton won the presidency and superseded it with his own executive order.[22]

This clearly demonstrates that reliance on executive actions alone is a precarious way to enact deregulatory change. Furthermore, even if President Trump's actions are successful in the short term, they are, at best, an incomplete effort, because they cannot address the root cause of excessive regulation: congressional overdelegation of its power to agencies.[23]

The fact that the office of the president has such wide authority to define and redefine approaches to any number of policies is a direct reflection of the accumulation of vaguely defined authorities bestowed to the executive by Congress. Indeed, legislation is often drafted to delegate to executive branch agencies the authority and responsibility to craft rules that carry the force of law.

Further, it is no accident that Congress has gradually abdicated its legislative powers to federal agencies, as such delegation allows congressmen to duck responsibility for contentious policy decisions. The inevitable result is an erosion of democratic accountability, as more and more lawmaking power shifts from democratically elected legislators to unelected, lifetime agency bureaucrats.

True deregulatory change is unlikely to become a reality without root-and-branch reform that seeks to amend the laws that give agencies like the EPA broad and poorly defined powers.[24] Luckily, there is a path out of the predictable oscillations in executive-branch approaches to policy, but it will require Congress to resume its constitutional role as the country's chief lawmaker.

DURABLE DEREGULATION

Unlike the EPA, Congress is unbound by precedent and has any number of options to clarify, alter or eliminate executive-branch regulatory authorities regarding greenhouse gas emissions.

A number of efforts have been attempted already. Indeed, in mid-2010, three resolutions that disapproved of the endangerment finding attracted a combined 206 co-sponsors.[25] Further, the Energy Tax Prevention Act of 2011 would have precluded the EPA administrator from taking any action on emissions for the purposes of addressing climate change and would have statutorily revoked the endangerment finding.[26] Similar legislation in 2011 would have restrained any EPA regulations that would adversely impact employment or delay the implementation of regulations.[27] These concerns were later reiterated in 2014 legislation introduced by Senate Majority Leader Mitch McConnell, R-Ky., that would require government certification that greenhouse gas regulation would not lead to job losses, deteriorated economic growth or higher electricity prices.[28] None of these proposals passed.

Nevertheless, such a flurry of legislative activity over the last several years suggests there is strong opposition to the EPA's approach to greenhouse gas emissions. While the Yale Program on Climate Change Communication found that 75 percent of Americans support the regulation of carbon dioxide as a pollutant, many Americans disagree with the means politicians have chosen to pursue that goal thus far.[29]

It is relevant to note that one of the first proposals to preempt EPA greenhouse gas regulatory authority was the American Clean Energy and Security Act, or the "Waxman-Markey" bill that would have introduced a cap-and-trade system into the U.S. economy. Though the underlying concept of a nationwide cap on carbon emissions has been roundly rejected in political circles, such compromise legislation – the trade of an alternative mechanism to reduce carbon emissions for the pre-emption of regulatory authority – would limit both the EPA's authority and greenhouse gas emissions. R Street has offered an alternative that would substitute a revenue-neutral carbon price for existing greenhouse gas regulatory authorities. Such a proposal has the added benefit of financing transformative tax reform with the potential to eliminate the corporate income tax—another top priority of this administration.[30]

CONCLUSION

The present analysis would be incomplete without a note on the limited ability of regulatory reform to produce significantly positive impacts for the American coal industry. While regulation has certainly limited opportunities for coal, other trends—particularly domestic ones in natural gas production—will obstruct any clear avenues for coal expansion in the future. Nevertheless, peeling back regulations and shrinking the EPA has certainly set a path for government consistent with the president's pledges.

Moreover, restoring economic opportunity, democratic accountability and good-governance principles is at the heart of recent efforts to revise the prior administration's approach to regulation. If, as Scott Pruitt suggested, it is indeed the job of the regulator "to bring certainty to those that they regulate," weeding out assiduous and vague authorities should be the top priority. Efforts to restrain the regulatory state without buy-in and direct action from Congress, however,

can lead to transient victories that are easily reversible by future presidents.

While the Clean Air Act is an inappropriate tool to address greenhouse gas emissions, the public remains interested in government policies to do so. Congress must move on legislation to rein in the executive while articulating clear and specific pathways to achieve the desired environmental outcomes. While such an alternative to the current system will be predictably difficult, given the harsh nature of politics around climate change, the onus remains on legislators to follow through with a durable vision for small government solutions.

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