

The administrative state on the chopping block

On Friday, February 24, President Trump issued an Executive Order to establish task forces in every regulatory agency dedicated to achieving his directives to cut the federal bureaucracy by 75%. The President is doing more than any prior occupant of his office to end the era of government by bureaucratic oligarchy. His action promises to do more to restore rule by the elected in place of rule by the unelected heads of the agencies than any President in the modern era, since before Franklin Delano Roosevelt.

The President's chief strategist, Steve Bannon, heralded the move as the first step toward "deconstruction of the administrative state," words spoken with the force of the President's conviction and the promise of returning America to the people. Since the 1930s, Congress has delegated progressively more legislative, executive and judicial powers to the unelected heads of what are now in excess of 250 regulatory agencies.

Today those agencies preside over a vast body of regulatory law that has never been approved by Congress. Indeed, federal regulation, adopted independent of Congress, represents over two thirds of all federal law. The heads of agencies have ruled like oligarchs, largely unaccountable to the courts, Congress and the American people. Congress has conveniently delegated away its and the Executive and Judicial Branches powers year after year, removing every thorny issue of law and policy from Congress (where accountability carries consequences at the ballot box) to the hands of the unelected who rule with little public awareness of their often sweeping actions.

Year after year industry sectors have been burdened with new

regulations, some to the point of driving out most market players and leaving behind a regulated monopoly. The result has been progressively less freedom, less market entry and activity, and more government power to determine winners and losers. The system has grown incredibly corrupt with regulatees essentially buying regulation by providing sure sources of post-government employment to the decision makers in the agencies.

New start ups and small firms along with consumers have suffered from the system. Repeatedly regulations that were designed to provide market protection or advantages for incumbent firms with political influence have been sold to the media and the public as designed to protect or further the public interest. The contrary reality has caused most Americans to distrust Congress and the agencies.

The President's new initiative differs from deregulatory regimes of the past, oftentimes lead by Vice Presidents in Republican administrations. This one is placing the power to arrive at significant deregulation in the hands of task forces at the agency level, task forces comprised of critics of government regulation. Those task forces will identify precise regulations to be put on the chopping block, so-called guidances that are in fact illegally adopted rules to be placed on the chopping block, and enforcement policies to be placed on the chopping block. For the first time, the promise of true deregulation is before us.

But deregulation is not enough, as is evidenced by Steve Bannon's statement that the significant deregulation contemplated is the first step toward "deconstruction of the administrative state." It is important for us to recall that the Constitution vests the powers to make laws in Congress, to execute laws in the President, and to judge laws in the Judiciary. In no instance does the Constitution authorize delegation of those essential powers to individuals outside of the constitutional framework of government. Indeed, although

condoned by the Supreme Court since the 1930's to usher in the alphabet soup agencies of the New Deal, those powers were intentionally placed in the constitutional branches so that the public would maintain an electoral check on the law making and enforcement powers wielded by our elected representatives.

The Administrative State has thus betrayed and circumvented the careful system of checks and balances created by the Constitution and has established virtually omnipotent fiefdoms that rule business in America, the agencies. Those agencies frequently violate law, interpret statutes to mean the opposite of what Congress intended, and expand the scope and control of government to such an extent that nothing done by business can be done independent of them.

With an ever watchful eye toward what a regulator may deem unacceptable, businesses operate in a constant state of fear, wondering whether contemplated expansion or innovation will bring down the wrath of regulators and whether competitors can achieve strategic advantages by currying favor with the oligarchs. Of all moves by the President to drain the swamp, this sweeping executive order may provide the most lasting and significant drainage, an effect that will help restore a Constitution that has been drowning in red tape for over eighty years.

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