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David Schoenbrod

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Cleaning Out the Statutory Junk

How can we push lawmakers to discard the legislative trash?

◆ BY DAVID SCHOENBROD

On April Fool's Day of 2018, an abandoned Chinese satellite named Heavenly Palace fell out of orbit and plunged into the Pacific Ocean. There's a half million pieces of detritus in orbit ranging in size from inoperative satellites like Heavenly Palace, which weighed nine tons, to stray nuts and bolts. Most of this space junk stays aloft, but because it travels at speeds six times faster than a bullet, even a small piece can kill an astronaut or ruin a working satellite. Fortunately, engineers have developed defenses against space junk.

"Statutory junk" is my term for the mishmash of statutory commands to administrative agencies that have accumulated over the decades and now are having unintended consequences. Enforceable in a court of law, even a few words of statutory junk can thwart a statutory purpose or impose unnecessary burdens on the public. Unfortunately, Congress typically fails to protect us from the statutory junk.

The Supreme Court spotted a particularly big hunk of statutory junk in a decision rendered a few months before Heavenly Palace fell to earth. *National Association of Manufacturers v. Department of Defense* arose from the Clean Water Act's requiring a permit from the U.S. Environmental Protection Agency or the Army Corps of Engineers for any discharge of a pollutant, including fill, into "the waters of the United States." "The waters of the United States" clearly includes more than just navigable rivers, but it doesn't include backyard puddles. Drawing the line somewhere between puddles and navigable rivers determines whether huge numbers of manufacturers, developers, farmers, highway departments, individual homeowners, and others must get permits. The stakes are high because the permit process is onerous even if the activity does no significant environmental harm. Yet, where the activity does such harm, the process is vital.

DAVID SCHOENBROD is a professor at New York Law School and author of *DC Confidential: Inside the Five Tricks of Washington* (Encounter Books, 2017).

To draw this line, the EPA and the Corps jointly issued a regulation in 2015. The question before the Supreme Court was not, however, the validity of this regulation but rather in what court to file the many cases challenging its validity. The choice was between a single court of appeals or multiple district courts.

In her opinion for the unanimous Court, Justice Sonia Sotomayor noted powerful policy reasons favoring jurisdiction in a single court of appeals. This choice would speed a final decision on the validity of the regulation and avoid disputes about the individual permits having to be litigated in two separate cases. Nonetheless, the Court concluded that jurisdiction must be in multiple district courts because that's what the statute's language dictated. The same problems will likely repeat themselves when the Trump administration promulgates its replacement of the 2015 rule.

Congress had never thought about how its jurisdictional text would apply to a challenge to a regulation defining "the waters of the United States." Lawmakers could have avoided the unintended consequences with just a few words of new text. The need for it was apparent: the regulation had been pending at the agency level for years and the statutory language on jurisdiction was well known to practitioners in the field. The lawmakers' failure to act meant that, on top of the time that will be wasted because of the statute's inadvertent choice of jurisdiction, years were wasted litigating where to file the challenges to the regulation.

As illustrated by this example, statutory junk is neither pro- nor anti-regulatory protection. It is pro-stupid.

This article argues that elected officials in Congress and the White House can organize themselves to protect us from statutory junk and describes how they can do so. First, however, it discusses why junk has become so common in administrative orbit.

THE JUNK'S CAUSE

There wasn't much junk in the short, vague statutes of the Progressive Era. They simply told agencies in essence, "Here's a



PHOTOGRAPHS BY: PHOTOGRAPHYMPUS/GETTY (COLUMN), JGANSER/GETTY (TRASH CAN), HOHL/GETTY (TRASH PILE)

problem, solve it.” In recent decades, however, Congress began enacting a new sort of regulatory statute.

An early example is the 1970 Clean Air Act. It directed the EPA to issue regulations sufficient to protect health from every harmful pollutant everywhere in the United States by statutorily set deadlines. It, moreover, gave citizens the right to sue should the EPA fail to carry out any of its duties. On this basis, the bill’s chief sponsor, Sen. Edmund Muskie, claimed that “all Americans in all parts of the country shall have clean air to breathe within the 1970s.”

In, say, 1940, a promise that the federal government could deliver such concretely specified outcomes requiring the regulation of tens of thousands of major pollution sources and millions of minor ones would have seemed laughable. Washington in 1940 worked with carbon paper and adding machines, but by 1970 it had Xerox machines and computers. It, moreover, had a track record of great accomplishments: winning World War II, inventing the atomic bomb, harnessing nuclear power, building the interstate highway system, passing important civil rights legislation, and landing people on the Moon.

Around 1970, lawmakers began feeling pressure to guarantee popular outcomes because voters had lost faith in the Progressive Era’s promise that expert agencies given broad mandates and insulated from politics would necessarily make correct choices. Meanwhile, judicial protection of civil rights in the 1960s suggested that the courts could protect statutorily specified rights.

Finally, the new way of legislating made life easier for lawmakers. They could take credit for making the popular promise of healthy air, but skirt the specifics of how to do so. That would be up to the agency and would come later. No wonder the Clean Air Act passed almost unanimously.

As it turned out, the EPA could not meet the statutory deadlines without imposing draconian burdens on the economy and voters, such as taking most of the cars off the road in Southern California. Legislators ended up blaming the agency for missing deadlines for healthy air, and also for regulatory burdens the EPA did impose.

Having claimed credit for the popular and shifted blame to the agency for the unpopular, legislators came to see statutory commands as political profit centers and so issued more and more of them. There are, believe it or not, 940 passages in the 1990 version of the Clean Air Act that state the EPA administrator “shall” do a certain task. Many of those commands must be carried out repeatedly. The commands, moreover, are not brief. The statute has as many words as a typical 450-page book.

Because the commands are based upon circumstances that may have changed or understandings falsified by experience, they often are stupid. Consider the statute’s command that sources emitting more than “250 tons per year” of regulated pollutants obtain a particular sort of permit requiring an arduous process. The statute set the threshold at 250 tons so that only a small number of big polluters such as large power plants would have to get the permits. But the threshold as applied to regulate green-

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house gases, which get emitted in immensely larger quantities than the previously regulated pollutants, would require permits for so many more sources—even high schools—that the process would grind to a halt. So the EPA decreed a special threshold for greenhouse gases that began at 100,000 tons rather than 250 tons.

In *Utility Air Regulatory Group v. EPA*, a majority of the Supreme Court ruled the EPA cannot disregard such clear statutory text. To avoid paralyzing the permit process, the Court interpreted the statute to exclude greenhouse gases from the pollutants that trigger the permit requirement, but nonetheless require greenhouse gas emissions of sources to be regulated if some other pollutant triggers the permit requirement.

One might disagree with the Court's opinion or the agency's finding that greenhouse gases are a danger, but not the point that the case illustrates: there's junk in the statute.

Breaking the logjam / Because of the controversy over climate change, one might understand Congress's failure to address this particular piece of Clean Air Act statutory junk. But that does not explain Congress's systematic failure to clean up statutory junk.

In the hope of getting rid of some of the junk in environmental statutes, New York Law School and New York University School of Law launched the "Breaking the Logjam" project in 2007 to show Congress and the president to be elected in 2008 how to update these obsolete statutes. None had been updated since 1990. The project brought together environmental experts from across the political spectrum. We focused on how to reform the statutes so that agencies could clean the environment more cost effectively rather than on how clean was clean enough.

The leaders of the project—Richard Stewart, former chair of the Environmental Defense Fund; his colleague on the NYU faculty, Katrina Wyman; and I—wrote a book, also titled *Breaking the Logjam*, stating the project's recommendations. The book received favorable endorsements from high environmental officials appointed by presidents of both parties.

When Stewart and I met with people from both parties on Capitol Hill, they praised the project's recommendations and said they wished that Congress had already enacted them. After all, the recommendations would produce a better environment at less cost. Yet, they doubted that they could get them enacted. Why? Because updating the statutes would require legislators to take responsibility for hard choices on how clean is clean enough. On the other hand, if they left the statutes unchanged, they could continue to pin most of the blame on agencies and the states for both the harm to the environment and the regulatory burdens.

Statutory junk is not confined to environmental legislation, but extends to instructions to agencies on other kinds of regulation. As Philip K. Howard observes in his 2014 book *The Rule of Nobody*, "American democracy is basically run by dead people" including "past generations of legislators."

HOW TO MAKE LAWMAKERS RESPONSIBLE FOR THE JUNK

Because lawmakers get away with blaming agencies for the harm that statutory junk does to their constituents, making these lawmakers responsible for regulations would prompt them to pay attention. This is an age-old problem; Harvard Law School dean James Landis, a leading New Deal agency official, was frustrated that legislators criticized agencies for doing what they, the legislators, had created them to do. In his 1938 book *The Administrative Process*, he wrote that for administrative officials, "it is an act of political wisdom to put back upon the shoulders of Congress" responsibility for "controversial choices."

Landis proposed two ways to do this: bar any major administrative decision from going into effect until Congress passes a bill approving it through the Constitution's full legislative process, or allow one or two houses of Congress, acting without the president, to veto a major administrative decision. With either legislative approval or legislative veto, Landis claimed, the agency would be "the technical agent in the initiation of rules of conduct, yet at the same time ... [the elected lawmakers would] share in the responsibility for their adoption."

Congress included the legislative veto in dozens of statutes. In 1983, however, the Supreme Court found this mechanism unconstitutional because it allowed one or two houses of Congress to take legislative action without going through the Constitution's full legislative process. The next year, Justice Stephen Breyer, then a judge, wrote in his 1984 *Georgetown Law Review* article, "The Legislative Veto after *Chadha*," that Congress could, consistent with the Constitution, use legislative approval if it really wanted to be responsible for regulations. His implicit point was that Congress is none too anxious to shoulder responsibility.

Chevron / The blame for the harm from statutory junk falls not just on agencies that apply the statutes, but also on the judges who interpret them. Then, however, to avoid the hot seat in many cases, judges began to cite the Supreme Court's decision in *Chevron v. Natural Resources Defense Council* (1984) as requiring them to go along with agency interpretations of statutes unless the interpretation clearly contravenes unambiguous statutory text. *Chevron* does give agencies some leeway to avoid statutory junk, but it is an insufficient response.

Agencies sometimes lose despite *Chevron*, as *National Association of Manufacturers* and *Utility Air Regulatory Group* demonstrate. Even when agencies ultimately win, they and the public must first undergo years of uncertainty before administrative proceedings and judicial review produce a definitive outcome. For example, even though the agency did finally prevail in the Supreme Court's 2014 decision in *EPA v. EME Homer City Generation*, it took multiple administrative proceedings and judicial reviews to win approval of a way to interpret the Clean Air Act to skirt statutory text not designed for the problem at hand.

Although sometimes protecting the public from statutory junk, *Chevron* helps to shield legislators from responsibility for the junk by holding out the hope that, armed with *Chevron* deference, federal agencies can take care of the problem. That has the perverse consequence of further reducing the pressure on Congress to clean up the junk.

Chevron, moreover, comes at considerable cost to the accountability of Congress. The nondelegation canon holds that statutes should be construed, when possible, to reduce the scope of authority delegated to agencies. But *Chevron* allows Congress to delegate authority simply by writing sloppy statutes or failing to clean up statutory junk.

The Supreme Court may end up declaring *Chevron* dead, but

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will likely still cut agencies much slack unless there is some other way to reduce the harm from statutory junk, such as lawmakers bearing responsibility for the harm it does.

Attempts at responsibility/ In 1995, some members of Congress asked me to help design a bill to make legislators responsible for regulation. I suggested legislative approval tweaked with a suggestion by Judge Breyer that the bill include rules that would force prompt votes on agency regulations. The rules would bar legislators from amending the proposed regulation, limit debate, and thwart filibusters by requiring votes by a deadline.

The bill, the Congressional Responsibility Act, began to gain traction, at which point some lawmakers became concerned that its passage would mean they would have to take responsibility for hard choices. So Congress pulled a switcheroo: it passed the sound-alike Congressional Review Act, which President Bill Clinton signed into law in 1996. It gives legislators *the option of taking responsibility rather than forcing them to do so*. They hardly ever take that option. In the Congressional Review Act's first 20 years, Congress used it to negate only one regulation. Congress invoked it infrequently because presidents are apt to veto bills negating their appointees' regulations and, in any event, members of Congress are reluctant to cast votes on hard choices.

There was, however, a flurry of activity under the statute in 2017. That flurry was a function of the election of a new president with a radically different regulatory philosophy than his predecessor. The outgoing administration, assuming that its favored

candidate would win the 2016 election, neglected to take precautions available under the statute that would have helped shield its regulatory handiwork. That mistake is unlikely to be repeated. So, after its 2017 moment in the sun, the Congressional Review Act will again return to the shadows.

In any event, it's a poor way to deal with statutory junk. It provides no way to improve regulations that are suboptimal because of statutory junk or prompt the issuance of good regulations that statutory junk stymied.

REINS/ The Congressional Review Act let legislators appear to be responsible for regulation without actually taking responsibility, but the statute's disuse made that pose increasingly unconvincing. To strike a more convincing pose, work began in 2009 on a bill based upon the Congressional Responsibility Act bill, but with many perverse twists.

One gets a sense of the perverse twists from its title, "Regulations from the Executive in Need of Scrutiny Act" (REINS), which blames the executive for regulatory burdens. Yet, the ultimate source of these burdens is Congress, whose statutes are structured to maximize the political advantage to legislators rather than the net benefit to their constituents.

benefit to their constituents.

In addition to Landis's pro-responsibility process, REINS contains many anti-regulatory features. It would command agencies to reduce the cost of existing regulations to fully offset the cost of any new regulations. So, REINS's sponsors would shift to the agencies blame for the cuts in regulatory protection needed to deliver on the popular promise of limiting regulatory burdens. Both REINS and the Clean Air Act try to promise the popular and shift blame for the unpopular, but in response to the opposite poles of the political spectrum. Thus does blame-shifting promote polarization.

Worse still, the command in REINS to cap regulatory costs potentially clashes with the commands in many existing statutes to increase regulatory protection. There is no evidence that the bill's sponsors have thought through how these clashes should be resolved. Years of litigation would be required to decide how agencies should respond to such clashing commands. This would sow uncertainty, which hurts economic growth.

Yet more uncertainty would come from another provision of REINS that abolishes any existing regulation that Congress does not approve within the next 10 years. This provision allows a member to call for separate votes on any such regulation and also for separate votes on conditions for its approval. This is an unworkable procedure for the huge number of current regulations, and so most of them will disappear, but it will be years before business knows which ones will stay and which will go. So, again, uncertainty would hurt economic growth.

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The House has passed REINS legislation for many years, but its anti-regulatory, junk-strewn twists have kept it from getting the bipartisan support needed to get by a filibuster in the Senate. No Democratic senator supports it. So REINS let its sponsors pretend to want to be responsible without ever having to shoulder responsibility.

Responsibility for Regulation Act/ Congress should take responsibility by passing what I call the Responsibility for Regulation Act. As detailed in my recent book *DC Confidential*, it would include the Landis legislative approval of major regulations and Breyer's fast-track legislative process, but exclude the anti-regulatory features of REINS.

It would work today even though Congress is more polarized than it was in 1938 or 1984. The polarization is heightened by Congress members claiming credit for popular goals but washing their hands of responsibility for specific regulatory actions. That is how lawmakers can be for regulatory protection without being responsible for regulatory burdens or against regulatory burdens without being responsible for less regulatory protection. In contrast, if lawmakers were actually forced to vote on concrete regulations—for instance, one that cuts pollution from power plants by a given percentage—those who vote “Yea” would be responsible for both cutting pollution and inflicting regulatory burdens, and those who vote “Nay” would be responsible for both tolerating pollution and avoiding regulatory burdens.

So, for example, Republican legislators would find that voting reflexively against climate change regulations would come at a political cost when, according to a 2017 Rasmussen poll, “56% of likely U.S. voters favor an EPA regulation that requires a one-third drop in carbon dioxide emissions from power plants over the next 13 years, while 33% oppose such a regulation.” And so, too, Democratic legislators would find that voting for President Obama's Clean Power Plan would have come at an unnecessarily high political cost because, as a result of statutory junk, the Clean Air Act forecloses efficient ways to cut greenhouse gases. In sum, lawmakers on both sides of the aisle would be more balanced than their present posturing sounds.

Lawmakers' responsibility for both regulatory costs and benefits would trigger a series of constructive changes. Agencies, to get their regulations approved, would propose regulations that balance competing concerns in a way likely to garner majority support in Congress. Lawmakers in turn would want to enable agencies to promulgate regulations that achieve more protection with lower burdens. To help them do so, they would want to get rid of statutory junk. They would finally have a personal political incentive to do so.

To take advantage of all these improved incentives, communication between Congress and agencies should begin before the agency promulgates the rule. To that end, the new bill should require agencies to alert Congress of proposals of major rules and any way that, in the agency's opinion, current statutes would prevent the agency from promulgating what the agency considers to be an optimal rule. Then, at the proposal stage, legislators

could, at their discretion, hold hearings, introduce legislation, or communicate with the agency individually or through committees. In addition, the bill should include a provision that adds an extra 30 days to the deadline for a final roll call vote if a majority of the agency's oversight committee in either chamber signs a petition calling for a hearing after promulgation.

With Congress having a real incentive and a process to deal with statutory junk, courts should be more willing to cut back the leeway that they give agencies.

WOULD CONGRESS EVER TAKE RESPONSIBILITY?

Although seemingly allergic to responsibility, legislators might just enact a pro-responsibility bill. Now, as Frances Lee demonstrates in her 2016 book *Insecure Majorities*, both parties “champion ‘all gain, no pain’ positions,” such as the Clean Air Act and the REINS bill, in order to appeal to their bases, hide the harm done to other interests, and win majorities in Congress.

Yet, this dynamic could change. One of the parties might come to find that shouldering responsibility would appeal to centrist voters and be more effective at winning majorities. Here're some indicia:

- Many voters do want elected lawmakers to take responsibility for regulations. For example, a 2017 Rasmussen poll found that voters, by a margin of 56% to 25%, believe that Congress should have to vote on major EPA regulations before they go into effect.
- Distrust of the federal government in general and Congress in particular has reached record levels in recent years. No wonder. Congress is supposed to compromise on the differences among us, but its “all gain, no pain” techniques inflame the differences and bring erratic government.
- As the parties in Congress have grown more rabid, an increasing portion of voters identify themselves as independents.

Besides, many members of Congress are not just incumbent reelection machines. Some want to be proud of the work they do. Some want to be part of an institution that is not despised. Some want to be statesmen.

Regulation as usual is under threat from another direction. A small group, the Madison Coalition, has gotten the legislatures of 26 states to pass resolutions calling for Congress to propose a constitutional amendment that would, in essence, put Landis's legislative veto into the Constitution. The support to date is still short of what is needed to amend the Constitution, but that a small group with scant resources has gotten so far in a few years suggests the vulnerability of the present, responsibility-shirking system. Still, I prefer the Responsibility for Regulation Act to the constitutional amendment because statutes are easier to get, easier to change, and Congress could use the act only to vote on major regulations rather than individual cases.

I don't know what the future will bring. But the political parties in Congress may well find themselves in a race to show they are willing to shoulder responsibility. R