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OPINION | REVIEW & OUTLOOK

An Obama Zombie Returns

A case study in how liberal judges protect regulatory overreach.

By The Editorial Board

April 1, 2019 7:04 p.m. ET



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The Administrative Procedure Act is intended to ensure regulatory due process, but Democrats have weaponized the law to entrench Obama Administration diktats that do the opposite. Witness a judge's order last month reinstating a payroll sweep that has left employers scrambling.

The Equal Employment Opportunity Commission has long required employers under

Title VII of the Civil Rights Act to file confidential reports including the number of individuals employed by job category, sex, race and ethnicity. But liberals say the government needs more data to patrol discrimination and pay disparities.

Ergo, the EEOC in 2016 mandated reams of pay data and planned to publicize the information by industry and geography. The new report form required employers to enumerate employee demographics by pay-band—e.g., female Hispanic assistants earning between \$50,000 and

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\$80,000—and increased the data points 20-fold.



A Chamber of Commerce survey projected direct compliance costs would be some \$400 million—far more than the EEOC’s \$50 million estimate. Employers also warned that reconfiguring software would be cumbersome and provide little insight into pay disparities without information such as workers’ experience, education and prior salary.

The EEOC’s response: Who cares? While the agency said employers would benefit by comparing their worker pay to their peers, the big beneficiaries would be liberal groups and plaintiff attorneys fishing for lawsuits. Although the EEOC would supposedly only publicize aggregate data, employer-level data could be obtained from the Labor Department’s Office of Federal Contract Compliance Programs.

Here’s the kicker: Only after the rule was sent to the Office of Management and Budget for final approval did the agency release the form’s data file specifications. The EEOC data demand thus appears to have violated the Administrative Procedure Act and the Paperwork Reduction Act (PRA).

Enter the Trump OMB, which in 2017 suspended the data collection. The PRA says OMB may review collection when “relevant circumstances have changed or the burden estimates provided by the agency at the time of initial submission were materially in error” or there is “good cause.” The agency had plenty. As OMB explained, the Obama EEOC’s “burden estimates did not account for the use of these particular data file specifications,” and the “continued collection of this information is contrary to the standards of the PRA,” among other things.

The National Women’s Law Center sued, arguing it would be harmed by being deprived of data to identify pay disparities though the data had never been collected. This is hardly a concrete and demonstrable injury, the standard for legal standing.

Yet federal Judge Tanya Chutkan, an Obama appointee, ruled that the Trump Administration violated the APA and PRA. According to the judge, OMB’s “reasoning lacked support in the record” and ignored the impact on liberal groups. This is a textbook case in how liberal judges contort the APA to bring Obama regulations back from the dead.

Perhaps preoccupied, the Justice Department hasn't appealed the ruling or asked for a stay though the judge has ordered employers to comply by next month. Justice needs to move pronto and let employers—the real victims of the Obama regulatory overreach—present their case to the courts.

Appeared in the April 2, 2019, print edition.

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