Deregulation Under Trump

Despite claims of broad deregulation, the administration's hallmark has been little regulatory activity.

❧ **BY KEITH B. BELTON AND JOHN D. GRAHAM**

Donald Trump seems determined to go down in history as a deregulator. This is surprising because no other post–World War II president—except perhaps Ronald Reagan—has exhibited such public commitment to this cause.

During the 2016 presidential campaign, candidate Trump took a stark and distinctive stance on the modern administrative state. He advocated widespread deregulation of the U.S. economy. It was a central plank of his national economic and energy plans as outlined in major speeches in Detroit (August 8, 2016) and Pittsburgh (September 22, 2016). He called for both a moratorium on new regulations and an explicit process of review and repeal of unnecessary regulations, which some advisers referred to as "deconstruction of the administrative state." Since entering office, he has frequently revisited those themes.

Has President Trump's performance matched his rhetoric? We conducted a review of his administration's deregulatory efforts as of the end of his second year in office. We interviewed dozens of regulatory experts, conducted a literature review, and undertook analysis of governmental data. We did this to answer three questions:

- Has the administration curbed the flow of new regulations, thereby slowing the growth of the *stock* of regulation?
- Has the administration worked with the Republican-majority Congress to *repeal or scale back* the existing stock of regulations?

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- Using executive power, has the administration *repealed or revised existing regulations* to be less burdensome or intrusive?

In the field of presidential studies, these questions relate to presidential effectiveness, not presidential virtue or policy desirability. In assessing the Trump record, we have not evaluated the economic, public health, social, or environmental effects of his deregulatory agenda. Thus, we take no stance on whether the agenda as a whole or any specific deregulatory action is good for the United States or the world. We do not take a side in the ongoing argument over the magnitude of the change in welfare brought about by Trump's deregulatory efforts. Rather, we simply want to determine if, and to what extent, he followed through on his stated ambitions.

MOTIVATION AND METRICS

The Trump administration sees regulation as an intrusion on the freedoms of private citizens and enterprises. This perspective is closely connected to a conservative legal philosophy that is gaining favor within the Federalist Society and conservative think tanks. President Trump's initial White House general counsel, Donald McGahn, made a pointed claim to a sympathetic audience that "the ever-growing, unaccountable administrative state is a direct threat to individual liberty." Both of Trump's appointees to the U.S. Supreme Court, Neil Gorsuch and Brett Kavanaugh, have expressed concerns about the immense powers of the modern administrative state. Relatedly, the administration is working to ensure regulators do not exceed their statutory authority when issuing regulations and Trump's Office of Information and Regulatory Affairs (OIRA) expects agencies to implement the *best* reading of the statute, not merely a *reasonable* one.

This non-economic rationale for deregulation helps explain why the Trump administration may favor deregulation in specific

President Trump symbolically cuts red tape during a December 14, 2017 press event on regulatory policy.

instances even when regulated businesses, pro-business Republicans, or professional economists do not support deregulation. The administration appears to be giving greater weight to the freedom considerations than the welfare-economic considerations that were the focus of some previous administrations.

If the deregulatory rationale is not solely about economic efficiency, then some nonmonetary metric is needed to ascertain whether the Trump administration is reducing government intrusion into the lives of citizens and businesses. A potential new metric can be found in Executive Order 13771—one of the first issued by Trump—which stipulates that "for every new regulation issued, at least two prior regulations [must] be identified for elimination." EO 13771 also calls for a new regulatory budgeting

process to control the overall cost of agency regulations. Prior to the Trump administration, there was no annual cap on the additional cost burdens an agency can impose.

At the end of fiscal year 2017, the Trump administration reported that it had accomplished 22 acts of deregulation for every act of regulation. It should be noted that this ratio is not an apples-to-apples comparison. Acts of deregulation are defined liberally by OIRA to include non-significant regulations (those not reviewed by OIRA), significant regulations (those reviewed by OIRA), economically significant regulations (those reviewed by OIRA and having the largest economic effect), guidance documents, paperwork requirements, and even avoidance of planned regulations. Acts of regulation are defined more narrowly to encompass only promulgation of significant new regulations. In our interviews with regulatory experts across the political spectrum, skepticism was expressed as to whether this approach to

computing the ratio is intellectually defensible.

The regulatory budgeting process may have much less effect than proponents hoped, but also much less effect than opponents feared. That is because the political appointees in the Trump administration are not eager to adopt new regulations, especially ones that would impose additional costs on regulatees. Regulatory budgeting is more likely to affect a government like Tony Blair's 1997–2007 prime-ministership in the United Kingdom, where substantial ambitions for new regulations coincided with the need for regulatory housekeeping in the UK.

A regulatory budget may also not have much of an effect on a deregulatory-minded administration. Trump is separately instructing his cabinet officers to find as many regulations as possible to eliminate and his appointees have been carefully selected to ensure sympathy with deregulation. The proof of a regulatory budget will be in the pudding: the number of existing regulations eliminated or made less burdensome or less intrusive by the Trump administration.

FINDINGS

So how did this turn out? Below are the results of our assessment of the first two years of the Trump administration's regulatory policies. As part of this assessment, we consider both the *flow* of new regulations and the *stock* of existing regulations.

Finding 1: *The flow of new regulations was much smaller than under the previous two administrations.*

The pace of issuing new regulations under President Trump has slowed considerably compared to recent presidential administrations. Table 1 reports the number of new regulations issued in the first 24 months of the Trump, Barack Obama, and George W. Bush presidencies. As the table shows, the total number of final regulations issued under Trump is approximately 40% smaller than the number issued under Bush or Obama. The number of significant regulations under Trump is almost 50% smaller than the number issued under Bush and Obama. For major rules (i.e., the most economically significant rules), the counts under both Trump and Bush are substantially smaller than under Obama.

The final columns in Table 1 refer to regulatory and deregulatory actions under Trump's EO 13771, and those terms are applicable only to his administration. The difference between the number of significant regulations under Trump and the number of regulatory actions subject to his EO 13771 is notable. The smaller number reflects the limited scope of the two-for-one order as the administration restricted coverage to exclude transfer rules, financial rules, budgetary rules, rules from independent agencies, and other specialized cases.

Why is the flow of new regulations so small under Trump? His administration did propose large cuts in the budgets of regulatory agencies, though Congress largely failed to adopt them even when

TABLE 1

New Rulemakings During Recent Presidents' First 24 Months

	Total Regulations	Significant Regulations	Major Regulations	Regulatory Actions under EO 13771*	Deregulatory Actions under EO 13771*
G.W. Bush	6,999	1,885	103	N/A	N/A
Obama	6,793	1,931	176	N/A	N/A
Trump	4,310	1,027	90	17	243

Sources: US GAO Federal Rule Database and the White House Office of Management and Budget.
* Covers the time period from 1/20/17 through 9/30/18.

it was controlled by Republicans. Therefore, we believe the most important factor may be the appointments President Trump made to the federal regulatory agencies because they appear to have been made with a preference for deregulation. Another underappreciated factor may be vacancies at regulatory agencies. An unusual feature of the Trump administration is that the White House has been relatively slow to nominate candidates for top regulatory posts and the Republican-majority Senate has been correspondingly slow to approve the nominations that were made.

Finding 2: *The Trump administration has been somewhat effective in working with Congress on legislative acts of deregulation.*

The Trump administration worked with the Republican-majority House and Senate to deregulate through legislative action. The tools to accomplish this included resolutions of disapproval of recent rules under the Congressional Review Act (CRA) and deregulatory provisions inserted as part of newly enacted legislation.

Until President Trump took office, the CRA had been used to overturn only one regulation since the law's inception. The CRA is an unlikely tool if the White House and both houses of Congress are not held by the same party because the president can veto disapproval resolutions and a two-thirds congressional majority would be required to override the veto.

The 2016 election allowed the Republican Party to take control of the White House and both chambers of Congress simultaneously. The Republican Congress promptly began applying the CRA in an aggressive manner. Between February 14, 2017 and May 21, 2017, 16 resolutions of disapproval were passed and signed by Trump. Many other resolutions of disapproval were introduced but failed to garner bicameral support for various reasons, including the scarcity of Senate floor time; the CRA limits the time for passage of disapproval actions.

The economic importance of the 16 CRA disapprovals can be questioned. None of them approach the potential economic effect of the multi-billion-dollar Occupational Safety and Health Administration ergonomics rule that was the subject of the sole previous use of the CRA, back in 2000. And several of the recent CRA actions were enacted without quantitative estimates of benefits and costs; that analysis is required only for major (economically significant) regulations.

The Trump administration also worked with Congress on direct

legislation to accomplish deregulation. Four items are worthy of mention:

- Congress repealed, as part of tax reform, the penalty for violating the individual mandate in the Affordable Care Act (ACA), the most unpopular provision of President Obama's signature piece of domestic legislation.
- Also as part of tax reform, Congress authorized oil and gas drilling in the Arctic National Wildlife Refuge on Alaska's North Slope.
- Congress passed modest deregulatory provisions in banking reform legislation.
- In a March 2018 appropriations law covering the Department of Labor, Congress created a compromise to the controversy surrounding how tips are allocated at restaurants.

Finding 3: *Progress toward reviewing and removing the huge body of existing regulations has been slow, though there have been some notable achievements.*

In comparison to the huge volume of unanalyzed existing regulations, the number of completed Trump deregulatory actions is very small. The combined total for FY 2017 and FY 2018 is 243 out of the 68,846 total regulations adopted in the last 24 years, if we accept the accuracy of OIRA's "deregulatory" classifications. The vast majority of the 243 are not economically significant, but they address a wide range of issues, from exemptions for religious and moral objections under the ACA, to streamlined approvals of liquefied natural gas exports.

Finding 4: *The Trump administration has underway 514 deregulatory rulemakings on a wide range of issues.*

The administration's *Regulatory Agenda* reports 514 deregulatory rulemakings are ongoing (i.e., "active"). This number is small compared to the huge stock of existing regulations, but larger than what the Reagan administration tackled over a similar time frame. The fact that 26 are categorized as economically significant and 156 are categorized as significant indicate that they may represent important changes to national policy.

Finding 5: *There are early signs that Trump's deregulatory agenda is being blocked or delayed by the federal judiciary.*

The Institute of Policy Integrity (IPI) at New York University School of Law is tracking litigation over President Trump's deregulation efforts. As of May 8, 2019, there were 41 cases in the IPI database. The administration won only three; 38 were won by plaintiffs. Of those 38, 11 were cases of capitulation and 27 were cases where, from the government's perspective, adverse judicial verdicts occurred. None of the adverse decisions reached the U.S. Supreme Court, where Republican-appointed justices hold a five-to-four majority. Some legal experts have observed that Trump's loss rate in administrative litigation appears much larger than that experienced by previous administrations.

We gathered information from *Wikipedia* to determine which president appointed each of the judges participating in the 27 judicial verdicts adverse to the Trump administration. Twenty of the 27 decisions were rendered at the district court level (single judges) while six were made at the appellate level (three-judge panels). Of the 20 single-judge decisions, 15 were made by judges appointed by Democratic presidents (seven by Obama) and five were made by judges appointed by Republican presidents. All six of the three-judge panels were comprised of at least two judges appointed by Democratic presidents. In three cases the panel was unanimous and in two cases the panel was split, with both dissents written by judges appointed by Republican presidents. In the sixth case, only two judges participated in the opinion because the Senate was considering the third judge, Brett Kavanaugh, for confirmation to the U.S. Supreme Court.

Based on the IPI data, the Trump administration must face the reality that unless a case is heard by the U.S. Supreme Court, where a majority comprised of GOP-appointed justices could uphold the Trump agenda, the outcome is likely to be controlled or influenced by judges appointed by Democratic presidents.

Of note, even when the Trump administration was fortunate enough to argue a case before a judge appointed by a Republican president, the administration won only four of 11 (36%) of the decisions. Thus, a key insight from the IPI database is that the administrators, general counsels of the regulatory agencies, and OIRA need to do a much better job of building an appropriate administrative record for deregulatory decisions—buttressing the preambles to the rules and strictly following proper administrative procedures under the Administrative Procedure Act. The only positive news for Trump's administration is that the judicial setbacks to date revolve around a few consistent shortcomings (e.g., lack of a public comment period) that might be correctable.

Finding 6: *The Trump administration is undertaking several deregulatory actions related to climate change, but those actions are vulnerable to delay or reversal through judicial or legislative interventions.*

Four complications obstruct the Trump administration's deregulatory efforts on climate change regulation:

- the U.S. Environmental Protection Agency's 2009 endangerment finding on the risks posed by climate change (which has not been modified or rescinded),
- the social-cost-of-carbon issue (the Trump administration has not provided a policy rationale for changing this number),
- the health "co-benefit" issue, which indicates large non-climate-related health benefits from reducing greenhouse gas emissions and thus alters benefit–cost calculus, and
- the changing congressional politics of climate change (concern over climate change is becoming increasingly bipartisan).

These complications create vulnerability through judicial or legislative action.

Findings 7: *An unintended consequence of federal deregulation under Trump has been growth in state and local regulations.*

In a federalist system of government, the overall burden of regulation is a function of actions taken by federal, state, and local regulators. If businesses experience or fear a proliferation of conflicting state and local regulations, they may seek a uniform national regulatory solution. This situation is worthy of special analysis when product sales traverse state lines and when there are incremental costs of producing different products for different state and local jurisdictions.

An unintended consequence of Trump's deregulation program is that some state and local governments are becoming more aggressive in their regulatory policies. Three examples of this intergovernmental dynamic include internet regulation, greenhouse gas regulation for motor vehicles, and industrial-chemical regulation.

RECOMMENDATIONS

Given our findings, we have several recommendations for how the Trump administration could better pursue deregulation. Our recommendations are conditional in the sense that we are accepting the president's deregulation agenda as given.

Recommendation 1: *Empty leadership posts at federal agencies should be filled by the Trump administration as soon as possible.*

If the administration's only objective is to halt the issuance of new regulations, then regulatory offices without leadership can serve the administration's interests. But President Trump is determined to remove or reform existing regulations to make them less burdensome and intrusive, and in that case vacant regulatory posts are counterproductive.

The completion of deregulatory rulemakings is a sensitive, complex, and evidence-intensive process. Within regulatory agencies, career staff are more likely to work diligently and constructively on such rulemakings if their agency is led by a qualified and duly confirmed appointee. If a political appointee is "acting" and has not been confirmed, career staff may question the appointee's legitimacy, influence, and longevity.

Without the assistance of agency career staff, it is unlikely that deregulatory rulemakings will be completed in a judicially defensible manner. Some improvements may be needed in the Trump administration's personnel policies and in appointee-careerist working relationships to achieve high-quality deregulatory rulemakings.

Recommendation 2: *When the Office of Management and Budget reports the number of deregulatory and regulatory actions, the same type of actions should be counted on both sides of the ledger.*

OIRA is not currently making apples-to-apples comparisons under the Trump two-for-one executive order. If only significant new regulations are counted as pro-regulatory actions, then only significant deregulatory actions should be allowed to offset them. This recommendation is particularly important for OIRA's public communications about progress on deregulation because the ratios currently reported lack credibility.

There is some indication that OIRA recognizes this concern: for FY 2018, it reported both the number of regulatory and deregulatory actions subject to EO 13771 in terms of significant rules.

Recommendation 3: *New tools are needed to measure the effects on freedom of regulatory and deregulatory actions.*

Not all regulations are equally intrusive, yet the Trump two-for-one accounting system implicitly assumes that they are. A new measurement system should be devised and validated that would account for the degree of a regulation's intrusion on each regulatee and the number of regulatees that are affected. The system could be semi-quantitative or continuous, as either would be more defensible than the current approach, which fails to consider the extent of regulatory effects on freedom. Research is needed to develop the tools to assist agencies and OIRA in understanding the extent of regulatory intrusion and deregulatory liberation. OIRA should request the National Science Foundation to commission tools-oriented research and development into how changes in human freedom from regulation can be defined and measured.

Recommendation 4: *The forgone benefits of regulation need to be taken seriously in regulatory impact analyses, agency decision making, and OMB communications about federal regulatory policy.*

When a regulation is rescinded or made less burdensome or intrusive, benefits may be forgone that would have occurred had the regulation been implemented and enforced. Forgone benefits, which may be qualitative or quantitative in nature, can relate to a variety of welfare outcomes like economic wellbeing, health status, social equity, and environmental quality.

Failure of agencies to analyze forgone benefits will undermine public confidence in regulatory analysis and put deregulatory actions at significant risk of judicial and legislative reversal. Like smart regulation, smart deregulation includes careful consideration of the societal consequences on both sides of the benefit–cost ledger. Benefit–cost analysis may therefore increase the stability of regulation or deregulation.

Recommendation 5: *The Trump administration should revise its climate rulemakings to make them less vulnerable to judicial reversal. It should also consider a legislative initiative on climate policy.*

The EPA's final climate rulemakings should be revised to ensure responsiveness to the agency's 2009 endangerment finding and the climate science that has since been published. The final rules may not need to be as stringent as the Obama-era rulemakings, but they must be responsive to climate science and based on improved analyses of the benefits of reducing greenhouse gases and related co-benefits. A clear policy rationale should be provided as to why the EPA shifted from primary reliance on an estimate of the global social cost of carbon to primary reliance on an estimate of only the domestic cost.

Given that the politics of climate change will shift in the new Congress, the Trump administration—if it returns for a second term—should consider developing a legislative position. Without one, the administration risks being excluded from legislative dialogue.

Recommendation 6: *When devising federal regulatory and deregulatory solutions, the Trump administration should consider the prospects of future state and local regulations.*

In our federalist system, a proliferation of conflicting state and local regulations may be the predictable result of a regulatory vacuum at the federal level. The Trump administration needs to engage in careful legal, economic, and political analysis of the opportunities for federal preemption of state and local regulatory actions. On the other hand, the potential for policy experimentation and learning from state and local innovation in regulatory choice should be considered. On occasion, a negotiated solution between federal and state regulators may be superior to years of unpredictable litigation.

CONCLUSION

In his first two years in office, President Trump emphasized deregulation to a greater extent than his predecessors. This can be seen in his presidency's small number of new regulations and new major regulations, the number of existing regulations targeted for elimination or reduced stringency, and the ideological composition of his political appointees and judicial appointments.

However, Trump's effectiveness as a deregulator has been hampered by a lack of political appointees in key regulatory agencies and a skeptical judicial branch dominated by judges appointed under Democratic administrations. The president could improve his effectiveness as a deregulator by filling key administrative positions that are now vacant or held by "acting" appointees, paying greater attention to the administrative process for revising existing regulations, and developing better metrics for deregulation. **R**

READINGS

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