Selling the Family Silver: Can Trump’s Corporate Cabinet Accomplish Sweeping Regulatory Change?

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For many years, I’ve been thinking and writing about the following question: When private companies and private individuals do the government’s job, such as when the Department of Defense hires Blackwater to conduct military operations on the battlefield, does the Constitution have anything to say about it? And the answer is somewhat surprising: No, not really.

This question has traditionally occupied a corner of separation of powers theory that only a handful of scholars has paid much attention to. But with the incoming Trump Administration, the merging of the public and the private sectors—and how to ensure that anyone who exercises government power is accountable to the people—has become a front-burner issue.

What is privatization and why should we care about it? “Privatization” is a wonky term that generally refers to the range of efforts to take something that government is doing (or traditionally has done) and give it to private industry to do. We should care because the Constitution only applies to government actors. The Bill of Rights does not limit how private parties exercise government functions. So, if you are groped in an airport by a TSA screener who happens to be employed by a private contractor, you have no constitutional claim against him or his employer. If the TSA screener is on the federal payroll, you do have a constitutional claim. Nor do disclosure laws, like the Freedom of Information Act, apply to private parties. In short, private contractors are not accountable to the public in the same ways that government actors are. Private industry also has a profit-making incentive, which can make it arguably more efficient than government in some ways—but also less interested in serving the “public good” than government actors who may have taken an oath to uphold the Constitution and whose job do not depend on bottom-line revenue numbers.

What does this have to do with the Trump Administration? Of course, we have all heard about Mr. Trump’s unprecedented conflicts of interest and refusal to disentangle himself from his namesake businesses across the globe, despite their ties to foreign governments, among other concerns. The somewhat frightening bottom line is that Trump can use the Office of the President for his own personal gain by bartering influence over American public policy with relatively little constitutional ado.

The Trump Administration is also poised to meaningfully “privatize” the administrative state—that is, the range of federal agencies that dot Washington, D.C. and that create laws regulating all sorts of conduct that affects our everyday lives. For example, Trump’s pick for Education Secretary, Betsy Vos, wants to steer public money to voucher programs and away from public education. Mr. Trump’s choice for Secretary of Health and Human Services, Tom Price, has a
record of advocating for privatization of Medicare. His pick for Defense Secretary, James Mattis, has reportedly received nearly $1 million in compensation as a board member of major defense contractor, General Dynamics. And Mike Pence lobbied for the privatization of Social Security during the Bush years.

The Trump “corporate Cabinet” is just the very tip of the privatization iceberg. It is reasonable to expect that corporate America will do much more governing behind-the-scenes over the course of the Trump Administration. Whether Mr. Trump plans to expand private influence by increasing the use of private companies to perform governmental tasks—as President George W. Bush did—remains to be seen. If he does, it will not make headline news, despite its constitutional significance.

So, how much regulatory change can Trump and his Cabinet actually accomplish? I often ask this question of my students on the first day of an Administrative Law course: How can a new President implement the policy agenda that theoretically got him elected? The answer: With agency rulemaking, it is not as easy as it looks.

- Because Congress creates agencies and gives them their rulemaking power, Congress can certainly pass laws that preempt existing rules, but we know that this can be politically difficult, even with a Republican Congress.
- Congress can cut agency budgets, leaving them effectively unable to operate.
- As for the new President, he can certainly reverse Executive orders.
- He can tell agencies that he wants them to amend, repeal or create certain rules. But it takes years for agencies to promulgate regulations. The federal statute governing the rulemaking process – the Administrative Procedure Act – contains numerous procedural steps that agencies must follow in order to make laws. Congress has enacted many other statutes that add layers upon layers to that process.
- The President can simply sit on regulations that he doesn’t like, and refuse to let them out the door for public comment or in final form.
- The President can influence an agency to stop enforcing certain laws, such as environmental regulations and civil rights laws. It would be as if prosecutors and police were to decide to stay home from work one day. We might still have laws against murder, but if nobody is around to arrest and prosecute murderers, the laws are not worth the paper they are written on.
- The President can influence agencies to outsource their functions to the private sector which, as I indicated before, is not subject to most of the rules that government must abide by, including the Constitution.
- He can issue executive orders, and his successor can reverse them.
- The President can influence agencies to make rules informally and quickly, which they do a lot, but these kinds of rules may be struck down by the courts if they try to do too much in a truncated way.
To what extent, then, does this administrative procedural apparatus provide a check on Mr. Trump’s ability to accomplish what he said he wants to do? There is a big debate within the administrative law community about whether the many layers of bureaucracy that encumber agency decision-making are good or bad. Some people argue that the laws that bind how agencies function in fact create “paralysis by analysis” – bogging down the government’s ability to get things done. Others argue that such laws are necessary to ensure an accountable, effective government. Of course, most of the roughly 2.6 million individuals that comprise the federal bureaucracy are not political appointees. They believe in the mission of their agencies. In quiet ways, they could be a particularly important check on Trump’s ability to accomplish what he has publicly set out to do.