

LECTURE

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The Administrative State and the Structure of the Constitution

The Honorable Neomi Rao

Abstract: *The Constitution has carefully provided a structure for administration of the laws, but the United States has moved away from that structure to a regulatory state that often operates with minimal congressional guidance, inconsistent presidential direction, and deferential judicial review. Returning to a more constitutional government requires that all three branches of government exercise their constitutional responsibilities. President Donald Trump has launched major regulatory reforms, some Members of Congress have introduced reform bills, and judges and justices have indicated the need for more probing judicial review. If each branch succeeds in its sphere in limiting the reach of regulation, it will promote individual liberty, restore more accountable government, and ultimately benefit the American people.*

As many of you are aware, President Donald Trump has really emphasized regulatory reform as a key component of his Administration, and I think that the President's election in many ways represents part of a broader reaction against the excesses of government and, in particular, regulatory interference. We can see it's part of a movement against government paternalism and meddling in the lives and property and decisions of individuals.

The previous Administration imposed an incredibly high level of unnecessary regulatory burdens on the American people. Rolling back these regulations is essential to restoring more individual freedom and to promoting economic growth, job creation, and innovation, so in my remarks today, I plan to highlight two main principles about administration.

First, we need a much smaller and more effective regulatory state.

Second, we need much more accountable and responsive

KEY POINTS

- America needs a much smaller and more effective regulatory state and a much more accountable and responsive administration.
- Far too many regulations are a solution in search of a problem rather than a response to an actual market failure.
- Administrative agencies that operate on their own inertia often create regulations that are overly burdensome and fail to deliver any real benefits.
- Excessive regulation impedes individual liberty for all Americans, makes it harder to get a job, and makes it harder to start and maintain a small business. It makes ordinary goods and services much more expensive and limits choice in the marketplace. Expansive social regulations can impede choices that are fundamental to religious exercise and freedom of conscience.
- Reducing these overall regulatory burdens is part of returning government to its proper and limited role and giving the American people greater control over their lives, their work, and their property.

This paper, in its entirety, can be found at <http://report.heritage.org/hl1288>

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administration. More accountable administration is essential to bringing the federal government closer to the constitutional structure and to restoring the checks and balances between Congress, the President, and the courts.

I think about this in big terms. Reaffirming more constitutional government, which I know is important to many of you, is really in some ways first and foremost today about tackling systematic regulatory reform. Those reforms include reducing the regulatory burden, carefully analyzing the authority that agencies are exercising, and making sure that the benefits are very substantial compared to their costs. We also want to make sure that we are promoting due process and fair notice by repealing and discouraging the use of guidance and other sub-regulatory actions.

The Realities of Administration

Let me start with some of the practical realities of administration and why we need less regulation as well as more effective regulation.

Most of the authority of the federal government is exercised through administrative agencies that create regulations, enforce those regulations, and also at times adjudicate cases under those regulations. To be sure, regulatory actions can sometimes implement important health, safety, and welfare priorities that have been set by Congress, but administrative agencies that operate on their own inertia often create regulations that are overly burdensome and fail to deliver any real benefits.

Today, we have on the books many regulations that are arguably inconsistent with law, regulations that have never worked or are no longer working, regulations that cause affirmative harm, and regulations that are duplicative or simply unnecessary. Far too many regulations are a solution in search of a problem rather than a response to an actual market failure, and what you see as excessive regulation often provides an advantage to large and well-connected businesses that can easily afford compliance costs, often at the expense of smaller or upstart companies.

The previous Administration, by the Office of Management and Budget's own probably quite conservative estimate, imposed as much as \$80 billion in annualized costs, which is hundreds of billions of dollars over the lives of those regulations. This level of involvement of government in the choices of individuals and businesses has slowed economic growth and stifled innovation.

Excessive regulation impedes individual liberty for all Americans. It makes it harder to get a job. It makes it harder to start and maintain a small business. It makes ordinary goods and services much more expensive. And it limits the choices that we have in the marketplace. We've also seen that very expansive social regulations can impede choices that are fundamental to religious exercise and to freedom of conscience. So reducing these overall regulatory burdens is part of returning government to its proper and limited role and giving the American people greater control over their lives, their work, and their property.

President Trump has set some very ambitious goals for shrinking the regulatory burden. In a series of executive orders, he's directed agencies to follow a policy that should result in the elimination of at least two regulations for every new one. He's also directed agencies to reduce the overall regulatory burden, and he's established regulatory reform officers and regulatory reform task forces in each of the agencies.

I'm here to tell you that, nine months in, the President's agenda is working. For fiscal year 2017, which just concluded, across the Administration, we have more than met the two-for-one requirement. We're still receiving and tabulating some of the results, but the Administration looks set to exceed this objective that the President set. Perhaps even more impressive, we've kept regulatory costs to below zero. We didn't just reduce the growth of new costs; we actually on net reduced more regulatory costs than we've imposed.

The pace and the scope of deregulation that's occurred are truly unprecedented, and we're just getting started. We've removed or postponed more than 860 planned regulations that were in the pipeline. Through the Congressional Review Act, the President and Congress have eliminated 14 major regulations, and the Administration has also been working to roll back a wide range of burdensome regulatory requirements in the form of guidance and other actions that are not formal regulations. These sub-regulatory actions are often pernicious because they can occur without any public notice or comment. For example, the Department of Education's guidance on Title IX and sexual harassment on campus imposed significant obligations on universities without going through notice and comment rulemaking. The Education Department has recently withdrawn that guidance, and Administration-wide,

we continue to make careful scrutiny of guidance a real priority.

Looking ahead to fiscal year 2018, the President has called on every agency to set a negative regulatory cost allocation, which means that each agency should reduce its overall regulatory burden in 2018, not just impose no new costs. We're in the process this month of working with the agencies on their fall regulatory agendas and regulatory plans, and we're pushing them to identify as many deregulatory actions as possible.

What we've seen in the past is that there's been a very steady upward trajectory of new regulatory burdens, and that upward trajectory has continued across both Democratic and Republican Administrations. We are focused on turning back this tide. We're not just slowing, as I've said, the pace of growth, but actually shrinking the overall government, putting us on a negative trajectory. And we're working hard to fundamentally change the culture at agencies so that they are thinking first and foremost about how to reduce costs, lift burdens, and reform outdated regulations rather than just piling on new costs and new burdens. Much less and more effective regulation is an important goal of this Administration, and it's animated by these broader principles of individual liberty and more accountable government. That brings me to my second main point, which is restoring the accountability of administration within the structure of the Constitution. My office, the Office of Information and Regulatory Affairs, is often considered the wonkiest of all government offices. My excellent staff and I do focus on the details of regulation and their costs and benefits, and that's certainly important, but from my perspective, I view this office as much more than just the green eyeshade. I consider the President's regulatory reform efforts as fundamentally about restoring accountability and promoting more constitutional government.

So in addition to some of the more specific and practical achievements I've already outlined, I want to discuss some of these foundational principles and the place of administration in the Constitution's structure. This involves thinking about the three separate and coordinate branches of the federal government and the role they play in creating, enforcing, and checking administrative authority. As an officer in the executive branch, I'll focus most on our efforts there, but I also want to discuss the important roles of Congress and the courts.

Article I: Congress

Let's begin where the Constitution begins: with Congress. Most talk of administration tends to focus on the executive branch—unitary executive theory or the problems of judicial review and deference to agencies—but it seems to me that the real root of administration is Congress. It's true that a significant amount of regulatory activity is discretionary, and this Administration is already working hard to review, reform, and, where appropriate, repeal such activity. But in many contexts, there are statutory requirements and statutory limits that executive agencies must follow, and the President's executive orders on regulatory reform appropriately extend only insofar as consistent with law. In the long run, Congress really has to play a central role in reducing the scope and reach of regulation.

It's an observation that's consistent with the Constitution, which at the outset in Article I, Section 1, vests all legislative power of the federal government in Congress. As part of its enumerated powers, Congress creates administrative agencies. Congress also establishes for each agency its leadership and structure, its particular forms of accountability, and its funding. But perhaps most important, Congress sets the statutory authority for agencies. Administrative agencies have no inherent regulatory or other powers. It's emphatically not the rule that agencies may do anything that is not prohibited by statute. Quite the contrary: Agencies can act only with express authorization from Congress. This point seems to me so obviously true, yet I think it bears restating and emphasizing in the current regulatory environment.

Over the years, particularly since the start of the 20th century, Congress has transferred ever more policymaking discretion to the agencies. With only the loosest guidance from Congress, agencies in many areas now have the ability to set far-reaching policy through regulations, enforce that policy, and then adjudicate that policy. This structure combines the three powers of the federal government and blurs the Constitution's careful separation of powers.

To restore more constitutional accountability, Congress could delegate less authority to the executive branch. As noted, Article I vests all legislative power of the United States in Congress. Another way of saying this is that only Congress can exercise the legislative power. And although we know that the Supreme Court does not vigorously enforce

its non-delegation doctrine, the Court—in every case to raise the issue—has reaffirmed the non-delegation principle as a cornerstone of republican government. I explain in a forthcoming law review article that non-delegation may be one of the most important structural features of maintaining a government of limited and enumerated powers: a government of, by, and for the people.

Now, I'm not naïve: I've lived in Washington a long time, so I recognize that limiting delegation is a tall order. Nonetheless, it seems to me essential for thorough regulatory reform and a restoration of more limited and accountable government. In a more practical way, Congress can also take more direct action toward regulatory reform and focus its legislation on deregulation.

It's often very difficult for Congress to enact complex regulatory schemes. That's why we have the problem of excessive delegation in the first place. Nonetheless, in some ways, the legislative process is actually well-suited to deregulation.

For agencies, deregulation is hard—something I've learned in the past three months. Even when an agency knows that a regulation is no longer working or is excessively burdensome, deregulation requires following a complex administrative process and then facing potentially years of uncertainty in the courts. By contrast, if a regulation isn't working, Congress can repeal it by statute. Congress can simply deregulate through legislation and override an agency's determination. Congress has a real opportunity not just through the Congressional Review Act, but in general through its legislative power, to clear out bad regulations and bolster the overall deregulatory efforts for this and future Administrations.

Article II: The President

That brings me to Article II and to the President, who can have in many ways the most immediate impact on administration. Article II vests all executive power in the President, which makes the President not only the commander in chief, but also the administrator in chief. The President has the authority to direct and to control the execution of the laws through administrative agencies. His obligation to “take Care that the Laws be faithfully executed” includes the power to ensure that his subordinates are in fact faithfully executing the law.

President Trump has taken leadership of administration in a very direct and effective way through

a series of executive orders and the appointment to the Cabinet of individuals who are committed to regulatory reform, and the importance of presidential direction of administration has been noted across the political spectrum: It's been noted by Justice Elena Kagan and Justice Antonin Scalia, by Professor Cass Sunstein (a predecessor of mine at OIRA), and also by conservative proponents of a strong unitary executive like Steven Calabresi and Gary Lawson.

It's in part because presidential control of administration serves some very important and vital goals: It's more energetic and decisive, and it's accountable and responsive to the people. Executive branch officials should report up through the chain of command ultimately to the President, and when administration reflects presidential priorities, it promotes important democratic principles. Elections should truly have consequences for administration; otherwise, we will have an unconstitutional fourth branch of government.

In my office, we play a key role in ensuring presidential direction of administration. Our authority includes formally reviewing significant rules, and agencies don't finalize these rules before OIRA has concluded its review. OIRA can play an important role in promoting an accountable and unitary executive. We coordinate within the Executive Office of the President, between the President's close advisors. We also coordinate a robust interagency review, which ensures that issues are fleshed out from different perspectives, hopefully eliminating duplicative or inconsistent regulations across the executive branch.

I like to think of OIRA's combining the green eyeshade with some of these broader principles, and we do this in a number of ways. We try to make sure at OIRA, first and foremost, that when agencies act, they act within the requirements of the law. When agencies have been conferred regulatory power, they should interpret and exercise that power within constitutional limits, including with respect for the non-delegation principle. It also means recognizing that agencies have no free-floating regulatory authority. In the past, sometimes regulations have been enacted with only the loosest connection to legal authority. By contrast, we expect agencies to identify the source of their regulatory power before they proceed.

Second, we view government with a fair amount of humility. We start by assuming that individuals

and businesses should be left as free as possible to make decisions. I'd like to point out that these ideas are not new to this Administration. In fact, they're reflected in President Clinton's Executive Order 12866, which has been in effect since 1993. That executive order, which sets out the centralized regulatory review process of OIRA, emphasizes that government should regulate only when necessary, such as when there has been a material market failure; it also suggests that regulations need to have a substantial net benefit for the American people before agencies can move forward and also that agencies should impose the least possible regulatory burden.

In this Administration, we're trying to reinvigorate some of these simple yet important ideas. For instance, we're focusing more on retrospective review. Everyone agrees that the government should carefully look at the actual costs and benefits of existing regulations, but in practice, it's been done only sporadically. President Trump's two-for-one executive order puts real muscle behind retrospective review. It's going to have to be an ongoing part of what agencies do. Moreover, regulatory reform officers and task forces in every agency are working on systematic efforts to evaluate and reduce regulatory burdens.

As I said, we're currently reviewing agency agenda submissions, and we're going to have more information about their actions in the coming months. Moreover, we're trying also to proceed with our deregulation efforts in a transparent and open manner: Agencies have actively for months been seeking public comments on deregulatory ideas and engaging with individuals and regulated entities about the costs and the benefits of regulation.

Another thing OIRA must do is ensure that when regulatory action is permitted under the law, the agency is still only proceeding when necessary and when the benefits truly outweigh the costs. One might ask: Why would the executive branch interpret laws to burden rather than benefit the people? Insofar as consistent with law, agencies should implement only regulations with substantial net benefits. We need to ensure that those benefits are being calculated based on accurate information and reasonable assumptions. The last Administration was able to justify many of its costliest regulations

by using so-called benefits calculations that relied on some very tenuous assumptions.

Similarly, deregulatory actions also have to meet our rigorous cost-benefit standards. We want to assure that deregulatory actions are responsible and are not dismantling regulations that may be working and serving important public purposes.

Finally, OIRA is working with other parts of the White House, particularly the White House Counsel's Office, to ensure that agency actions have respect for both due process and fair notice. In practice, this means carefully reviewing guidance documents to make sure that they are truly guidance-interpreting regulations rather than back-door attempts to impose new regulatory burdens. The last Administration frequently used guidance in this manner to impose such obligations on the public, but we're cracking down on these practices.

We want to make sure that when the federal government exercises its power to regulate, it does so in a way that provides notice to regulated parties and the public. So we are putting principles of presidential accountability and direction into practice, in particular through a systematic and institutional push for reducing regulatory burdens and promoting more effective regulation.

Article III: Judicial Review of Administrative Action

That brings me to Article III. I just want to say a few words about the judicial review of administrative action. I was a law professor previously, and I know there's a robust scholarly industry thinking through and measuring judicial deference, revisiting *Chevron*,¹ talking about legislation that purports to overturn deference regimes. I'd like to take note of a few key principles in this area.

First, the practice of judicial review of agency action is diverse and not easily captured by formulas of deference. Often, there's not a single target of Chevron deference because courts interpret and apply these doctrines in very different ways.

Second, the practice of deference cannot be separated from the current acceptance of very expansive delegations to agencies.

Third, the Administrative Procedure Act already requires that courts decide all questions of law. As

1. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Justice Scalia often noted, a thorough and careful interpretation of the statutory text can often lead the Supreme Court to a clear answer rather than ambiguity.

Fourth, irrespective of doctrines of judicial deference, the courts continue to have a duty to say what the law is: It's part of the judicial power, and it's part of their obligation to decide cases and controversies.

If you think about these basic principles, it should lead to a more robust review of regulatory action in the courts. In particular, courts should consider whether an agency has any statutory authority for its actions. It means looking at the scope and reach of delegated authority. Courts should also carefully review whether agencies have followed statutory procedures, and they should push back against sub-regulatory actions that impose new obligations without notice and comment rulemaking. I think courts can provide more meaningful checks on agency action and authority, enforcing both statutory and constitutional due process. And we've seen over the past few years that the Supreme Court, particularly Justices Thomas, Alito, and Gorsuch, is engaged in a reconsideration of the non-delegation doctrine and the judicial deference doctrines.

Conclusion

That brings me to my conclusion. The Constitution has carefully provided a structure for administration of the laws. But today, as I've noted, we've moved much farther away from that structure to a regulatory state that often operates with minimal congressional guidance, inconsistent presidential direction, and deferential judicial review. Returning to a more constitutional government requires all three branches to exercise their constitutional responsibilities.

President Trump has launched major regulatory reforms; some Members of Congress have introduced reform bills; judges and justices have indicated the need for more probing judicial review. Let's hope that each branch succeeds in its sphere, because limiting the reach of regulation will promote individual liberty, restore more accountable government, and ultimately benefit the American people. More needs to be done, but changes are happening, and I remain optimistic about the possibilities for lasting regulatory reform.

—The Honorable Neomi Rao is Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President.