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COVID-19 Reveals the Need for a Regulatory Reset

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The COVID-19 pandemic has highlighted the many deep inadequacies of the regulatory system of the government of the United States. Nearly every day brings news about red tape being rolled back because it has hampered efforts to test for COVID-19,[1] to treat patients in need of medical care,[2] or to send checks or make loans to everyday Americans who are losing their livelihoods.[3]

For now, the United States remains in the midst of an emergency, which has to be the priority. When the pandemic has receded, however, policymakers should prioritize reviewing these regulations to determine what went wrong. This evaluation will require setting up a systematic process for reviewing existing requirements and identifying those in need of modification. Although this kind of institutionalized review process has eluded past reformers, it can potentially be achieved with two relatively simple reforms.

First, new regulations should be drafted with sunset provisions built into them, so that requirements that outlive their usefulness can be allowed to expire down the road. Regulations should remain in force past their sunset dates only after passing the same level of scrutiny as a new regulation. Second, existing regulations should be repealed and replaced so that they have expiration dates attached to them as well. A simple executive order could initiate both reforms, and evidence from the states suggests these kinds of reform could be successful.

RECENT REGULATORY FAILURES

In recent weeks, governors around the country have been waiving many medical regulations, especially occupational licensing regulations for medical professionals and certificate-of-need regulations that restrict the supply of medical equipment.[4] Many states are now accepting out-of-state

licenses for physicians or nurse practitioners, setting up reciprocity agreements whereby one state will accept another state's licenses, or temporarily relaxing certificate-of-need requirements.[5] Even in ordinary times, there are many who are skeptical of these regulations owing to the way they insulate certain workers or industries from competition,[6] they make it harder for ordinary Americans to earn a decent living,[7] and they have a mixed record on how well they improve the quality of medical services.[8] During an emergency, however, virtually everyone agrees these regulations have counterproductive effects.

Regulations are also being rolled back at the federal level to enable more COVID-19 testing and to enable more labs to conduct such testing. The FDA declared a public health emergency on January 31, 2020.[9] While it often takes years to get a new diagnostic test approved by the FDA, now tests can be approved for "emergency use authorization" in a matter of weeks or even days. Furthermore, labs that want to conduct high-complexity testing usually have to be approved under the Clinical Laboratory Improvement Amendments, but the FDA has essentially removed itself from this process by turning over lab oversight to the states.[10]

HISTORY OF RETROSPECTIVE REVIEW

What the examples above highlight—and there are many more examples of harmful regulations rolled back that are beyond the scope of this policy brief[11]—is the urgent need for a process for reviewing existing regulations to ensure they are not counterproductive. In an emergency, some regulations can be rolled back as they create stumbling blocks. Ideally, such regulations would be identified in advance and either modified or eliminated so that the country is better prepared when an emergency arises.

There is no institutionalized process by which all existing federal regulations get reviewed. The closest thing to it is perhaps a provision of the 1980 Regulatory Flexibility Act, which requires periodic retrospective review of regulations that impact small businesses.[12] However, this provision is generally thought to lack teeth, in part because agencies aren't penalized when they ignore the requirement.[13]

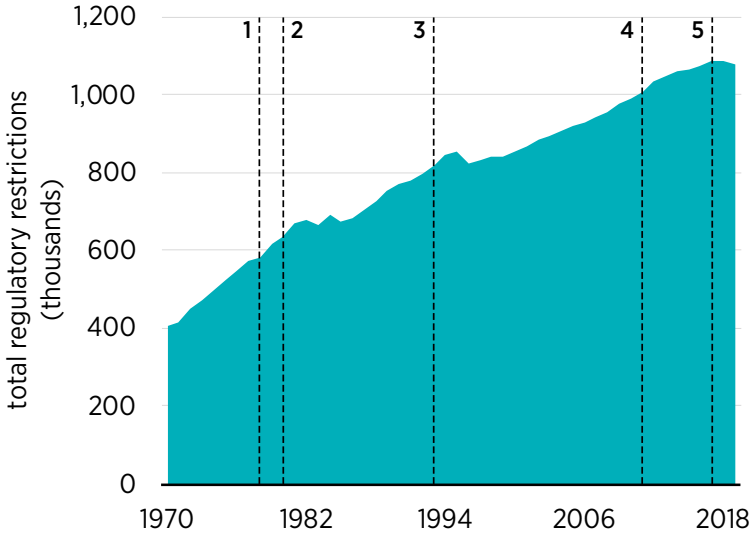
In the past, "spring cleaning" of existing regulations has usually taken place on a one-off basis at the direction of the president. For example, Jimmy Carter issued an executive order directing agencies to "periodically review their existing regulations to determine whether they are achieving" goals.[14] Barack Obama issued a similar executive order, encouraging agencies to identify and analyze "rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."[15] Bill Clinton created the National Performance Review (later named the National Partnership for Reinventing Government) to create a government that "works better, costs less, and gets results that Americans care about."[16]

All of these efforts were noble attempts to root out regulations that are not achieving their goals; however, their ad hoc nature limited their effectiveness because they failed to institutionalize a culture of retrospective review at federal agencies. The overall amount of federal regulations has continued to grow at a steady clip in spite of such efforts (see figure 1). Often this growth is because efforts to undo old regulations are counteracted by new regulations added during the review period.[17]

President Trump's one-in, two-out executive order,[18] which requires the elimination of two old regulations for each new one added, is more promising. That policy has certainly created a shift in regulatory priorities away from adding new regulations and toward removing old ones, but in order for that culture shift to be maintained, or even strengthened, the order will have to remain in place (perhaps modified to be a one-in, one-out requirement eventually). However, a future president may well revoke the order. Moreover, most observers note that Trump's deregulatory efforts have done more to slow the pace of new regulatory activity than to reduce the existing stock of regulations that have accumulated since the New Deal era.[19]

These retrospective review efforts have thus far failed to institutionalize a culture of retrospective review at federal agencies, which explains why subsequent presidents keep needing to create new initiatives for the same purpose.

Figure 1. Regulatory Accumulation in Spite of Attempts to Implement Retrospective Review



Note: Vertical lines reference the following events:
1. **1978:** Jimmy Carter signs Executive Order 12044, "Improving Government Regulations."
2. **1980:** Regulatory Flexibility Act passes.
3. **1993:** Bill Clinton creates the National Performance Review.
4. **2011:** Barack Obama signs Executive Order 13563, "Improving Regulation and Regulatory Review."
5. **2017:** Donald Trump signs Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs."

Source: RegData US (dataset), Quantgov, Mercatus Center at George Mason University, accessed April 15, 2020, https://quantgov.org.

A PROCESS FOR REVIEWING EXISTING REGULATIONS

The United States needs a systematic process for reviewing its stock of existing regulations. Indeed, every regulation should be scrutinized at some point in its lifespan, preferably more than once. The simplest way to ensure this happens is to take advantage of those same safeguards that have been built into the regulatory process for new regulations and to apply them to existing regulations.

The modern regulatory system in American is built upon two pillars: the Administrative Procedure Act (APA) and third-party review of regulations by the Office of Information and Regulatory Affairs (OIRA).[20] The latter pillar includes cost-benefit analysis (CBA) requirements for the largest economically significant regulations.

The APA creates a process whereby the public can participate in rulemaking and can challenge regulations in court if citizens feel they are unduly harmed by them. The OIRA review and CBA process is meant to ensure that regulations are backed up by a minimum amount of scientific, economic, and other technical evidence.

As of now, only new regulations are put through these procedures, but existing regulations should periodically go through them as well. For example, most CBAs produced by federal agencies will almost inevitably be inaccurate because they are forward-looking, making a projection about what might happen in the future. Backward-looking retrospective analysis will tend to be more accurate but is rarely undertaken.

The easiest way to change this state of affairs is to force regulations back through the rulemaking process anew, which can be done by incorporating sunset provisions into the regulations. Sunset provisions are automatic expiration dates attached to laws. So, for example, if a 10-year sunset were attached to a regulation, the regulation would automatically expire after 10 years. If the regulating agency felt it was worth it to keep the regulation, the agency would have to repromulgate the rule as if it were a new regulation, where it would be subject to the APA notice-and-comment process, CBA requirements, and third-party quality control review by OIRA. Even though the CBA for regulations might still be forward-looking in scope, it could be required to include a backward-looking component, i.e., a retrospective analysis, for those regulations that are being drafted to replace a sunsetting rule. Furthermore, one way to project how a rule is likely to work in the future is to see how it has performed in the recent past, so retrospective analysis can inform forward-looking CBA, as well.

This approach has several advantages. First, adding an entirely new set of retrospective analysis procedures on top of existing procedures may complicate the regulatory process beyond what is optimal. Government, just like private businesses, can get tied up in red tape.[21] A sunset process would take advantage of existing procedures without adding to them significantly.[22] Second, periodically reviewing regulations as a result of sunset provisions means regulations are more likely

to stay up to date. A final advantage is that sunset provisions already exist in many states, so there is evidence they can work and need not be disruptive.

New Jersey, for example, has a sunset review process for regulations whereby seven years after rules are adopted they expire automatically unless re-adopted by the regulating agency.[23] Roughly 35 percent of regulations filed each year are re-adoptions, the vast majority of which are amended in some way from their original versions,[24] meaning they are likely being updated. This is precisely one of the goals of sunset provisions—to ensure regulations stay up to date with changing circumstances. Contrast this with the *Code of Federal Regulations*, where one study found that 68 percent of federal regulations have never been updated.[25]

Idaho presents another potential model. Idaho governor Brad Little signed an executive order in January 2020 requiring that state agencies review their rules on a five-year staggered basis.[26] The order directs agencies to issue rules formally repealing existing rule chapters—in essence a form of sunset—and if the agency wants to keep a chapter, it must refile it as a new rule, thereby subjecting it to the public commenting process as well as to new economic analysis requirements.

As the Idaho example demonstrates, a sunset process can be created through an executive order, without additional action from the legislature.[27] Florida is another state that recently mandated sunset provisions be built into regulations through an executive action.[28]

How long the sunset period should be is an important factor to consider. Arizona has a five-year review process for rules,[29] although there is no sunset attached to the review in Arizona. Furthermore, in Arizona agencies seem to review their rules more or less at the same time, while in Idaho different agencies review their rules in different years, depending on a schedule determined by the state budget office. New Jersey actually increased its review period from five to seven years,[30] suggesting five years may be too short of a time horizon. North Carolina requires that rules be reviewed every ten years. Rules that aren't reviewed or that are deemed unnecessary expire according to a schedule set by a state Rules Review Commission,[31] an executive branch agency that reviews and approves regulations adopted by state agencies.[32] Regulations deemed necessary as part of this review process are re-adopted as if they are new rules.

Requiring that sunset provisions are built into new regulations is relatively easy and could be mandated through a simple executive action. However, building sunset provisions into the existing stock of regulations that are already in place would be somewhat more difficult, because these rules would need to be amended to include expiration dates. Three reforms could enable sunset provisions to be attached to existing regulations:

1. The entire regulatory code could be allowed to expire, with agencies forced to refile any rules they want to keep before the expiration happens. New regulations could then be required to have sunsets built into them. This sounds dramatic, but two states—Idaho and

Rhode Island—have experimented with this kind of "regulatory reset" in recent years.[33] Rhode Island passed legislation in 2016 that set an expiration date for its administrative code at the end of 2018.[34] Meanwhile, Idaho's code requires annual reauthorization from the state legislature, and in 2019 the legislature opted not to reauthorize the code.[35]

2. This first reform would almost certainly require action from Congress. Alternatively, an executive order could be issued, like the one issued in Idaho in early 2020,[36] which directs agencies to formally repeal all of their regulations and refile them as new regulations with sunset provisions. This strategy would not require action from Congress, and regulations could be refiled on a staggered basis so as not to overwhelm the system.
3. A third option would be to create a commission to comb through all the existing rules. As already mentioned, North Carolina has a regulatory commission that oversees the regulatory review process in the state. In recent years New Jersey and Illinois have created regulatory commissions to review their respective codes.[37] The Base Realignment and Closure Commission, which was created to close Cold War–era military bases, has also been proposed as a potential model for "closing" obsolete regulations.[38] A review body could make recommendations as to which regulations should be revoked or which should have sunsets built into them. If such a commission were made permanent, the federal government could have a perpetual rule-review body in place.

CONCLUSION

The governmental response to the COVID-19 crisis has been hampered by regulatory red tape at nearly every turn. It is almost certain that the US government would have been better prepared for the current pandemic if periodic reviews of regulations had been a more routine part of governance in the past. Unfortunately, such reviews have been mostly ad hoc at the federal level. Where safeguards have been built into the rulemaking process, it is primarily to ensure effectiveness of new regulations, not existing ones.

Policymakers can leverage these safeguards by extending them to existing rules with the use of sunset provisions. Such provisions are an ordinary course of business in many states, and they could easily be required at the federal level through an executive action or an act of Congress. Building sunsets into the stock of existing regulations will be more challenging but could be done by repealing existing rules and replacing them over a reasonable period of time.

The American people deserve a regulatory system that works for them. Unfortunately, the system we have has failed us just when we needed it most. Fortunately, there is a pragmatic path forward.

ABOUT THE AUTHOR

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NOTES

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4. Isabelle Morales, "List: 274 Regulations Waived to Help Fight COVID-19," *Americans for Tax Reform*, April 3, 2020.
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7. Dick Carpenter et al., *License to Work: A National Study of Burdens from Occupational Licensing*, 2nd ed. (Arlington, VA: Institute for Justice, 2017).
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10. Stapp, "Timeline: The Regulations—and Regulators—That Delayed Coronavirus Testing."
11. See Morales, "List: 274 Regulations Waived to Help Fight COVID-19."
12. 5 U.S.C. § 610.
13. Keith Belton and John Graham, *Trump's Deregulatory Record: An Assessment at the Two-Year Mark* (Washington, DC: American Council for Capital Formation, 2019).
14. Exec. Order No. 12044, 3 C.F.R. § 152 (1978).
15. Exec. Order No. 13563, 76 Fed. Reg. 3821–23 (January 21, 2011).
16. Patrick McLaughlin and Stephen Strosko, "What Can the 1990s Tell Us about Good Regulatory Policy in the 21st Century?," *The Bridge*, September 4, 2018.

17. As an example, the Reinventing Government Initiative under Bill Clinton claimed to have eliminated about 16,000 pages from the *Code of Federal Regulations* (CFR). Yet, from 1995 to 1997, the CFR declined only by about 7,000 pages, suggesting new regulations may have offset some of the declines. McLaughlin and Strosko ,"What Can the 1990s Tell Us about Good Regulatory Policy in the 21st Century?"

18. Exec. Order No. 13771, 82 Fed. Reg. 9339 (January 30, 2017).

19. James Broughel and Laura Jones, "Effective Regulatory Reform: What the United States Can Learn from British Columbia" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, 2018).

20. John D. Graham and James Broughel, "Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act," *Harvard Journal of Law & Public Policy: Federalist Edition* 1, no. 1 (2014): 30–54.

21. James Broughel, "Virginia Finally Seems to Be Attacking Its Regulatory Overload," *Washington Post*, February 7, 2020.

22. It could end up meaning agencies need more resources or personnel, however. For example, they may need more economists to analyze rules.

23. New Jersey Rev. Stat. § 52.14B.5.1

24. James Broughel, "Cutting Red Tape in the Garden State: New Jersey's Regulatory Reform Program under Governor Chris Christie" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, 2018).

25. William D. Eggers and Mike Turley, "The Future of Regulation: Principles for Regulating Emerging Technologies," *Deloitte Insights*, June 19, 2018.

26. Idaho Exec. Order No. 2020–01 (2020).

27. Although sunsets can be implemented through executive action, it would likely be a more enduring reform if they were mandated by Congress.

28. Governor Ron DeSantis sent a letter to agency heads directing them to, among other things, build sunset provisions into new rulemaking actions. See Letter from Governor Ron DeSantis to Governor's Agency Heads, November 11, 2019.

29. Ariz. Rev. Stat. § 41-1056.

30. Broughel, "Cutting Red Tape in the Garden State."

31. North Carolina Gen. Stat. § 150B-21.3A.

32. North Carolina Office of Administrative Hearings, "Rules Review Commission," https://www.oah.nc.gov/rules-division/rules-review-commission.

33. James Broughel, "Prompting a Regulatory Reset in Arizona" (Testimony before the Arizona State Senate Committee on Government, Mercatus Center at George Mason University, February 10, 2020).

34. S. 3015 Gen. Assemb., Jan. Sess. (R.I. 2016).

35. James Broughel, "Idaho Repeals its Regulatory Code," *The Bridge*, May 9, 2019.

36. Idaho Exec. Order No. 2020-01 (2020).

37. See Illinois Exec. Order No. 2016-13 (2016), New Jersey Exec. Order No. 3 (2010), and New Jersey Exec. Order No. 41 (2010).

38. Joshua Hall and Michael Williams, "A Process for Cleaning Up Federal Regulations: Insights from BRAC and the Dutch Administrative Burden Reduction Programme" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, 2012); Patrick McLaughlin and Tyler Richards, "Regulatory Review Commission + Regulatory Budget = A Diet for Better, More Effective Regulations" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, 2019); Patrick A. McLaughlin, Matthew D. Mitchell, and Adam Thierer, "A Fresh Start: How to Address Regulations Suspended during the Coronavirus Crisis" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, 2020).