

Swamp Things—Trump’s Discordant Regulatory Impulses Threaten to Derail His Successes and Expand the Administrative State

I will be signing our 738 Billion Dollar Defense Spending Bill today. It will include 12 weeks Paid Parental Leave, gives our troops a raise, importantly creates the SPACE FORCE, SOUTHERN BORDER WALL FUNDING, repeals “Cadillac Tax” on Health Plans, raises smoking age to 21! BIG!

—Tweet by President Donald Trump, December 20, 2019.¹⁴⁵

President Trump has pruned rules and costs and held down regulatory output with more enthusiasm than other presidents.¹⁴⁶

Trump cuts. But Trump also adds.

Some increases in regulation remain inevitable, and the spending state propels that as well. A president is limited in any ability to unilaterally roll back much of the administrative state. For example, the Trump administration’s making peace with the Affordable Care Act now seems near-inevitable given the grinding machinery of the administrative state, driven by massive, sweeping legislation that delegates enormous power to agencies.¹⁴⁷ This ratcheting upward of federal administration, with rare retrenchment, is endemic of institutionalized social-policy fiscal spending and regulation, the cost of which is rarely measured beyond the purely budgetary element.

On the flipside of Trump’s regulatory savings, Trump sports regulatory impulses of his own that could derail or even eclipse the rollback agenda not just in 2020 but for years beyond.¹⁴⁸ Not every Trump executive

order has reduced regulatory intervention; some open the door to it. Trump’s proclivity for trade restrictions and his ad hoc zeal for antitrust and media regulation (such as swipes at Amazon and the AT&T–Time Warner merger) are well known.¹⁴⁹ There are additional less well-known warning signs of regulatory initiatives that have emerged or heightened during the Trump tenure, such as the president’s approval of a permanent reauthorization of the Land and Water Conservation Fund,¹⁵⁰ and his boasting of “the largest public lands package in a decade, designating 1.3 million acres ... of new wilderness” for a federal government that already owns a large portion of the continent.¹⁵¹

In the worst case—one-in, two-out and net-zero “regulatory budget” notwithstanding—Trump could be adding more than he is subtracting in terms of the broader federal administrative state interventionist dynamic. And just as some of the relaxation of regulatory action does not show up in the *Federal Register*, many of the interventions now in play may not show up immediately or lend themselves to measurability.

Notably, on October 17, 2018, the day the 2018 fiscal year two-for-one update was released, Trump held an Oval Office meeting on regulations and the economy with several industry-specific workers and cabinet officials during which he said: “We’ve removed more regulations, and we will continue to get rid of regulations.” But then, in a little-noted remark at the time, Trump said, “I think within a period of about another year, we will have just about everything that we’ve wanted.”¹⁵² Yet, there remains plenty to be done regarding comprehensive regulatory

There are additional warning signs of regulatory initiatives that have emerged or heightened during the Trump tenure.

The administration has energized pursuit of antitrust-related campaigns related to long-dormant issues like price fixing.

reform, especially given the administrative state's propensity to grow and its built-in defenses against retrenchment.

Among the bigger complications for the Trump streamlining agenda is the fact that one cannot get rid of regulations; one can generally at best replace a rule with another rule.¹⁵³ As former OIRA Administrator Susan Dudley pointed out:

For significant regulations, agencies must develop a legal and factual record to support the action, engage in interagency review led by OMB, seek public comment on the revisions, and justify the final action with information in the record.¹⁵⁴

This does not give any president much time in the face of a patient careerist-dominated administrative state, yet there is much on the books that may only be addressed in this fashion when Congress sits idly by. But more important, Trump's own regulatory impulses have become the most pertinent concern, particularly where he exhibits substantial agreement with regulatory advocates on issues such as antitrust policy, regulatory action against tech firms and traditional media companies, and industrial and social policy.¹⁵⁵ What follows are areas where the administration has added regulation or aggressively signaled support for intervention. This section will conclude with observations about rules with ambiguous effect and the complexities those present in streamlining bureaucracy.

Antitrust. On the one hand, the Trump administration has taken steps to cut merger review times overall and to speed up bank merger approvals via internal streamlining at the Federal Reserve and Comptroller of the Currency.¹⁵⁶ But on the other hand, President Trump has casually invoked antitrust action against some tech and telecom firms, striking a discordant note with his deregulatory agenda. A hint occurred when candidate Trump proclaimed, "AT&T is buying Time Warner, a deal that we will not approve in my administration ... because it is too

much concentration of power in the hands of too few. ... We will look at breaking that deal up and other deals like it."¹⁵⁷ The Justice Department's attempt to block the merger ultimately failed.¹⁵⁸ Similarly, Trump tweeted in 2018 that Comcast may be violating antitrust laws.¹⁵⁹ However, after mulling it over (such delay of transactions is itself a regulatory cost), the Justice Department did not investigate the Comcast-NBCUniversal alliance.¹⁶⁰ Further, the president has said that Google, Facebook, and Amazon may be in a "very antitrust situation,"¹⁶¹ and said he was "in charge" and "looking at it,"¹⁶² in an environment in which politicians and pundits across the political spectrum have called for the breakup of those companies.¹⁶³

In early 2019, the Federal Trade Commission (FTC) announced a "technology task force" to assess tech sector "antitrust" violations and increase scrutiny of acquisitions beyond current practice.¹⁶⁴ In the wake of that, and in contrast to the administration's recognition of the misuse of guidance elsewhere, the FTC is now in the process of drafting guidance on how the antitrust laws apply to the technology sector and defending its own role in policing it.¹⁶⁵

In other antitrust developments, the FTC is pondering an injunction against Facebook's procedures for interoperability across platforms.¹⁶⁶ The FTC is also in the early stages of investigating Amazon, having started interviews in 2019 with businesses that sell on the site.¹⁶⁷ Other signals point to a potentially expanding Trump administration antitrust agenda by the Department of Justice and FTC beyond big Internet firms.¹⁶⁸ The FTC, for example, is challenging an acquisition transaction in DNA sequencing.¹⁶⁹

Hospital and pharmaceutical price transparency mandates and price controls. Reform legislation affecting the Food and Drug Administration (FDA), known as "right to try," has expanded the public's access to certain needed medications.¹⁷⁰ On the other hand, the administration has energized pursuit of antitrust-related campaigns related to long-dormant issues like price fixing. The

Trump administration in 2018 rattled the pharmaceutical industry with charges that companies were “getting away with murder” and voicing support of government drug-price negotiation.¹⁷¹ The administration that year introduced a regulatory proposal to require pharmaceutical price-listing mandates in television advertisements.¹⁷² A federal judge blocked the subsequent rule from the Department of Health and Human Services.¹⁷³ Demonstrating Trump’s own contention that regulation drags down markets, the drugmakers’ shares rose upon the blocking of the rule.¹⁷⁴

We have not likely seen the end of such campaigns. Some Republicans in the U.S. Senate proposed not just transparency but controls on prices (tying them to lower prices charged in some other nations), in an attack on “big pharma companies,”¹⁷⁵ which would affect availability and medication research and innovation.¹⁷⁶ The president is reported to support the idea as well, in the wake of the judicial rejection of compelled TV ad listings.¹⁷⁷

The president also issued an executive order in mid-2019 on hospital price transparency that, while it expanded Health Savings Accounts and Flexible Spending Accounts, included negotiated rates for services and shoppable items.¹⁷⁸ This presaged finalization of a rule in November 2019 about which the president boasted, “Under the new price transparency rule ... hospitals will soon be required to publish the price of everything from individual medical supplies to the total cost of common procedures.”¹⁷⁹ Today, little of the nation’s medical sector remains unsupervised by the federal government.

Speech, social media, and tech regulation.

Trump and many on the left agree on regulation of social media search and speech, although each camp has its own reasons.¹⁸⁰ When Trump’s economic adviser Lawrence Kudlow was asked in the summer of 2018 about the administration’s openness to regulating Google search results, he responded, “We’ll let you know. ... We’re taking a look at it.”¹⁸¹ Google is a private entity, and the

search results it offers up represent free speech of Google’s own. Facebook, Google, Twitter, and other private platforms cannot censor; only governments can do that.¹⁸²

Yet Trump has tweeted extensively about media censorship,¹⁸³ and not just social media censorship. At one point candidate Trump even threatened NBC’s broadcast license,¹⁸⁴ and in June 2018 called for a boycott of AT&T over CNN’s coverage of himself.¹⁸⁵ Candidate Trump in 2016 proclaimed at a rally, “I’m going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money.”¹⁸⁶ Trump reaffirmed that sentiment at a January 2018 cabinet meeting, telling reporters, “We are going to take a strong look at our country’s libel laws.”¹⁸⁷

Asked at a November 7, 2018, press conference if he would regulate social media companies, Trump acknowledged that “when you start regulating, a lot of bad things can happen.” Nonetheless he said, “I would do that. Yeah. I would look at that very seriously. I think it’s a serious problem. At the same time, you start getting into speech; that’s a very dangerous problem. That could be the beginning. So it’s very dangerous. ... But I would certainly talk to the Democrats if they want to do that. And I think they do want to do that.”¹⁸⁸ In the wake of a June 2019 *Fox Business* interview Trump attacked tech giants like Google and Facebook for “bias ... toward Democrats” and “hatred” for Republicans and said legislation may be warranted, and that they “should be sued.”¹⁸⁹ And in June 2019 Trump said he was “all in” for a “no brainer” constitutional amendment proposed by Sen. Steve Daines (R-MT) to ban burning of the American flag.¹⁹⁰

In May 2019 the administration set up a tattletale Tech Bias Story Sharing Tool (since discontinued) for members of the public to report to the White House allegations of online bias and censorship, such as account suspension or termination.¹⁹¹ That was followed by a July 11, 2019, White House Social Media Summit featuring a number of right-of-center personalities.¹⁹² In a Tweet

*Facebook, Google,
Twitter, and other
private platforms
cannot censor;
only governments
can do that.*

Taxes influence behavior and are regulatory, and the tech sector is naturally a target in that regard.

showcasing the event, the president asserted, “Today, I am directing my Administration to explore all regulatory and legislative solutions to protect the free speech rights of ALL AMERICANS. We hope to see more transparency, more accountability, and more FREEDOM!”¹⁹³

The White House also appears to be considering an executive order to combat alleged anti-conservative social media bias.¹⁹⁴ This move would complement other moves by conservatives, potentially working with progressives, to change the regulatory environment of social media and big tech and its accountability for user-generated content. The result of that would likely backfire on conservatives by making bias real rather than imaginary or exaggerated.¹⁹⁵

Tech regulation. The regulatory apparatus aimed at social media goes beyond market-power and speech concerns. In July 2019, the Federal Trade Commission approved a record-level fine against Facebook for alleged privacy violations involving consulting firm Cambridge Analytica gaining improper access to user data.¹⁹⁶ The agreement could result in very close regulatory supervision of the company’s moves henceforth.¹⁹⁷

Another major but much smaller privacy settlement is that of the FTC with YouTube over the service’s collecting children’s information without parents’ consent. Illegal behavior and violation of contract need to be addressed, but overzealous responses can backfire as well as affect firms that have not misbehaved. As former FTC chief technologist Neil Chilson noted on Twitter, “The FTC has shifted in a way that will require platforms to police user-generated content more heavily. This is an incremental change for big platforms who already have large staffs to review content; it is a much bigger deal for small players.”¹⁹⁸

Alongside antitrust, social media “censorship,” and privacy-related incursions, other escapades illustrate the many ways policy makers, even in a deregulatory Trump ad-

ministration, will seek openings to creatively expand power.

In a rerun of a contentious move that happens periodically, some high-level security officials in the Trump administration are seeking to bar encryption that law enforcement cannot circumvent.¹⁹⁹

The FTC has discussed in hearings concerns with algorithms that share user data in behind-the-scenes “auctions” that influence the advertisements viewers see.²⁰⁰

The FTC hosted a workshop to “examine consumer protection issues related to video game ‘loot boxes,’ in-game rewards players can buy while playing a video game.” Sharing sentiments with and mirroring pursuits of some legislators who wish to treat video gaming as an “addiction” and elevate government-as-parent in response, one panel examined “potential social, psychological, and economic motivations associated with loot box spending,” while another focused “on current initiatives for disclosing in-game micro-transactions and explore ideas for other mechanisms that may enhance consumer protection.”²⁰¹

Online taxes. Taxes influence behavior and are regulatory, and the tech sector is naturally a target in that regard. When the Internet sales tax was upheld in the 2018 Supreme Court case *South Dakota v. Wayfair, Inc.*,²⁰² the Competitive Enterprise Institute’s Jessica Melugin observed that “the U.S. Supreme Court reversed 50 years of precedent by allowing states to collect sales taxes from businesses located completely outside that states’ borders.”²⁰³ While the ruling was by no means any of Trump’s doing, the president had seemed to favor an Internet tax, perversely seeing it as a shot at Amazon, despite that company’s being one of the online sales tax’s most high-profile proponents.²⁰⁴ On the international stage, French President Emmanuel Macron proclaimed on Twitter, “Some digital players pay very little tax. This is an injustice that destroys jobs. @realDonaldTrump and I have just agreed to work together on an agreement at the @OECD level to modernize international tax rules.”²⁰⁵

Bipartisan large-scale infrastructure spending with regulatory effects. Too often, the only bipartisanship found in Washington is in passing big spending bills, as both parties show an inclination toward spending stimulus in the form of infrastructure.²⁰⁶ Proposed spending levels have called for \$1 trillion in direct federal spending, with plenty of regulatory set-asides and stipulations.²⁰⁷ Heavy government spending in economic quarters will always have regulatory effects and alter the trajectory of industries engaged in large-scale transactions. At this writing, it is too early to tell the regulatory effects of the \$2 trillion-plus COVID-19 relief legislation, though those should be apparent by the time of the 2021 edition of this report.

Trump has engaged in a number of significant executive actions to liberalize infrastructure permitting and expansion.²⁰⁸ Ominous, though now perhaps off the table following the impeachment episode, was talk of a potential arrangement with House Speaker Nancy Pelosi (D-CA) of some form of major federal infrastructure spending package.²⁰⁹

At the FCC, the infrastructure subsidy/welfare Rural Digital Opportunity Fund intends to spend tens of billions of dollars to bring old-school telephony subsidies to the modern age, with new mapping approaches to expand it in the future.²¹⁰ At one point, Trump championed the enlistment of eminent domain to contribute to building a wall on the southern border with Mexico, invoking the potential use of a “military version” of an already awesome power.²¹¹

Trade restrictions. President Trump once referred to himself as “Tariff Man.”²¹² Trade wars do not work because tariffs hurt Americans.²¹³ Barriers create direct costs, regulatory uncertainty, and market losses—likely greater than Trump’s regulatory savings. In a study of the Trump administration’s trade policy on prices and welfare, the London-based Centre for Economic Policy Research found that the “full incidence of the tariff falls on domestic consumers, with a reduction in U.S. real income of \$1.4 billion per month by the end of 2018.”²¹⁴

If one were to assume this trade barrier cost burden commenced in December 2018 and stayed constant, Trump’s claimed regulatory savings of \$51 billion to date would be eclipsed in about three years. One interpretation maintains that the trade war tariffs wipe out the typical household’s savings from the tax reform package enacted under Trump.²¹⁵ Resolution with China can resolve the pain of the trade war hammer.²¹⁶

In a notable fusion of trade restrictions and infrastructure spending, Trump also issued a January 2019 executive order on “Strengthening Buy-American Preferences for Infrastructure Projects.”²¹⁷ That was followed in summer 2019 by an order on “Maximizing Use of American-Made Goods, Products, and Materials” in federal contracting.²¹⁸ A fixation on reciprocity in trade deals can increase costs of household-level imports like e-commerce purchases by ejecting de minimis exemptions.²¹⁹

Anecdotes of trade harm also abound. The tariffs that were to boost the steel industry are claimed to have not had their desired effect.²²⁰ Other unanticipated effects include craft distillers canceling plans to export to Europe,²²¹ calls for helping Maine’s lobster industry suffering from the trade war,²²² and the oddity of reparative payments to farmers damaged by the trade war.²²³ Harm to farmers increased in 2019,²²⁴ compounded by the bulk of restorative aid said to unfairly benefit the largest farmers.²²⁵ Yet Trump sees nothing amiss in the latter, no problem that reparations cannot handle, upping the ante in January 2020, proclaiming of a spending package, “We’re signing a monster. A big, beautiful monster. Forty to fifty billion dollars to our farmers. ... I keep saying go buy larger tractors.”²²⁶ Even the resulting dispute resolutions can result in overly managed, backward-looking trade.²²⁷

Frontier sectors, including artificial intelligence (AI) innovation, are vulnerable to trade restrictions as well. For example, Adam Thierer and Jennifer Huddleston of the Mercatus Center at George Mason University in Virginia noted, with respect to the Trump

Too often, the only bipartisanship found in Washington is in passing big spending bills.

Government spending has often disregarded regulatory effects, such as the displacement of private action by steering toward government-chosen ends, and by creating marketplace distortions.

administration’s pondering of a “potentially massive expansion of export restrictions on a wide variety of technologies,” that more “than a dozen different AI or autonomous system technologies appear on the list for consideration.”²²⁸

Added features of the trade war with China included Trump’s call for companies to leave China altogether and for importers to police drug trafficking.²²⁹ Shares of UPS, Amazon, and FedEx fell after Trump tweeted, “I am ordering all carriers, including Fed Ex, Amazon, UPS and the Post Office, to SEARCH FOR & REFUSE ... all deliveries of Fentanyl from China (or anywhere else!).”²³⁰

Farm bill and agriculture. Many interventionist policies move along with a life of their own, but some deserve to be called out as overly regulatory when accentuated. The \$860 billion farm bill, signed December 2018, was a prominent example. Rep. Justin Amash of Michigan, a former Republican now independent, characterized it appropriately in May 2018, tweeting, “This farm bill is loaded with corporate welfare and subsidies. It’s a big-government, anti-market swamp creature that puts special interests ahead of the American people. Every conservative should oppose it.”²³¹ Trump, however, saw things differently: “[T]he House will vote on a strong Farm Bill ... We must support our Nation’s great farmers!”²³²

Stealth regulatory measures or requirements can also accompany ostensibly deregulatory ones. University of Pennsylvania Law Professor Cary Coglianese noted that when the “USDA [United States Department of Agriculture] lifted its import ban on pitahaya fruit,” it also “imposed a regulatory regimen on production sites, calling for work plans, inspections, and various pest management techniques.”²³³ That USDA move highlighted the reality that rules operate beyond presidential control as elements of regimes moving on autopilot. One example was a proposed bioengineered food disclosure requirement,²³⁴ which, according to Henry I. Miller of the Hoover Institution and University of Oklahoma Law Professor Drew L.

Kershen, “may be the worst regulation,” costing hundreds of millions annually with no benefits.²³⁵

Subsidies with regulatory effect. Government spending has often disregarded regulatory effects, such as the displacement of private action by steering toward government-chosen ends, and by creating marketplace distortions. This can come from unexpected quarters; the EPA, for its part, considered subsidies for “talking car” technologies to communicate hazard and other information.²³⁶ As a general matter, subsidies or corporate welfare aggravate problems of a president being able to, as Rep. Amash put it, “act as a central planner in chief to bribe and coerce companies.”²³⁷ The president has expressed support of the Export-Import Bank,²³⁸ long deemed a showcase for cronyism and corporate welfare.²³⁹

Trump also supports ethanol subsidies, even warning (while in campaign mode in October 2018) that Democrats would be anti-ethanol.²⁴⁰ And the EPA issued a rule in 2019 boosting the amount of ethanol allowed in gasoline blends during summer months.²⁴¹ If that were not enough, Trump set about reassuring farmers in mid-2019 nervous about his commitment to ethanol: “Farmers are going to be so happy when they see what we are doing for Ethanol. ... It will be a giant package, get ready! At the same time I was able to save the small refineries from certain closing. Great for all!”²⁴²

Telecommunications. The FCC’s approach has been deregulatory, as noted, but a long legacy of the top-down control of the “expert” administrative state leaves only new regulation and law to cope with mundane matters—like caller ID spoofing or robo-calling—with inordinate fines that competitive markets might have put to rest ages ago.²⁴³ That makes it hard to keep regulators away from more momentous concerns in any sector. But other aberrations have come from above. Early in the Trump administration, there were growing calls to build a nationalized 5G network.²⁴⁴ That elicited a response letter to the administration from

U.S. Senators Ted Cruz (R-TX) and Catherine Cortez Masto (D-NV)²⁴⁵ and introduction of anti-nationalization legislation in the 116th Congress.²⁴⁶ Proposals such as these would have substantial unmeasured long-term effects, such as the compounded costs of delays of cellular technology and induced airwave scarcity.²⁴⁷

A June 2019 executive order, “Securing the Information and Communications Technology and Services Supply Chain,” aims at preventing foreign adversaries’ use or acquisition of “any information and communications technology or service.”²⁴⁸ This has now been elevated to a proposed rule from the Commerce Department²⁴⁹ that appears to arrogate an alarming degree of unilateral power to interfere with or block foreign transactions with entities controlled or influenced by whomever the administration declares to be an “adversary.”²⁵⁰ While Commerce “invites comments,” it informs us in no uncertain terms that “the determination of a ‘foreign adversary’ for purposes of implementing the Executive order is a matter of executive branch discretion and will be made by the Secretary.”²⁵¹

Personal liberties: health-tracking, vaping, supplements, anti-privacy, and firearms.

While on the one hand, the FDA is said to be approving drugs at greater speed (which is a cause of concern for some), it is currently engaged in numerous regulatory or potentially regulatory pursuits beyond the Department of Health and Human Services’ hospital and drug disclosure/pricing regulations.²⁵² FDA guidance aims to clarify when the agency would regulate health-tracking apps and software as medical devices.²⁵³ It is already regulating (“approving”) robotic exosuits for rehabilitation.²⁵⁴

The agency also spent energy on regulations on vaping and smokeless tobacco products, which, as an alternative to cigarettes, save lives.²⁵⁵ The president stopped the push for a ban of all flavored e-cigarettes, but tight deadlines for e-cigarette makers are in place for filing pre-market tobacco applications.²⁵⁶ And in December 2019, as part

of the larger defense spending bill, Trump signed into law a ban on the sale of vaping products to those under age 21.²⁵⁷ In another tobacco-related move challenged on free speech grounds, the FDA sought in 2019 to mandate graphic, photorealistic images on cigarette packages, in addition to the traditional Surgeon General warning.²⁵⁸

The FDA has also been considering costly and unhelpful labeling regulation for non-dairy products that use the term “milk.”²⁵⁹ The administration continued to implement Obama-era menu-labeling rules.²⁶⁰ The FDA is also continuing strengthening enforcement of regulation of dietary supplements.²⁶¹ In one campaign, the FDA is warning companies, while not banning the herb, to stop selling kratom as treatment for opioid addition or cancer.²⁶²

New postal regulations aimed at addressing the opioid abuse issue require providing identifying information and contents on international shipments.²⁶³ On the surveillance or threat-to-privacy front, the White House, in a response to gun violence, has begun to explore tracking the mentally ill or those suspected of being so via their wearable devices (like the health monitoring ones the FDA would enjoy regulating) and smartphones.²⁶⁴ The Department of Homeland Security, already now one of the more costly agencies, is preparing regulation requiring biometric face scans of all travelers, including U.S. citizens, entering or leaving the country.²⁶⁵ Finally, in a move controversial to his base, Trump moved to ban bump stocks used on semi-automatic weapons by designating them as machine guns.²⁶⁶

Finance. Along with favorable executive actions, the Trump administration signed legislation such as rolling back financial regulatory excesses of the Dodd-Frank law said to overburden smaller institutions,²⁶⁷ and, as part of a spending package for the 2020 fiscal year, the Setting Every Community Up for Retirement Enhancement (SECURE) Act, which changes rules of inherited retirement plans and allows small businesses to band together to offer retirement plans, and

The administration has exhibited regulatory impulses in the financial arena.

allows part-timer participation in employer retirement plans.²⁶⁸ Other steps toward liberalization included, for example, policies from the Consumer Financial Protection Bureau (alas, now a fixture) allowing for easing test experimentation for certain financial products and the streamlining of consumer disclosures.²⁶⁹

But as in other sectors, the administration has exhibited regulatory impulses of its own in the financial arena, particularly with respect to newfangled offerings enabled by technology and the Internet that threaten incumbents and the vast financial regulatory superstructure. Prominent are efforts to regulate cryptocurrencies, and for the establishment of government-run real-time payment systems.

The Securities and Exchange Commission deems digital currency products, such as Facebook's Libra, to be "securities" in a bid to claim jurisdiction over them, which would saddle cryptocurrency developers with new layers of red tape.²⁷⁰ Companies failing to register their "tokens" are being targeted with restraining orders by the SEC.²⁷¹ Yet, the SEC has no legal jurisdiction over most crypto and tokens; its assertions and actions to the contrary constitute a power grab.²⁷² While Democratic members of Congress have proposed barring big tech's digital currencies, Trump administration officials seek a clampdown.²⁷³ Treasury Secretary Steven Mnuchin calls crypto a "national security" issue and said digital currency providers must be regulated and not be operated in the shadows.²⁷⁴ Likewise, Federal Reserve Chairman Jerome Powell testified in the Senate that Facebook's Libra "raises serious concerns" and "cannot go forward" without satisfying government regarding money laundering and other concerns, and told senators that Fed oversight was "an interesting idea."²⁷⁵ In a three-part Twitter thread, the president himself express his great distaste for crypto, that he is "not a fan of Bitcoin and other Cryptocurrencies, which are not money," that they are "highly volatile" and will have "little standing or dependability." He continued that if tech firms want to "become a bank,"

they must seek charters and become subject to all "Banking Regulations."²⁷⁶ And naturally, if you have income from cryptocurrencies, the IRS expects to hear from you.²⁷⁷

The same Federal Reserve that wants to regulate crypto also proposes to directly compete with private banks' processes of confirming and completing financial transactions.²⁷⁸ In its enthusiasm to implement its "FedNow" scheme, the Fed is skirting laws like the Congressional Review Act and the Paperwork Reduction Act.²⁷⁹ As Peter Wallison of the American Enterprise Institute put it, this is an agency that already has too much to do and should leave the payments system to the private sector.²⁸⁰

There is more. The Treasury Department has contemplated regulations on foreign equity stakes in U.S. biotech firms to subject those firms to greater review.²⁸¹ Troubling also, especially in light of the new talk of digital taxes, is the reported potential support in the administration for a "global minimum tax" in the name of tax harmonization.²⁸²

Industrial policy or market socialist mechanisms. Overabundant taxpayer funding of scientific and technology research is incompatible with a future of lightly regulated science and technology specifically, and with limited government generally.²⁸³ Neither major political party takes that view, in today's rule-of-experts, send-tax-dollars-home America. Addressing infrastructure and other broad initiatives in his February 5, 2019, State of the Union address, for example, the president called for legislation "including investments in the cutting edge industries of the future" and proclaimed, "This is not an option, this is a necessity."²⁸⁴ Along with the regulatory effects of strings attached of such spending, it is not proper for the sciences and their practical applications to proceed walled off from one another in an arbitrary legislative appropriations environment.

Artificial intelligence serves as a warning. A February 11, 2019, executive order, "Maintaining American Leadership on Artificial Intelligence," established the "AI Initiative,"

which was followed by the March 19, 2019, launch of the federal hub AI.gov (now whitehouse.gov/ai). Executive orders are not law, but they can influence policy, and this one promotes “sustained investment in AI R&D [research and development] in collaboration with industry, academia,” and others. It also calls for federal collection of data, among other centrally coordinated moves. The orders states: “Actions shall be implemented by agencies that conduct foundational AI R&D, develop and deploy applications of AI technologies, provide educational grants, and regulate and provide guidance for applications of AI technologies.”²⁸⁵

This “federalization” is concerning on its own, but it occurs in an environment in which much federal AI research happens at the Department of Defense. The Pentagon, on the day after Trump’s AI executive order, released its own AI strategy, describing use, plans, and ethical standards in deployment.²⁸⁶ Where is a definition of AI codified in federal statute? In the John S. McCain National Defense Authorization Act for Fiscal Year 2019.²⁸⁷ Alas, when it comes to robotics and military, Isaac Asimov’s famous Laws of Robotics (devised to protect humans) are programmed out, not in. This makes fusion of government and private AI deployment troubling. Where one tech titan’s motto had been “Don’t Be Evil,” a fitting admonition now for the AI sector is “Don’t Be Government.”

The most recent development is OMB’s Guidance for Regulation of Artificial Intelligence Applications.²⁸⁸ The January 2020 document strikes the right tone. It aims at engaging the public and forbearance, limiting regulatory overreach, eliminating duplication and redundancy across agencies, improving access to government data and models, recognizing that one size regulatory shoe does not fit all, using performance-based objectives rather than rigid rules, while avoiding over-precaution.²⁸⁹ Michael Kratsios, chief technology officer of the United States, called the guidance, which is directed at heads of federal executive branch agencies, the “first-of-its-kind set of regula-

tory principles to govern AI development in the private sector” to “address the challenging technical and ethical questions that AI can create.”²⁹⁰

The guidance states: “When considering regulations or policies related to AI applications, agencies should continue to promote advancements in technology and innovation, while protecting American technology, economic and national security, privacy, civil liberties, and other American values, including the principles of freedom, human rights, the rule of law.”²⁹¹ The guidance mentions “American values” five times, without recognizing the degree of incompatibility of the administrative state with those values, and the extent the bureaucracy has an opposite vision of “rule of law.”

As such, the guidance contains numerous exploitable elements. The guidance correctly states: “The deployment of AI holds the promise to improve safety, fairness, welfare, transparency, and other social goals, and America’s maintenance of its status as a global leader in AI development is vital to preserving our economic and national security.” On the other hand, it says “AI applications could pose risks to privacy, individual rights, autonomy, and civil liberties that must be carefully assessed and appropriately addressed.”²⁹² But governments, not competitive free enterprise, are the primary threat to these values.

Agencies not only want to get in on the game, they have been invited. In evaluating “benefits and costs” of regulatory alternatives, agencies are to evaluate “impacts to equity, human dignity, fairness, potential distributive impacts, privacy and civil liberties, and personal freedom.”²⁹³ These favor agency governmental proclivities, not the competitive process and nongovernmental resolutions of the difficult issues that will naturally arise. Agencies always answer the question, “is there call for regulation,” in the affirmative. The guidance invites agencies to “consider whether a change in regulatory policy is needed due to the adoption of AI applications in an already regulated industry,

Where one tech titan’s motto had been “Don’t Be Evil,” a fitting admonition now for the AI sector is “Don’t Be Government.”

or due to the development of substantially new industries facilitated by AI.”²⁹⁴ Regulating the latter, as a blank canvas, will prove irresistible.

The notion that industry likes regulation that disadvantages rivals is generally true of AI regulation specifically: “Companies cannot just build new technology and let market forces decide how it will be used,” says one leading tech CEO.²⁹⁵ While companies may not like the kind of regulation that makes them ask Mother-may-I, established players, especially given the government contracting and military head-start presence in AI, will appreciate federal approaches that forestall those with a different idea. Here are a few additional concerns with the guidance at this stage.

The notion that industry likes regulation that disadvantages rivals is generally true of AI regulation specifically.

- The first item in the “Template for Agency Plans” invites agencies to establish “Statutory Authorities Directing or Authorizing Agency Regulation of AI Applications” and instructs them to “List and describe any statutes that direct or authorize your agency to issue regulations specifically on the development and use of AI applications.”²⁹⁶ No definition of AI existed at the time such “predicates” came to be, and this request for statutory rationales for future intervention will be stretched to justify regulation. The guidance fails to engage Congress or recognize its primacy, and does not call on agencies to consult with Congress for clarity.²⁹⁷
- The guidance invokes executive orders, OMB guidance, pursuits like maximizing net benefits, and “regulatory impact analyses” as restraints on excessive AI regulation, but these tools have not been able to either restrain or facilitate regulatory streamlining, much less a hands-off approach. On the contrary, they are apt to be used to reinforce rather than resist calls for regulation.
- The guidance invites expansion of anti-trust regulation: “Agencies should also consider that an AI application could be deployed in a manner that yields anticompetitive effects that favor in-

- cumbents at the expense of new market entrants, competitors, or up-stream or down-stream business partners.”²⁹⁸
- The guidance invites social policy regulation: “AI applications have the potential of reducing present-day discrimination caused by human subjectivity.”²⁹⁹ On the other hand, it invites political predation in the form of social policy regulation: “When considering regulations or non-regulatory approaches related to AI applications, agencies should consider ... issues of fairness and non-discrimination with respect to outcomes and decisions produced by the AI application at issue.”³⁰⁰ Further, “there is a risk that AI’s pursuit of its defined goals may diverge from the underlying or original human intent and cause unintended consequences—including those that negatively impact privacy, civil rights, civil liberties, confidentiality, security, and safety.”³⁰¹
- The OMB directive may create vulnerability to the very guidance documents that the administration is seeking to restrain elsewhere. In the noted call for a premature inventory of sector-specific statutory authority, agencies are invited to use their conclusions regarding their authority “to issue non-regulatory policy statements, guidance, or testing and deployment frameworks.”
- Relatedly, there may be opportunities for gaming of the system and rent-seeking in well-meaning attempts to “allow pilot programs that provide safe harbors” and the systematization of “collaboration with industry, such as development of playbooks and voluntary incentive frameworks.”³⁰² The White House has invited “Federal engagement in the development of technical standards and related tools in support of reliable, robust, and trustworthy systems that use AI technologies.” Furthermore, it states: “Federal engagement with the private sector on the development of voluntary consensus standards will help agencies develop expertise in AI and identify practical standards for use in regulation.”³⁰³ Such “voluntary consen-

sus standards” will only be favored by some, not all, firms and entrepreneurs.

Sometimes there is misdiagnosis of the source of problems. The OMB guidance calls on agencies to “encourage the consideration of safety and security issues throughout the AI design, development, deployment, and operation process.”³⁰⁴ But the government is more prone to undermine encryption used in private sector applications, and, especially given government’s heavy “collaborative” role, indemnify winner companies when things go wrong. The guidance also stretches the bounds of the possible. It acknowledges that “current technical challenges in creating interpretable AI can make it difficult for agencies to ensure a level of transparency necessary for humans to understand the decision-making of AI applications.”³⁰⁵ Agencies cannot do this; no one can. It is the nature of black box machine learning.

The administration’s AI proclamations belong in the regulatory rather than the deregulatory camp, so it is good that “strong” AI (the potentially sentient, self-improving version) is ostensibly not addressed. Republicans and Democrats alike seek major government funding of science generally, including a proposal to appoint a “manufacturing czar.”³⁰⁶ Internationally, governments are moving toward regulation, along with the U.S.³⁰⁷

This state of affairs is not particularly the fault of policy makers within the White House, but is more likely due to the lack of a constituency for a hands-off approach. Unfortunately, in part due to Trump’s order and subsequent guidance, we can confidently predict that future presidents will expand cozy government alliances with a subset of private sector winners, perhaps even promote a sort of cartelization. The legitimization of this concept at the top by an ostensibly deregulation-oriented president will make it harder to achieve regulatory liberalization and any “separation of technology” and state in the future.

The establishment of a “Space Force,” enacted in the National Defense Authorization Act of 2020,³⁰⁸ presents the same lock-in,

given that commercial space activities have barely taken root beyond NASA contractors and partners.³⁰⁹ Making the AI-driven force a sixth branch of the armed forces is bound to alter freedoms and commercial space activities, heavily influencing technology investment in a sector that barely exists yet.³¹⁰ The space force move had already been preceded by a presidential directive on space traffic management complete with tracking, cataloging, and data sharing with government.³¹¹ It is worth remembering that most debris in space used to justify calls for regulation is there thanks to NASA, not private entrepreneurs.³¹² “Normalizing” commercial space activities for a “diverse portfolio of actors and approaches” is not compatible with heavy regulation.³¹³

In a similar vein, an October 2019 executive order established a new President’s Council of Advisors on Science and Technology that declares:

Through collaborative partnerships across the American science and technology enterprise, which includes an unmatched constellation of public and private educational institutions, research laboratories, corporations, and foundations, the United States can usher extraordinary new technologies into homes, hospitals, and highways across the world. These technologies would have American values at their core. By strengthening the ties that connect government, industry, and academia, my Administration will champion a new era of American research and innovation, which will give rise to new discoveries that create the industries of the future.”³¹⁴

This appeared in the wake of Executive Order 13885, “Establishing the National Quantum Initiative Advisory Committee,”³¹⁵ aimed at implementing the 2018 National Quantum Initiative Act in its purpose of “supporting research, development, demonstration, and application of quantum information science and technology.”³¹⁶

Large-scale federal initiatives morph over time into interventions unintended and unforeseen—or perhaps not so unintended.

Welfare and labor regulations. We noted earlier the propensity for federal government involvement in job training. In the Trump administration, a “national strategy for training and retraining workers for high-demand industries” is in play, spearheaded by Ivanka Trump.³¹⁷ In other labor regulation, the president also signed into law as part of the same defense compilation the Fair Chance Act, which bars government and contractors from inquiring into job applicants’ criminal history prior to making an offer. Some companies follow such guidelines already, but this move is meant to “ban the box,” the familiar job application query into whether or not one has been convicted of a crime.³¹⁸ It is a form of regulation that can be expected to backfire and aggravate the discrimination problem it is purported to solve, but only the public will be punished, not those who knowingly imposed a faulty rule.³¹⁹

In addition, a “nationwide paid family leave” plan was touted by Trump in his second State of the Union Address,³²⁰ an issue that has been taken up by legislators on both sides of the aisle.³²¹ This development represents another example of the extent to which the regulatory state is statutory and fiscally driven. Senators released a “bipartisan framework” for mandated family leave in summer 2019.³²² The plan ultimately came to fruition in the same December 2019 compromise defense spending package that included the Space Force.³²³ A mandate on the private sector is baked in, since, as Ivanka Trump put it (speaking in her role representing the federal government), “It’s very hard for people to say, well, employers should provide this benefit—if we are unwilling to provide it ourselves. So you have to lead by example.”³²⁴

As opponent Sen. Ron Johnson (R-WI) put it, “[I]n the end, President Trump should get full credit for this because he’s the one who made it happen. I know the Democrats won in the House, but this would not have happened had not President Trump strongly supported it.”³²⁵ Then, in summer 2019, Trump signed legislation that requires all federal buildings to provide a room for nurs-

ing mothers to breastfeed, including members of the public, not just federal employees. The mandate is so specific that it requires that “rooms provide privacy and contain a chair, working surface and an electric outlet for breast pumps,” as NPR described it.³²⁶

The foregoing comprises an incomplete catalog of active policy implementations and proposals with substantial regulatory heft that run counter to the administration’s deregulatory campaign as summarized by OMB in each year’s “Regulatory Reform Report: Completed Items for Fiscal Year.” That official roundup catalogs what are in most cases less dramatic examples of the kinds of regulatory actions cataloged here. Individual rules and regulations matter, but the overall structure of the market, business environment, and prospects for economic growth are also heavily influenced by overarching government policy. Large-scale federal initiatives morph over time into interventions unintended and unforeseen—or perhaps not so unintended. The conventional administrative state and big-spending appropriations framework exert a considerable influence. Trump cannot and has not stopped it all, which is to be expected, but he has also counterproductively added his own pro-regulatory predispositions to the landscape, which are enough to outweigh his claimed billions in streamlining.

There are ambiguities as well, given administrative law’s entrenchment. Changes with ambiguous effect may be rooted in factors that cannot be laid at Trump’s feet. Some items get deemed deregulatory, such as streamlining subsidized small business loans, yet are inherently distortionary. This self-reinforcing growth is abetted by the fusion of the budgetary and regulatory, and the complexities over who is the beneficiary in the cost/benefit calculus—whether taxpayers or some targeted public.

Trump issued an executive order commanding “free speech” at colleges that receive federal research or education grants.³²⁷ Free speech is nonnegotiable in society, but a directive like this one would not be an issue

if government were not funding education and inflating its cost in the process. Also illustrative of ambiguities is revocation of an Obama “gainful employment” rule cutting off funding to poorly performing for-profit colleges while leaving nonprofit ones alone. Neither should be receiving federal funding.³²⁸ A similar situation exists with respect to a Trump rule invoking “Federal conscience and anti-discrimination laws” that take into account religious objections to providing certain services or that prevent certain abortion referrals by health clinics that receive federal dollars. Had there been no federal funding, there would be no or less “regulation” over which to argue divergent, incompatible views of benefits and costs.

Prominent programs in this category include joint State Department and Department of Homeland Security issuances on “Inadmissibility on Public Charge” grounds,³²⁹ in response to Trump’s intent to suspend immigration that would “Financially Burden the United States Healthcare System, in Order to Protect the Availability of Healthcare Benefits for Americans,”³³⁰ the Department of Agriculture’s changes to the Supplemental Nutrition Assistant Program’s eligibility and asset rules,³³¹ work requirements for the able bodied with no dependents,³³² and a Department of Housing and Urban Development–proposed rule on public housing eligibility and asset limitations.³³³ All these are deemed and characterized regulatory and appear as part of the one-in, two-out “Regulatory Reform Report: Actions for Fiscal Year 2019.”³³⁴

It is notable that efforts to make government spending more difficult or to tighten benefits eligibility or qualifications for government programs are characterized as costs. These raise distributional issues, but can involve direct outlays. Even components of the deregulatory repeal of the Clean Power Plan are deemed regulatory in the new Unified Agenda disclosures and the 2019 Regulatory Reform Report.³³⁵ Such is also the case with the Trump SEC’s ostensibly deregulatory re-

write of the Obama Department of Labor’s “fiduciary rules” targeted at investment advisors. While better, these remain costly, and with the SEC being an independent agency, the rule did not appear in the one-in, two-out roundup.³³⁶

These peculiarities further show the difficulty of disclosure and basic tractability. In perpetuating the administrative state approach, streamlining may do only short-term good. Congress has not passed comprehensive regulatory liberalization in nearly a quarter century, and deregulation under Executive Order 13771 has inevitably become a more difficult task as quick-to-rid regulations are exhausted. As the University of Pennsylvania’s Coglianesse observed at the outset, “In a single year the regulatory rule book simply cannot be changed dramatically enough to make a palpable dent in the obligations imposed on industry.”³³⁷ Therefore, the pertinent question is whether any executive branch regulatory liberalization can be maintained over time given the administrative state’s barriers and intractable resistance to any reform at all.

When all is said and done, the administrative state cannot be said to have fundamentally changed under Trump. While agencies like FCC, EPA, and CFBP are led by pro-liberalization appointees—and at one point operated under an instruction from then-OMB Director Mick Mulvaney that deregulation should be their “highest priority”—the permanent bureaucracies are likely biding their time.³³⁸ Without congressional action on general reforms (there have been targeted ones such as the Economic Growth, Regulatory Relief and Consumer Protection Act aimed at reducing burdens on small banks), much of the Trump streamlining phenomenon will be transitory, especially if he backs off from that streamlining or sends mixed signals. A pruned weed is a healthy weed when it comes to the administrative state’s half-hearted roll-backs, so expectations for executive-branch-only reforms must be tempered.³³⁹

*When all is said
and done, the
administrative
state cannot
be said to have
fundamentally
changed under
Trump.*
