The Pen and the Phone, and the Regulatory Pendulum Problem

by

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Introduction

Let me first thank Randy May and the Free State Foundation for having me here today, and thank all of you for being here. The subjects of my remarks today certainly have been informed in part by my government service and other roles that Randy mentioned, but of course I am speaking solely for myself.

As you know, my topic today is "the pen and the phone, and the regulatory pendulum problem." Some may be asking "what are those"? So let me start by explaining what they are, because perhaps for some people they will have a 'back to the future' quality, with my using terminology from ten years ago. The "pen and the phone" is a phrase coined by President Obama at a time when he had been unsuccessful in obtaining legislation on a number of subjects, and he announced in 2014 that if Congress wasn't agreeable to giving him what he wanted, he would find ways to do it through executive action – with the pen being the metaphor for executive orders and other presidential directives, and the phone meaning his ability to call the people in the federal government who worked for him doing regulations and similar things such as guidance documents. So "the pen and the phone" is loosely a reference to executive orders and regulations; and that is how I'm going to use the term here today.

Now the pendulum problem is probably less well known, and there are probably other synonyms for it, but what it refers to is the phenomenon of a president and the agencies putting out policy-oriented regulations which don't have the durability of legislation because they can be changed by a subsequent president, so one president puts in a regulation and a subsequent president removes it, and then a third president puts it back in (or puts it back in an even more aggressive form), and then down the road another president of the opposite party comes in and again removes it.

Regulations are laws. So the pendulum is meant to describe where there is a legal requirement for some period of a presidency, and then it's not a legal requirement anymore for a period of time, and then with another election it's back to being the law, and it goes back and forth. An example of this would be the net neutrality rule, where it was adopted by the FCC during the Obama years, was revoked by the FCC in the Trump years, and it's been proposed for restoration by the Biden FCC last year, and if the FCC finalizes that, it would not be surprising to see a future FCC with a majority appointed by a different president take it back out. So this is the pendulum issue and it is a big part of what I'm going to talk about today, especially about the pendulum having increasing amplitudes and increasing speed, and some of the difficulties that presents.

But before I get there, let me start with this: Under our Constitution, who is supposed to make the laws? Under Article One of the U.S. Constitution, that's the Congress: "All legislative powers herein granted shall be vested in a Congress of the United States." And under the Constitution, the executive branch is supposed to implement what Congress has enacted and to enforce the laws. As set out in Article Two: the President "shall take care that the laws be faithfully executed."

Unfortunately, this is not how things work anymore, and hasn't been for quite a while. For some time now it has been the case that the annual number of new regulations has *significantly* exceeded the number of laws passed by Congress. So if we just look at the most recent year 2023, 236 significant final regulations were put into effect, compared to less than 40 laws enacted by Congress. And in the first three years of the current administration, counting both Executive agencies and the so-called Independent agencies, there is a record setting pace so far of 826 significant final rules costing, by the agencies' own estimates, $452 billion of costs so far. And the agencies have published another set of 365 proposed rules, which if adopted, would add another $615 billion of new costs.

Those are big ticket requirements, and that's the way laws are being made these days, with huge consequence, huge impact. I am sure in various realms we can all think of big dollar examples such as the Treasury's beneficial ownership rule, SEC's Private Advisor rule, the Labor Dept.'s rule on tips, EPA's ozone and mercury rules, the Energy Dept.'s energy conservation rules, HHS's minimum staffing rules for long-term care – and the FCC's recently adopted Digital Discrimination regulations. So as to the number, cost, and impact of rules, that is perhaps a familiar topic, and this kind of executive branch action is what the "pen and the phone" is about.

By contrast, in a system where Congress makes the laws, Congress has procedures that make it harder to change them, and they tend to have durability and continuity. That's less and less true when the executive branch makes the laws. So the regulatory pendulum presents a different set of challenges than the cost, impact, and policy reach of the pen and the phone.

That's the playing field that I want to talk about, which I'm going to do in three parts, consistent with our constitutional setup.

Part I: The Executive Branch

I'll start with the executive branch, which for today's purposes includes the so-called independent agencies. Over time, the executive branch has become bigger and more powerful. That's not a new observation, but it's a reality that has increased with time right up to the current day. And the ability to make new laws that are done unilaterally, and without budget limits, is a powerful tool indeed. This obviously presents some areas of concern. One is the costs, which are an issue and have been for some time, as I mentioned a moment ago.

But, that's not the only aspect of the "pen and the phone" pushing new outer boundaries. Another is the controversies over legal authority, and this has been going on for a while too, so I don't mean to focus solely on the current administration, because I'm just describing the problem which over time has increased on an almost continuous basis. In the Trump years some advocacy groups criticized immigration rules as beyond statutory authority or violating the Administrative Procedure Act, as the Supreme Court held with regard to DHS's repeal of DACA, for example. In more recent years there have been additional rules that the Supreme Court has said exceeded the actual authority the agencies had. I'm thinking about the CDC's rule preventing evictions of renters, the Department of Education student loan cancellation rules, and the EPA's power plant rule. And there are many others that have generated legal controversy. And the reason I'm noting this is not to say who is right or wrong, or whether regulation is too much or too little, but to illustrate the size of the *consequences*. The fact that it is executive branch lawmaking and that the stakes have increased – as there are more consequential rules, more costly rules, more subject matters being addressed – all increase the tendency of presidents of both parties to use the pen and the phone. The inclination does not appear likely to recede anytime soon.

Now, a key aspect of the pen and the phone is that, compared to laws made by Congress, laws made by agencies are much more subject to being easily reversed with a change in the presidency, and much more easily and readily able to be changed every time there's an election. And the executive branch is an all or nothing proposition where only one political party controls it at a given time, unlike Congress where there are representatives of at least two parties and the minority side is not totally powerless.

Which takes us back to the regulatory pendulum. This is an area where, in decades past, there used to be some continuity and stability. I want to first give an illustration of what I'm talking about, referencing presidential executive orders. There are now cumulatively on the order of about 14,000 executive orders that have been issued by 46 presidents going back to George Washington. The way these worked over quite a long period of time until the last decade or two was that there was a lot of stability in that presidents typically added but didn't subtract much;

they might modify, supplement, or update an old one, but by and large the body of executive orders stayed fairly consistent. If we look back to the first six months of each new administration during the last 25 years or so, that continuity has receded. In the first six months after President Bush took over from President Clinton, Bush revoked only 6 executive orders. All but one dealt with labor union type issues, which is an area that the two parties historically have had a long disagreement; Bush didn't change any of Clinton's executive orders that dealt with regulatory policy, including the EO 12866 that sets up the OMB process for centralized review of agency regulations. That was left in place. So then President Obama came after President Bush, and he revoked *eight* executive orders, including the labor ones, but also one about the regulatory process (EO13422), and also new subject matters, including a pair about stem cells and about terrorist interrogations. Then when President Trump came in, he issued numerous executive orders of his own, and he revoked *six* of the Obama executive orders. He revoked none of the several Obama directives on the regulatory process, but he revoked some policy orders on new subjects including climate change and energy development. Fast forward to 2021, when the current administration came in. In its first month, the current administration issued at least forty executive orders or directives, far beyond any of the last seven presidents. In its first six months, the current administration issued fourteen executive orders that revoked *forty-four* Trump executive orders, including all six of Trump's that dealt with regulatory processes, and a host of others dealing with energy development, infrastructure permitting, apprenticeships, TikTok, border security, refugee vetting, the financial system, and more. Again, you may agree or disagree with the specifics of any one or all of those, but the tendency to revoke predecessors' directives has definitely gained both volume and speed as time has passed. I think it's safe to predict that that trend is unlikely to recede when there's a party switch in the White House.

With agency regulations something similar has occurred over time as well, as there had been some continuity as each president comes in and they and their agency appointees focus on doing new things, working on their own priorities. But this is where the pen and the phone and the pendulum started to intersect, because when the number, cost, and policy role of regulations increased substantially, they generated even more desire and more will to *undo* those actions of predecessor administrations. The Obama administration had implemented many costly and controversial rules; as examples, EPA's climate rules and the Labor Dept. joint-employer rule, and its fiduciary rule. Then when the Trump administration came in, agencies revoked some of those high visibility Obama rules. Not just those EPA and Labor examples, but think also about net neutrality mandates, Education's Title IX college sexual misconduct regulations, EPA's rule about waters of the United States, and DOT's fuel economy requirements. Then the Biden administration came in, and began to revoke rules that were promulgated in the prior administration in even a more aggressive manner, trying to pull them out root and branch, and in many cases not just ending those but also swinging the pendulum to put back in Obama era rules – or even more ambitious versions of regulatory requirements that had been put in place during the Obama administration. The Brookings Institute has a Regulatory Tracker that says of the first 43 regulatory actions from the current administration, 25 were rescissions, reversals, or delays of the prior administration's actions. And it is not hard to think of examples that are now regularly going back and forth, such as the FCC's net neutrality rule, EPA's climate rules, Labor's overtime rules, HHS abortion-related rules, and some immigration-related rules. Others may join them, such as the Council of Environmental Quality's revisions and then revocations regarding the NEPA permitting process. Current administration revocations have even extended to rules about

the rulemaking process. During the previous administration, numerous agencies had put in regulations sometimes called the "rule on rules", which were requirements for due process and what procedures were needed to issue new rules, such that the more consequential the rule was, the more procedural protections the public would be afforded. The current administration revoked those at roughly a dozen agencies. Again, you can agree or disagree with the specific actions, but the scope and practice of revocations is broadening and accelerating, and is likely to continue doing so.

And that takes me to OMB, and specifically to OIRA, the centralized regulatory review office, which had been a source of continuity for many many years. Among other things, OIRA historically exercised self-oversight of executive branch agencies, and self-discipline, so was a long-term source of stability, and perhaps a restraint on the pendulum effect. But for most of the first two years of the current administration there was not a confirmed or even a nominated head of OIRA to oversee the regulatory process. Now there is, but the biggest thing that happened last year was another pendulum-type event, destabilizing the rules for cost benefit analysis and other regulatory analysis that had been in place for more than 20 years. It's called circular A-4, and a number of controversial changes that appear to facilitate more regulation and higher regulatory costs were put in place by the new OIRA administrator; instead of continuity and stability, they almost ensure that in a future administration Circular A-4 will become a subject of the regulatory pendulum. Time will tell, but there is reason to be concerned whether all self-restraint by the executive branch will be essentially out the window in the future. No one can say with certainty, but as the pendulum swings, it is utterly myopic to think that one administration can proceed with ambitious revocations and replacements, and that it is not going to reverberate with a pendulum that comes back the other way in another administration. Having unleashed the swinging pendulum, it ought to be common sense that it is easier to let genies out of the bottle than to get them back in.

Does it matter if the executive branch over time chooses not to exercise some self-restraint, and the oscillation and the amplitude of the pendulum gets bigger? What are the consequences? There are of course reasons why each administration does this, and if some policies they regard as detrimental are replaced even temporarily, maybe there are situations where it is helpful.

But there are also difficulties. Those are first and foremost a problem for the regulated businesses, hospitals, schools, local governments, and the like, who experience the regulatory whiplash. But sometimes these can also produce an undesirable situation for society and for the economy as a whole. The pendulum swings produce *uncertainty*, which makes it extremely difficult to plan, especially as to capital expenditures or other kinds of future directed expenditures, such as training of employees.

A second problem related to uncertainty is waste and inefficiency. Consider the mercury rule that went into effect in 2012 and then was invalidated in a case called Michigan versus EPA in 2015. The money to comply had already been spent. Then the rule was gone. (Nearly a decade later EPA is trying again.)

A third problem, which is a societal and a policy problem, is that the pendulum can lead to *ineffective* policies, in both directions, especially if agency officials try to shoehorn new rules

into old statutes with poor fits. Sometimes the revocations do not even restore the status quo, because there have been actions taken as a result of the regulations when they were in effect, even if they never go back in effect. And if it is understood they might be revoked, there is the contrary possibility there will be less compliance, or more waiting to see what happens.

Fourth, another potentially bad consequence is that the pendulum can induce some regulated entities to adopt a strategy in which, because they don't know what the rules will be, they become instead what economists call "rent seeking" entities, seeking subsidies and governmental support. If that occurs, it hurts us all.

Fifth, there is a harm that is less about the participants and more about our political system, which is when the White House becomes a winner-take-all way to make laws, more like a parliamentary system, so if you get it you get to do what you want, with no role for the minority side, you create much more pressure for gaining control of the White House. That is certainly a situation we observe, and it may help to explain some really disturbing things like a University of Virginia poll from last October that reported that 38% of Trump supporters and 41% of Biden supporters said it is acceptable to use violence to stop the other side from achieving their policy goals.

The underlying problem is that in a well-functioning system, many of these policy matters that swing back and forth would be resolved by persuasion and compromise in Congress. Without that, however, the executive branch lawmaking will swing back and forth with Presidential elections.

Part II. Congress

So what about Congress? Unfortunately, I can be very brief on that topic. If the executive branch is making the laws by regulation, and the executive branch is not going to exhibit self-restraint and in fact over time is increasingly pushing the limits, can't Congress fix this? In theory it could. But the reality is, with regard to the regulatory process, Congress has taken almost no substantive measures since the passage of the Administrative Procedure Act in 1946. The need for Congressional action may be greater than ever, but you don't need me to explain why Congress is not likely to provide us with solutions very soon. I would like to be wrong about that.

Part III. The Judiciary

Assuming Congress doesn't act, that takes us to the judiciary and Article Three of the Constitution.

I'll start with the litigants who bring the cases. If we have these problems which have no legislative solution and we can no longer assume that stability will be accomplished through executive branch self-oversight and self-restraint, there will still be a need to have these problems addressed somewhere. They need an outlet and that builds pressure to litigate more often. Many private sector businesses might prefer not to litigate; they would much prefer to be heard by the government, they would much prefer to be in a situation where their needs and concerns can be addressed even if they don't necessarily like every aspect of an outcome, so long

as they think it is something they can reasonably deal with. But as the regulatory pendulum's amplitude increases to extremes, many private sector parties find themselves in this tension where they don't want to be adverse to regulators or the government generally, but they're between a rock and a hard place: as rules swing further in one direction and then the other direction, they create new demands, inconsistent directions, demands that are extraordinarily hard to meet, and expectations that seem to have only short term impact. Unfortunately, the swinging pendulum emulates the polarization of our politics. But for people seeking rationality, it may leave few options except to seek help in the courts.

That at last takes me to the courts themselves. Many judges in general might also prefer not to address issues that look like they involve policy judgments, which they think of as the role of the elected branches. But courts recognize the need to ensure that the law is followed and that agency actions are not arbitrary or capricious. That's not a trivial task.

But how can courts address the regulatory pendulum problem? Addressing issues of administrative law is one way. Consider the issue of courts giving agencies Chevron deference. During at least the last 40 years, courts have given deference to agencies, including during these back and forth swings of the pendulum, as set out in Supreme Court cases like Fox versus the Federal Communications Commission, involving changed rules on broadcast indecency, and NTCA v. Brand X, involving how the FCC classifies Internet services. Back at the time of Chevron, there was thinking that deference to executive branch expertise would provide consistency and stability from the experts. But Chevron and its siblings have delivered the opposite result: they provide that executive branch reversals are fine, and they get deference.

Earlier this year in a case called *Loper Bright v. Raimondo* that concerns whether such deference should be revised or even done away with, Justice Kavanaugh made the point during the oral argument that: "when the agency changes position every four years, that's going to still get Chevron deference" (Tr. 40).

We'll see where *Loper Bright* comes out, but some have suggested that definitive judicial interpretations that are made on the basis of the laws Congress enacted and that can't be changed by each new presidential administration are more likely to be stable and predictable than rules adopted and reversed by the regulatory pendulum's back and forth that are accorded deference.

But Chevron is not the be-all end-all, and deference is far from the only thing that matters to how the courts can best address regulatory law issues. Both the pen and the phone, and the regulatory pendulum, create pressure for courts to have to address a wide range of aspects of the regulatory apparatus for making laws. The "major questions" doctrine, which the Court invoked in 2022 to invalidate an EPA power plant rule in *West Virginia v. EPA*, is one aspect, but it hardly stands alone. This year we see the Supreme Court with at least four important cases about regulatory issues, dealing with the structure of the Consumer Financial Protection Board, with the SEC's in-house courts, with the timing of constitutional challenges to agencies, and with Chevron deference. This trend seems likely to continue. Some people will welcome more judicial review, some will not like it. But if the amplitude and velocity of the pendulums swings continue to increase, the judicial role is inevitable, and probably necessary. Litigation under the "major questions" doctrine will continue, as will other litigation about the limits of agency power – and

perhaps even litigation about the non-delegation doctrine, which defines the realm where *only* Congress can make laws. That might be the ultimate stop to the regulatory pendulum of executive branch lawmaking.

Conclusion

I'll close with one additional thought, which is that the underlying dynamic behind both the pen and the phone and the regulatory pendulum is in reality the increased polarization of our politics and of our citizenry. Unfortunately, that is a much bigger issue than the regulatory process I've addressed today.

If and when our political system gets back to bridging divides rather than reinforcing them, then improvements in our regulatory system will follow. In the meantime, we'll have to deal with the realities of the system I've described today. Thank you for your interest, and thank you again to the Free State Foundation for letting me share these thoughts with all of you today.

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