Research

President's Regulatory Record in the Courts

SAM BATKINS | AUGUST 21, 2012

Judiciary Strikes Down $23 Billion in Regulations

Federal courts have not ignored President Obama's controversial – and costly – rulemakings. Courts have struck down dozens of rules costing $23 billion. During the past seven years, his regulators have published more than $800 billion in regulatory burdens. Judges across the ideological spectrum – including four Obama appointees – have invalidated Dodd-Frank rules, EPA actions, NLRB labor rules, and FDA rulemakings. The chart below will be updated as courts strike down new regulations.

Case	**Issue**	**Judge**	**Cost of Regulation**
Michigan v. EPA	Mercury Air Toxics Standard	Justice Antonin Scalia	$10 Billion
NAM v. SEC	Dodd-Frank's Conflict Minerals Rule	Raymond Randolph	$4.7 billion
API v. SEC	Dodd-Frank's Disclosure by Resource Extraction Issuers	John D. Bates	$1.4 billion
APA v. Department of Energy	Energy Efficiency Rules for Furnaces	Per Curiam	$876 million
R.J. Reynolds v. FDA	Cigarette Warning Labels	Richard J. Leon	$525.5 million

Case	Issue	Judge	Cost of Regulation
Private Colleges and Universities v. Duncan	Gainful Employment Regulations	Rudolph Contreras (Obama)	$521.2 million
Delaware v. EPA	Emissions Standards for RICE and SI Engines	A. Raymond Randolph	$489 million
Ohio v. Army Corps of Engineers et al.	Waters of the U.S.	David McKeague	$462 million
Chamber of Commerce v. NLRB	Union Notification Posters	David C. Norton	$386.4 million
Florida Wildlife Federation v. EPA	EPA Imposition of Water Standards for Florida	Robert L. Hinkle (Clinton)	$206.1 million
OOIDA v. FMCSA	Electronic Monitoring Devices in Trucks	Diane Wood (Clinton)	$139 million
Loving v. IRS	IRS Tax-Return Preparer Regulations	Brett Kavanaugh	$142.4 million
APSCU v. Duncan	Department of Education Regulations	Harry T. Edwards (Carter)	$126.1 million
Home Care Association v. Weil	Labor's Wage Standards for Domestic Employees	Richard J. Leon	$25.8 million
Business Roundtable v. SEC	Dodd-Frank's Proxy Access Rule	Douglas Ginsburg	$11.91 million
Bayou Lawn & Landscape v. Solis	Labor Visa Regulation	M. Casey Rodgers	$14.6 million
Electric Power Supply v. FERC	Demand Response Rule	Janice Rogers Brown	$1.71
Verizon v. FCC	Net Neutrality	David Tatel	$0.51
UARG v. EPA	GHG Tailoring Rule	Justice Antonin Scalia	N/A
PhRMA v. HHS	Orphan Drugs	Rudolph Contreras (Obama)	N/A

Case	**Issue**	**Judge**	**Cost of Regulation**
NAM v. NLRB	Union Notification Posters	Amy Berman Jackson (Obama)	N/A
Chamber of Commerce v. NLRB	Ambush Elections Rule	James E. Boasberg (Obama)	N/A
National Mining Association. v. EPA	Water Quality Guidance	Reggie B. Walton	N/A
Luminant Generation Co. v. EPA	EPA Disapproval of Texas Regulations	Jennifer Walker Elrod	N/A
Texas v. EPA	EPA Disapproval of Texas Regulations	E. Grady Jolly	N/A
American Insurance Association v. HUD	Fair Housing Act Rules	Richard J. Leon	N/A
EME Homer City Generation v. EPA	Cross-State Air Pollution Rule	Brett Kavanaugh	N/A
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North Dakota v. EPA	Waters of the U.S.	Ralph Erickson	N/A
Wyoming v. Interior	BLM Fracking Rule	Scott Skavdahl (Obama)	$50 Million
Nevada v. DOL	Overtime Rule	Amos Mazzant (Obama)	$2.9 Billion
NFIB v. Perez	Persuader Rule	Sam Cummings	1.2 Million
ABC of TX v. Rung	Fair Pay and Safe Workspaces	Marcia C. Crone	$872 Million
Mingo Logan Coal Co. v. EPA	EPA Rescission of Mine Permit	Amy Berman Jackson (Obama)	N/A
			TOTAL: $23 BILLION

In April, a federal judge in Florida invalidated NLRB's union notification posters. During the comment process, AAF argued that NLRB's "Notification of Employee Rights" proposal

likely exceeded the Board's statutory authority.National Labor Relations Board (NLRB)

President Obama's appointee to the D.C. District Court, Judge Amy Jackson, agreed and invalidated part of the regulation.

More recently, Judge David Norton of the South Carolina District Court concluded that NLRB exceeded its statutory authority, writing, "Since Congress has required notice posting in at least nine other federal labor statutes, notice posting is clearly a major question, not an interstitial matter.... The court holds that the Board lacks authority to promulgate the notice-posting rule based on its discovery of a 'gap' left in the Act by Congress."

The U.S. Court of Appeals for D.C. (D.C. Court of Appeals) immediately enjoined NLRB's enforcement of the regulation. NLRB Chair Mark Gaston Pearce then announced that the Board would refrain from implementation, pending the outcome of further litigation.

DODD-FRANK

Just one year after passage of Dodd-Frank, the D.C. Court of Appeals held that the Securities and Exchange Commission (SEC) violated the Administrative Procedure Act (APA) by failing to "consider the rule's effect upon efficiency, competition, and capital formation…" when it finalized its proxy access rule. The now-defunct regulation required companies to include shareholder nominees for director positions. The rule applied regardless of company size, affecting many small businesses.

To date, SEC has imposed more than 4.1 million hours of paperwork compliance during its implementation of Dodd-Frank.

The Court's invalidation of the proxy access rule should concern the Consumer Financial Protection Bureau, which recently issued a rule on remittance transfers that imposes more than 7.6 million paperwork hours, but contains no benefit-cost analysis.

According to AAF data, incomplete benefit-cost analyses are common. Of the 99 Dodd-Frank rulemakings that impose paperwork burdens, only 57 also quantify costs, and dozens fail to conduct a full benefit-cost analysis.

EPA

According to the Government Accountability Office (GAO), EPA has suffered several setbacks in federal court, having lost 184 cases from FY 2003 to FY 2010.

Last March Judge Jennifer Walker Elrod found EPA improperly denied a Texas

environmental implementation plan. Judge Elrod concluded that EPA created "three extra-statutory standards … out of whole cloth."

In addition, in *Mingo Logan Coal v. EPA*, Judge Amy Berman Jackson found EPA improperly withdrew two Clean Water Act permits. In a 34-page opinion, Judge Jackson wrote, "This attempt to withdraw the specification of discharge sites after a permit has been issued is *unprecedented in the history of the Clean Water Act*."

Bear in mind the administration's broader regulation of the energy sector. EPA has imposed greenhouse gas standards and made the cost of regulatory compliance higher by implementing Boiler MACT, Utility MACT, and Cross State Air Pollution rules.

FDA'S CIGARETTE LABELS

In June 2011, FDA mandated that all cigarette packaging contain graphic warning labels. Judge Richard J. Leon wrote that Congress and FDA imposed "bold" affronts to the Constitution with new warning labels.

Judge Leon found FDA's regulation violated the First Amendment. He added, "[T]hese mandatory graphic images unconstitutionally compel speech, and [the plaintiffs] will suffer irreparable harm absent injunctive relief.…"

The case is still pending review by a higher court but it appears FDA's regulation will face a high constitutional bar in future litigation.

GAINFUL EMPLOYMENT RULE

On June 30, an Obama appointee struck down the so-called "Gainful Employment" rule, implemented by the Department of Education. In a scathing decision, Judge Rudolph Contreras called the regulation "not based upon any facts at all," adding that it was "not reasoned decisionmaking," by Secretary Arne Duncan.

The regulation would have required for-profit institutions to meet certain metrics for graduate loan repayment and earnings. For-profit universities that fail to achieve the definition of "Gainful Employment" lose federal funding. By the same rubric, thousands of recent graduates from public colleges and law schools are similarly situated but their alma maters do not face such market discipline: the rule only applies to for-profit institutions.

A conservative estimate of the rule's impact predicts a compliance cost of more than 261,000 man-hours and $338 million in lost revenue for the for-profit sector. One recent

government estimate projected that five percent of institutions would lose funding if the courts had not struck down the regulation.

CONCLUSION

Judicial review of agency actions under President Obama has had a significant impact on both monetized costs and broader public policy. Although a vast regulatory web remains, it is worth noting the challenge this administration has had sustaining its signature domestic achievements in federal court, even with friendly judges. With major EPA rules still under review, courts could add to the President's legal struggles.

(Updated 11/25/2016)