How Trump's Birth Control Rules Run Afoul Of The APA

By Steven Gordon

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Recently, federal courts in California and Pennsylvania granted preliminary injunctions halting the implementation of two new Trump administration regulations that exempt employers who object on religious or moral grounds from a mandate under the Affordable Care Act to provide employees with cost-free access to certain methods of contraception.[1]


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The courts concluded that the regulations probably violate certain procedural and substantive requirements of the Administrative Procedure Act. Aside from the social issues at stake, these decisions are interesting because they illuminate several strictures that the APA places on rule-making, and especially on the ability of one administration to change the policies of its predecessor.

The "Contraceptive Mandate"

A provision of the Affordable Care Act mandates that insurance providers cover preventive health services for women without cost-sharing responsibilities. Congress delegated the enumeration of these preventive services to the U.S. Department of Health and Human Services, which defined them in 2011 to include all U.S. Food and Drug Administration-approved contraceptive methods.

At the same time, HHS and two other agencies issued a regulation that exempted certain religious employers from the mandate to provide contraceptive services. In 2013 the agencies issued a revised regulation which allowed religious nonprofit organizations to self-certify their eligibility and notify their insurance provider, which would then provide contraceptive coverage to the employees.

Challenges to the Contraceptive Mandate

In 2014 the U.S. Supreme Court ruled, in the Hobby Lobby case,[2] that application of the contraceptive mandate to closely held corporations, which were not covered by the

regulatory exemption, violated the Religious Freedom Restoration Act because it imposed a substantial burden on their religious exercise and was not the least restrictive means of ensuring that employees received coverage for contraceptive services. In response to Hobby Lobby and a related decision, the agencies issued a revised regulation in 2015 that extended the religious objector exemption to include closely held entities and provided an alternative process for eligible organizations to self-certify.

In 2016 the Supreme Court considered a challenge to the contraceptive mandate by organizations which contended that the self-certification process itself violates the RFRA. The court inquired whether contraceptive coverage could be provided through the employers' insurance companies without any notice from the employer. The parties agreed that this was feasible and the court remanded the case to permit them to develop such an approach, without ruling on the merits of the RFRA claim.

The agencies then issued a request for information which generated 54,000 comments on this issue. On Jan. 9, 2017, in the final month of the Obama administration, the agencies declared that an impasse had been reached — there was no feasible approach that would permit religious objectors to avoid self-certification while still ensuring that the affected women received contraceptive coverage.

The Interim Rules Expanding the Exemptions From the Mandate

In October 2017 the Trump administration issued two interim final rules, or IFRs, that substantially expanded the exemption from the contraception mandate. The religious exemption IFR extended the religious exemption to publicly traded corporations, and provided that eligible organizations would not be required to comply with a self-certification process. The moral exemption IFR exempted entities and persons that object to contraception based on sincerely held moral (as opposed to religious) convictions. These IFRs were issued without advance notice and comment, and took effect immediately. The agencies invited public comment on them within the next 60 days after the IFRs took effect.

A number of states challenged these new rules: One group of states filed suit in federal court in California, and Pennsylvania filed suit in federal court in that state. In December 2017 both courts issued preliminary injunctions blocking implementation of the IFRs. Both courts held that the plaintiffs were likely to prevail on their claims that the agencies had violated the APA because there was no exigency that justified issuing the IFRs without

advance notice and comment.[3]

The Final Rules Expanding the Exemptions

The agencies received over 56,000 public comments on the religious exemption IFR and over 54,000 public comments on the moral exemption IFR. On Nov. 15, 2018, the agencies promulgated final rules for the religious exemption and moral exemption that were nearly identical to the IFRs. The final rules were scheduled to take effect, superseding the enjoined IFRs, on Jan. 14, 2019.

The plaintiff states challenged these final rules and, shortly before they were scheduled to take effect, both the California and Pennsylvania federal courts entered new preliminary injunctions enjoining the implementation of these rules, finding that they likely violate procedural and substantive requirements of the APA.

One Court Finds A Procedural Defect in the Final Rules

The federal court in Pennsylvania found a procedural defect in the final rules. It concluded that the agencies' failure to comply with the advance notice-and-comment requirement in promulgating the IFRs likely invalidated the final rules as well. (The California court did not address this issue.) The court noted that the federal circuits have taken divergent views on the question of whether a procedural defect that taints an IFR carries over to the succeeding final rule. But it observed that "the U.S. Court of Appeals for the Third Circuit has "evidenced a deep skepticism towards the curative powers of post-promulgation notice-and-comment procedures."[4]

The court concluded that it is impermissible under the APA for an agency to substitute "post-promulgation notice and comment procedures for pre-promulgation notice and comment procedures ... by taking an action without complying with the APA, and then establishing a notice and comment procedure on the question of whether that action should be continued."[5]

Both Courts Find Substantive Defects in the Final Rules

The substantive challenges to the final rules turned on whether the agencies have authority to issue them. The agencies argued that the rules are authorized by the Affordable Care

Act. It was undisputed that the ACA delegated to the agencies the authority to define what "preventive care" is. In 2011, the agencies defined "preventive care" to include contraceptives, and the final rules do not purport to remove contraceptives from the coverage mandate. The agencies contended that the authority to define *what* preventive care will be covered includes a congressional delegation of authority to carve out exceptions to *who* must provide preventive coverage. Both courts rejected this argument, finding no support for it in the text of the ACA.[6]

The courts also rejected the agencies' alternative argument that the RFRA authorizes them to issue the religious exemption rule. The RFRA, a 1993 law, suspends generally applicable federal laws that substantially burden a person's exercise of religion unless the laws are the least restrictive means of furthering a compelling governmental interest. Both courts noted that the agencies' position on whether the existing exemption to the contraceptive mandate satisfies the RFRA had shifted with the change in administration.

"In years past, the Agencies asserted that the accommodation did not impose a substantial burden on any entity's religious exercise and that guaranteeing cost-free contraceptive coverage did serve several compelling government interests. The Agencies now take the obverse positions: that the accommodation constitutes a substantial burden on the religious exercise of objecting employers and that the contraceptive mandate does not serve 'any compelling interest.'"[7]

The courts noted that the RFRA does not delegate enforcement authority to any agency, and that agencies have no expertise in administering the RFRA. Thus, no deference is owed to the agencies' interpretation of the RFRA.[8]

The courts found that the agencies' justifications for expanding the religious exemption have already been rejected or discounted by other courts: (1) eight circuits have concluded that the existing self-certification process does not impose a substantial burden on religious exercise;[9] (2) the Supreme Court's decision in Hobby Lobby refutes the contention that a blanket exemption for religious objectors is required by the RFRA;[10] (3) Hobby Lobby also undercuts the contention that the contraceptive mandate imposes a substantial burden on the religious exercise of publicly traded corporations — the court explicitly declined to extend its holding to publicly traded corporations, suggesting that they would be unlikely to hold a singular, sincere religious belief.[11]

In addition, the California court concluded that plaintiffs are likely to prevail on their claim that the agencies violated the APA by failing to provide a sufficient explanation for their change in course, i.e., "a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy."[12]

Finally, both courts observed that the moral exemption rule cannot be justified by the RFRA, which protects only a person's "exercise of religion," and does not speak to broader moral convictions. Thus, the moral exemption rule is invalid because, as discussed above, it is not authorized by the ACA, and there is no other statutory basis for it.[13]

Analysis

The Supreme Court has observed that "[a]n initial agency interpretation [of a statute it enforces] is not instantly carved in stone. On the contrary, the agency ... must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations."[14]

Further, the court has long recognized that regulations can be changed "to meet administrative exigencies or conform to judicial decision."[15] Thus, for example, it was clearly appropriate for the agencies to modify the religious objection exemption in 2015 in response to the Hobby Lobby decision.

The Trump administration, however, was not responding to any new judicial decisions or changed factual circumstances when it promulgated the expanded religious exemption and the new moral exemption. Nor was it altering an interpretation of a statute that the agencies administer, i.e., the ACA. The California and Pennsylvania courts persuasively demonstrated that the ACA does not authorize the promulgation of these new rules.

Instead, the agencies were attempting to change course based on their new interpretation of a long-existing statute that they do not administer, the RFRA. Both courts properly declined to accord any deference to the agencies' position under these circumstances. And both courts were appropriately skeptical of the agencies' arguments. As one court commented, "administrative agencies may not simply formulate a view of a law outside their particular area of expertise, issue regulations pursuant to that view, claim that the law requires those regulations, then seek to insulate their legal determination from judicial scrutiny."[16]

This is not to say that agencies cannot take the RFRA into account in formulating their regulations. Indeed, the agencies evidently did so when they originally promulgated the religious objector exemption in 2011 and subsequently revised it in 2013. But, if such regulatory exemptions are challenged, courts will subject them to a searching, nondeferential review. The one area in which courts might accord some deference to an agency's position is practical issues regarding the feasibility of certain accommodations.

For example, in 2016, the agencies engaged in an extensive public notice-and-comment process to explore whether there is a feasible approach that would permit religious objectors to avoid self-certification while still ensuring that the affected women received contraceptive coverage. A court might give significant weight to the conclusions an agency reached through this type of process. But the Trump administration did not seek to rely on the results of the 2016 process. To the contrary, it side-stepped those results and simply announced its legal conclusion that the self-certification process "did not serve a compelling interest and was not the least restrictive means of serving a compelling interest."[17]

Turning from these substantive APA issues to the procedural issue, it is debatable whether the agencies' default in issuing the 2017 IFRs without advance notice and comment should doom the final rules, as the Pennsylvania court held. There are two principal arguments for invalidating the final rules in this situation.

First, the APA requires prepromulgation notice and comment (absent limited exceptions) and courts would invite widespread disregard of this requirement if they allow agencies to substitute a post-promulgation notice-and-comment process.

Second, the prepromulgation requirement "is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas."[18] On the other hand, the judicial review provision of the APA explicitly incorporates the harmless error rule.[19] In some situations, it is reasonable to conclude that an agency's delay in conducting the notice-and-comment process has not affected the final rule, and should not invalidate that rule.

Before issuing the final rules at issue here, the agencies received and considered over 56,000 public comments on the religious exemption IFR and over 54,000 public comments

on the moral exemption IFR. Had the final rules been otherwise valid, there is a substantial argument that they should not be set aside, and the agencies forced to start over, simply because the notice-and-comment process was triggered by IFRs instead of notices of proposed rule-making.

The Pennsylvania court reasoned that the agencies' approach had changed the issue on which the public was asked to comment: "instead of asking whether substantial expansions to the exemption and accommodation should be made *at all*, the Agencies solicited comments on whether those changes should be *finalized*."[20] But it is doubtful that this nuance significantly altered the nature of the comments the agencies received. And it is even less likely that the procedural defect had any impact on the agencies' formulation of the final rules.

Indeed, it is evident that the agencies went into the rule-making process with a definite agenda to expand the exemptions to the contraceptive mandate. It is therefore unlikely that the final rules would have been any different regardless of when the notice-and-comment process was conducted, which supports a conclusion that the procedural error was harmless. On the other hand, it can be argued that the stronger an agency's agenda when it embarks on rule-making, the more important compliance with the APA's procedural requirements becomes. We do not want an agency riding roughshod over those requirements in pursuit of its policy goals. Thus, while the Pennsylvania court's conclusion is debatable, it is certainly defensible.

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[1] California v. Health and Human Servs., --- F.Supp.3d ----, 2019 WL 178555 (N.D. Cal. Jan. 13, 2019); Pennsylvania v. Trump, --- F.Supp.3d ----, 2019 WL 190324 (E.D. Pa.

Jan. 14, 2019).

[2] Burwell v. Hobby Lobby Stores Inc., 134 S.Ct. 2751 (2014).

[3] Pennsylvania v. Trump, 281 F.Supp.3d 553, 576 (E.D. Pa. 2017); California v. Health & Human Servs., 281 F.Supp.3d 806, 829 (N.D. Cal. 2017), aff'd in relevant part sub nom. California v. Azar, 911 F.3d 558, 575 (9th Cir. 2018).

[4] Pennsylvania v. Trump, 2019 WL 190324, at *13.

[5] Id. at *14.

[6] California v. Health and Human Servs., 2019 WL 178555, at *13-14; Pennsylvania v. Trump, 2019 WL 190324, at *17-21.

[7] Pennsylvania v. Trump, 2019 WL 190324, at *22; see also California v. Health and Human Servs., 2019 WL 178555, at *21.

[8] California v. Health and Human Servs., 2019 WL 178555, at *18; Pennsylvania v. Trump, 2019 WL 190324, at *22-23.

[9] California v. Health and Human Servs., 2019 WL 178555, at *16.

[10] Pennsylvania v. Trump, 2019 WL 190324, at *24 (citing Hobby Lobby, 134 S.Ct. at 2775 n.30).

[11] Id. at *25 (citing Hobby Lobby, 134 S.Ct. at 2774).

[12] California v. Health and Human Servs., 2019 WL 178555, at *21 (quoting FCC v. Fox Television Stations Inc., 556 U.S. 502, 515–16 (2009)).

[13] California v. Health and Human Servs., 2019 WL 178555, at *22; Pennsylvania v. Trump, 2019 WL 190324, at *21 n. 22.

[14] National Cable & Telecomms. Ass'n v. Brand X Internet Services, 545 U.S. 967, 981 (2005) (internal quotes omitted).

[15] Morrissey v. Commissioner, 296 U.S. 344, 355 (1935).

[16] Pennsylvania v. Trump, 2019 WL 190324, at *22.

[17] 82 FR 47792, 47806 (Oct. 13, 2017).

[18] U.S. Steel Corp. v. EPA, 595 F.2d 207, 214-15 (5th Cir. 1979).

[19] 5 U.S.C. § 706.

[20] Pennsylvania v. Trump, 2019 WL 190324, at *14 (emphasis in the original).