

Trumping the Administrative State

By Adam J. White

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For deregulators, it was a very good year.

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During the 2016 presidential election, the *New York Times* alleged that the Trump campaign had offered to make John Kasich “the most powerful vice president in history,” through a novel division of duties: The vice president “would be in charge of domestic and foreign policy.” The president, meanwhile, would be in charge of “making America great again.”

The story might be apocryphal, but a year and a half later it resembles the Trump administration’s approach to reforming or rolling back the modern administrative state. While President Trump’s statements and tweets have dominated headlines, his agencies have taken important first steps toward significantly changing the ways that federal agencies govern American life, a process that began months ago with the president’s executive orders and continues under the watchful eye of the White House’s Office of Information and Regulatory Affairs (OIRA) and which was amplified in significant ways by Congress’s broad use of the long-dormant Congressional Review Act.

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This strong start is a signal achievement. But still greater challenges lie ahead. If, in the words of *Time*, *Politico*, and the *Washington Post*, the Trump administration has declared “war” on the regulatory state, then year two will be the time for the administration to show that it planned not just for the invasion but also for the long-term occupation.

Cutting Red Tape—Literally

Ribbon-cutting ceremonies traditionally mark the beginning of construction. But in December, the White House held a ribbon-cutting ceremony to mark a deconstruction. A few days before Christmas, President Trump stood in the White House’s Roosevelt Room, surrounded by administration officials and reams of paper. A few small piles represented the federal government’s regulations in 1960; other humongous piles represented regulations today. Affixed to the stacks was a long piece of red tape; President Trump, with his scissors, wasn’t trying to be subtle.

“We’re here today for one single reason,” he said: “to cut the red tape of regulation.” Citing the administration’s new policies on energy, the environment, and infrastructure, the president criticized the regulatory state that he inherited: “an ever-growing maze of regulations, rules, [and] restrictions” that “has cost our country trillions and trillions of dollars, millions of jobs, countless American factories, and devastated many industries.”

“But,” he added, “all that has changed the day I took the oath of office, and it’s changed rapidly. You’ve seen what’s happened. We’ve begun the most far-reaching regulatory reform in American history.”

Reporters, perhaps immune to grandiose presidential pronouncements, seemed underwhelmed by the announcement; they asked him about Marco Rubio and about Omarosa. But the president’s characteristically grandiose rhetoric was rooted in reality, as evidenced by the report released that same day by OIRA, the White House’s regulatory oversight office.

OIRA reported that in 2017 federal agencies “withdrew or delayed

1,579 planned regulatory actions.” Specifically, 635 regulatory initiatives previously announced by agencies had been withdrawn from the “Unified Agenda,” a semiannual White House report of the government’s pending regulatory activities; another 700 initiatives were downgraded to “Long Term” priority; and still another 244 regulatory initiatives were downgraded to “inactive” status. And OIRA expects the deregulatory trend to continue. “Agencies plan to finalize three deregulatory actions for every new regulatory action” this fiscal year, it noted.

Not everyone was impressed. Days earlier, *Bloomberg BusinessWeek* mocked the Trump administration for taking credit “for killing hundreds of regulations that were already dead,” because “hundreds of the pending regulations had been effectively shelved before Trump took office.” Citing a July White House report that 469 regulatory actions had been withdrawn, *BusinessWeek* argued that “42 percent of them were as good as dead already,” either because the Obama administration had had “no immediate plans to impose them” or because “there had been no activity on them in years.” And “another 15 had been halted under Obama before Trump took office.”

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Some of *BusinessWeek*’s specific criticisms had merit. (If only journalists took such a skeptical view every time federal regulators claimed to be helping the American people.) But the criticisms were overstated. To say that an agency’s regulatory proposals had been “effectively shelved” or were “as good as dead” is to admit that they had not actually been shelved or that they weren’t in fact dead. A regulatory proposal, no matter how long dormant, can be revived and raced through the regulatory process. Formally removing proposed actions from the books is an important step toward clearing the

administrative state's underbrush, an important assurance to the public.

And the administration plans to do more. The December report was accompanied by a letter from Neomi Rao, administrator of OIRA, an office long nicknamed the "regulatory czar." She characterized the administration's regulatory reform agenda in fundamental, constitutional terms:

This Fall 2017 Regulatory Plan reflects a fundamental shift. The Trump Administration recognizes that excessive and unnecessary federal regulations limit individual freedom and suppress the innovation and entrepreneurship that make America great. Starting with confidence in private markets and individual choices, this Administration is reassessing existing regulatory burdens. . . . Our regulatory philosophy and approach emphasize the connection between limited government intervention and individual liberty. Regulatory policy should serve the American people by staying within legal limits and administering the law with respect for due process and fair notice.

The White House already can claim some concrete victories. As it detailed in a list of regulatory actions completed in the administration's first year, agencies completed 67 "deregulatory actions" and issued only 3 new major rules: an Energy Department rule for walk-in coolers, an FDA notice for skilled nursing facilities, and the EPA's new regulation of dental offices' discharge of mercury into public water systems. The White House claimed that its deregulatory actions saved the public a net \$8.1 billion.

Importantly, the White House wasn't alone in this deregulatory work. In 2017 Congress made unprecedented use of the Congressional Review Act to nullify regulations that agencies had finalized in the Obama administration's last months. The CRA empowers Congress to strike down regulations or guidance documents promulgated by agencies on a legislative fast-track immune to filibusters.

Because the law requires the president's signature to complete Congress's rollback of a regulation, the CRA long was seen to be useful only during the opening days of a new presidency, when a new Republican president could sign Congress's resolutions striking down his Democratic predecessor's regulations. (Or, theoretically, vice versa.) Thus, while the CRA was enacted in 1996, it had been used successfully only once in its first 20 years, by President George W. Bush in 2001.

This year, by contrast, Congress passed 15 joint resolutions to nullify federal regulations under the CRA—ranging from the FCC's broadband Internet privacy rules to the Labor Department's controversial "fiduciary rule" governing financial advisers—and President Trump signed them all. The president and Congress even managed to nullify a regulation promulgated this year by an agency ostensibly within Trump's own administration: the Consumer Financial Protection Bureau, an independent agency led for much of the year by President Obama's appointee, Richard Cordray. And under the terms of the Congressional Review Act, the agencies are permanently prohibited from reissuing those regulations in substantially similar form without new authorization by Congress.

All told, it was a very, very good start.

The End of the Beginning

But before anyone declares "Mission Accomplished," it is important to keep in mind that the administration's work is only beginning. As President Trump noted in his December remarks, the admin-

istration has "*begun* the most far-reaching regulatory reform in American history." But being just the first year of a new administration, only so much can actually be finished. The Brookings Institution, which tracks deregulatory actions by the agencies, identifies just 15

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regulations previously in effect that have actually been repealed. (Although, as *BusinessWeek* reported, Brookings “acknowledges the list is not complete.”) The vast bulk of agency efforts to repeal existing regulations remains a work in progress.

As noted in the *Weekly Standard* early last year (“[The Power of the Presidential Pen](#),” March 13, 2017), this process began with a series of significant executive orders intended to kickstart the deregulatory process. The president issued orders directing agencies to reconsider and reform specific regulations (such as the EPA’s “Clean Power Plan,” a set of radical energy regulations aimed at reducing greenhouse gas emissions) or directing agencies to reorient themselves toward new policy priorities (such as the “Core Principles for Regulating the United States Financial System”). The president also signed significant orders affecting federal agencies across the board—most importantly Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” which ordered every agency to repeal two regulations for each new one it would issue and which imposed a “regulatory budget,” capping the costs agencies can impose on the public.

Federal agencies energetically took up this agenda. The EPA proposed to repeal the Clean Power Plan and replace it with a set of more reasonable regulations. The FCC has repealed the prior administration’s program for regulating broadband Internet services. Those are just two examples of many. As analysts at George Washington University’s Regulatory Studies Center highlighted in an excellent year-end report, OIRA’s “Fall 2017 Agenda includes hundreds of deregulatory activities, including 83 planned deregulatory activities from the Department of Transportation (DOT) and 54 from the Department of Health and Human Services.”

But hundreds of deregulatory activities will eventually be met with hundreds of lawsuits. And because the regulatory process tends to take a year or two before an action can be finalized, 2018 will mark the beginning of a steady wave of agency decisions that will immediately be appealed to federal courts. While many of these lawsuits will

be mundane, others—especially those challenging the FCC’s net-neutrality repeal, HHS health-care reforms, or just about anything issued by the EPA—will not. High-profile lawsuits can be expected, which often will be filed strategically before courts staffed disproportionately by sympathetic judges in Washington, D.C., or on the West Coast. This litigation may come to resemble the lawsuits challenging President Trump’s immigration and refugee orders: Judges will scrutinize agency actions much more aggressively than before. The traditional deference by judges to regulatory agencies’ decisions is unlikely to prevail, and courts will undoubtedly invoke statements by the president or by his appointees that they see as undermining the credibility that agencies usually are afforded. (This will be quite a turnabout after Democrats less than a year ago criticized President Trump’s appointee to the Supreme Court, Neil Gorsuch, for having questioned the amount of “deference” that courts give agencies.)

In all of this, we can expect the latest iteration of a familiar cycle: Many of those who once denounced judicial reversal of Democratic agency rules as “politicized judicial activism” can be expected to celebrate judicial reversal of Republican agencies as “the triumph of expertise over politics.” This makes President Trump’s public statements, and those of his agency heads, all the more important. The administration’s critics can be expected to challenge the agencies’ work in court; the president and his agency heads should not make their work easier by undermining the agencies’ own credibility.

If President Trump wants to succeed in actually cutting red tape and reforming the administrative state, it will not happen through tweets but through an executive order reforming and modernizing White House oversight of the regulatory agencies. He already

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accomplished much of this through his 2017 orders, but the legal and regulatory community continues to await an executive order updating the OIRA framework. Such orders are a staple of each new administration. In his first year in office, President Clinton issued an order that largely retained the modern OIRA framework established by President Reagan, with a few significant recalibrations. After President Bush succeeded Clinton, he waited barely more than a year to order reforms of his own; President Obama revoked those changes almost immediately upon his own inauguration. President Trump has not yet issued a similar order, which could conceivably extend OIRA's oversight to the so-called "independent agencies," such as the SEC and FCC, which the White House has long exempted from OIRA's core mission of reviewing agencies' estimates of regulatory costs and benefits.

Of course, Congress could itself legislate reforms to the legal framework governing the agencies, through the proposed Regulatory Accountability Act; a version of this bill already has been approved by the House of Representatives, and a bipartisan coalition of senators has introduced a similar version of it. But after the legislative breakdowns of 2017, it is not hard to imagine that Congress's deregulatory work in 2018 will be limited to nullifying more regulations and guidance documents with the Congressional Review Act. Under the act's plain terms, regulations and guidance documents not submitted to Congress for a CRA vote when an agency first promulgated them can still be submitted years after the fact, belatedly giving Congress its statutory opportunity to repeal those regulations or guidance documents and block the agencies from reissuing them.

Further use of the CRA would be no small feat, but if 2018 passes without major legislation reforming and modernizing the basic laws governing agencies—especially the Administrative Procedure Act of 1946, as described in the *Weekly Standard* last year ("[Regulatory Rollback](#)," September 11, 2017)—then Republicans controlling the White House and both houses of Congress will have squandered a rare opportunity to fundamentally reform our administrative state,

an opportunity Republicans may not enjoy again for a long time.

It would be disappointing and ironic: Congress's inaction is itself one of the main causes of our modern administrative state. By failing to legislate on the issues of greatest national interest, Congress creates a policy vacuum that agencies fill unilaterally with regulations. Lawmakers further compound this problem by failing to reform the antiquated appropriations process that no longer ties Congress's oversight of agencies to its constitutional "power of the purse."

Reform from the Bottom Up

But even in the absence of reforms legislated by Congress or ordered by the president, there is still something that individual agencies can do to improve the regulatory process: They can unilaterally adopt reforms to promote transparency and accountability within their own houses. Perhaps the best example of this so far are the efforts at the Justice Department and Education Department to scale back their reliance on "guidance" documents, a broad category of agency pronouncements that regulate the public but that do not undergo even the minimal procedures for public accountability otherwise required of new regulations. If these two departments succeed in reforming their own practices, they could come to be seen by the public (and by judges and legislators) as the regulatory equivalent of "best practices," raising the bar for what we expect of other agencies.

While such changes might seem minor, their impact could long outlive the agencies' more prominent substantive work. The next Democratic administration could undo much of the Trump administration's deregulatory effort every bit as quickly as the Trump administration undid the Obama administration's regulatory actions. But if Trump agencies succeed in improving their own transparency and procedural rigor, and if those agencies trumpet those reforms loudly, their Democratic successors may find it difficult to credibly undo those reforms—just as the Clinton administration largely accepted the dramatic OIRA reforms established and entrenched by Presidents Ronald Reagan and George H. W. Bush.

That is a lesson of an important new essay in *National Affairs* by political scientist Andrew Rudalevige. Tracing the history of OIRA's regulatory-review framework back to its forerunners in the Nixon, Ford, and Carter administrations, Rudalevige shows that the structural reforms usually ascribed to Reagan succeeded not simply because Reagan ordered them but because the Reagan administration committed itself to building upon practices that had taken root in earlier Republican and Democratic administrations. Such fundamental reforms, Rudalevige notes, required more than just a couple of executive orders telling agencies to change: "Lasting reform comes only from institutionalization, which requires the long-term investment of organizational resources, ranging from staff expertise to political capital." And, he adds, "whether those resources will be provided depends on how much good government a president really wants to buy."

Years from now, we may find that some of the Trump administration's most important regulatory reforms in 2018 were the ones that attracted the least attention. Executive orders and regulatory repeals announced to great fanfare are very important; even more important are reforms changing the culture of modern regulatory agencies, achieved through sustained effort within those agencies, to little fanfare and no ribbon-cutting.

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