The Invisible Assault on Our Protections
Presentation by Dr. Tom McGarity for the conference, “Restoring Public Control of Public Goods,”
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I. Introduction.

While Donald Trump’s almost daily outrages dominate the media, his appointees have quietly been engaged in an assault on the regulations that the federal government has over the years has put into place to protect health, safety, the environment from the private sector abuses.

The short-term agenda for the Trump Administration and the Republican-controlled conference is to pull back all of the regulatory protections promulgated during the Obama Administration.

The long-term goal is to roll back the protections that the federal government has put in place since the Progressive Era.

II. The Five Assaults on Our Protections.

Introduction.

The Trump Administration’s assault on our protection is the latest in a series of assaults that I chronicle in Freedom to Harm.

First Assault.

The First Assault occurred during the Reagan Administration. It got a great deal of attention, because the House was controlled by the Democrats. And they jealously protected the agencies.

It foundered on Ann Gorsuch’s overreach, Rita Lavelle’s incompetence and James Watt’s big mouth.

Second Assault.

The Second Assault came with the Gingrich Congress in 1995.

It was also quite visible, because Gingrich wanted it to be visible.

Congress was fulfilling the Contract with America.
Congress considered major revisions of bedrock statutes like the CAA and CWA, but they went nowhere.

But it nearly passed the Dole Bill, which would have made it very difficult for agencies to regulate. It lacked one vote of the 60 necessary to prevent a filibuster.

Third Assault.

The Third Assault came with the George W. Bush Administration.

It was less visible than the first two, because it was overshadowed by September 11 attacks.

It accomplished some rollbacks, but it foundered in the courts.

Fourth Assault.

The Fourth Assault took place after the Tea Party took over the House following the 2010 elections.

It was not especially visible, and it accomplished nothing of significance after Obama won the 2012 election.

Fifth Assault.

We are now in the midst of the Fifth Assault. And it is getting very little attention.

President Trump’s appointees hark back to the Reagan Era when the president appointed people who were ideologically committed to minimizing governmental regulation of the private sector.

Both Houses of Congress are controlled by Republicans who are far more radical than the Republicans during the Reagan or George W. Bush eras, when moderate Republicans from the Northeast put the brakes on radical legislation.

The first nine months of the Trump Administration have witnessed many notable victories for the radical anti-government crowd.

III. Congressional Review Act.
Introduction.

One of the few deregulatory successes of the Gingrich Congress was the Congressional Review Act.

The CRA states that before a “rule” can take effect, the agency promulgating it must submit to both Houses of Congress a “report” containing a copy of the rule, a description of the rule (including whether it is a major rule) and the rule’s proposed effective date.

Congress has 60 “session days” to pass a joint resolution of disapproval, which provides that the rule “shall have no force or effect.”

If Congress permanently adjourns prior to the 60 days, the next Congress gets another 75 session days.

The joint resolution in the Senate is not subject to a filibuster. A maximum of 10 hours of floor time may be devoted to the Joint Resolution.

If Congress passes and the President signs a joint resolution of disapproval, the rule is without any force or effect.

Moreover, the agency may not promulgate a rule that is “substantially the same” as the disapproved rule without express “specifically authorized by a law enacted after the date of the Joint Resolution.”

Prior to this year, only one regulation had been subject to a joint resolution of disapproval -- OSHA’s ergonomics rule in 2001.

Action During the 115th Congress.

Congress passed 14 joint resolutions during the first five months of the Trump Administration overturning federal regulations promulgated during the final days of the Obama Administration that were designed to protect consumers, investors, workers, mothers, students, the environment, and potential victims of gun violence.

(1) Fair Play and Safe Workplaces Rule providing that forced federal contractors to disclose violations of several labor statutes so that they could be considered by the contracting agency in determining the contractors eligibility to receive future contracts.

(2) DoI’s stream protection rule to stop mountaintop removal operations from covering up streams in valleys
(3) Alaska Wildlife Refuge Rule that prevented hunters from using helicopters to kill wolves in AWR.

(4) SEC’s oil anti-corruption rule under the Dodd-Frank Act that requires companies in extractive industries to file an annual report disclosing the amount of money they paid to foreign governments for access to their resources.

(5) Social Security Administration’s rule committing the agency to submit records to the gun background check system for social security recipients prohibited from possessing guns due to severe mental illness.

(6) OSHA Recordkeeping Rule.

(7) FCC Privacy Rule

IV. Regulatory Pullbacks.

Introduction.

Whenever an election puts a president of a different party in the oval office, the new administration attempts to stop “midnight” regulations from going into effect. In the past, most of the stayed rules wind up going into effect.

The Trump Administration, however, has been far more aggressive in its quite attempts to undo the previous administration’s regulatory accomplishments than any of its predecessors.

I have thus far tentatively identified over 80 major regulatory actions that the Trump Administration has prevented from going into effect as it considers whether to repeal or replace them.

Extending Effective Dates.

It has moved the effective dates of dozens of finalized rules, sometimes multiple times.

A few of these rules were promulgated years ago, but provided a 2017 effective date to give regulatees time to comply. The agencies are giving the more time while they decide whether to amend or repeal the rules.

The Administrative Procedure Act requires the agency to engage in notice-and-comment rulemaking to accomplish this, but the agencies have rarely done that.
EPA learned this the hard way in a case brought by environmental groups against its stay of the oil and gas GHG methane NSPS.

A federal district court found this to be unlawful because an extension of an effective date requires notice and comment.

To the chagrin of the Oil and Gas industry, the rule is now in effect as EPA scrambles to amend it.

But the amendments will have to survive judicial review.

In the case challenging EPA’s ELGs for power plants, EPA issued a stay at the outset of the Trump Administration.

When environmental groups challenged the stay in a district court, the agency quickly promulgated a rule extending the effective date for 2 years with notice and 30 days comment.

It then moved to dismiss the lawsuit as moot.

Seeking Judicial Stays.

The Trump Administration has on many occasions requested courts to stay and sometimes voluntarily remand regulations that the Obama Administration published (sometimes years ago) but are still being challenged.

A prominent example is the Clean Power Plan.

But EPA has asked for judicial stays in challenges to many other regulations, including the ozone NAAQS and EPA’s coal ash regulations.

The courts have in virtually every instance granted the requests.

V. The Pullbacks.

We are just beginning to get the first glimpses of what the Trump Administration proposes to substitute for the regulations it is pulling back.

Stay tuned.