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Channeling Reagan by Executive Order

How the Next President Can Begin Rolling Back the Obama Regulation Rampage

By Clyde Wayne Crews Jr.[*]

President Obama famously boasted that he would use his "pen and phone" to enact his agenda if Congress did not go along.[1] Indeed, the Obama administration has been characterized by aggressive executive actions that blur the lines of the separation of powers—and not just according to Republicans.[2] Yet, if the "pen and phone" can expand government, there are also aggressive steps that can be taken to check the regulatory state's expansion.[3] To that end, the next president can limit the scope of *future* government growth by using a number of tools, such as an executive order similar to one issued by President Ronald Reagan in the 1980s to reduce the burden of new and existing regulations, by ensuring robust White House oversight of major regulatory proposals, requiring periodic reviews of existing regulations, and improving agency transparency and accountability.[4]

The procedural safeguards required by Reagan's executive order were weakened by President Bill Clinton and subsequent administrations, but they nevertheless have had a positive, limiting impact on the growth of the regulatory state. Still, issuing a new executive order that restores robust presidential oversight of the regulatory process would go a long way toward reining in the bureaucracy's most abusive overreaching.

To be sure, this is not a permanent or comprehensive solution, because a future president could weaken these controls. But it would be a start. So, the next president should restore and extend the Reagan oversight criteria, while seeking legislative reforms to cement progress. Administrative reforms like Reagan's could help address regulatory excess in the short term and pressure Congress to reassert its own authority over the making of regulatory law and agency oversight.

Executive Orders for *Less* Government. President Reagan and his appointees were committed to lightening the burden of federal regulation, and one important tool at their disposal was Executive Order 12291.[5] Issued on February 17, 1981, Reagan's order required agencies to ensure that the benefits to society of all new and existing regulations outweighed their societal costs, and to choose regulatory approaches that would impose the least net cost on society, unless such benefit-cost assessments were prohibited by statute.

The executive order also provided for the Office of Information and Regulatory Affairs (OIRA) within the White House Office of Management and Budget (OMB) to review agencies' proposed "major rules" and the analyses agencies conducted to justify those proposals. The term "major rule" was defined as one likely to impose $100 million or more

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in costs on the economy, ones likely to raise costs for consumers or industries substantially, or ones likely to have significant negative impacts on employment, competition, investment, or other economic activities. This ensured that a significant number of agency policy proposals would be reviewed by the White House before they were finalized.

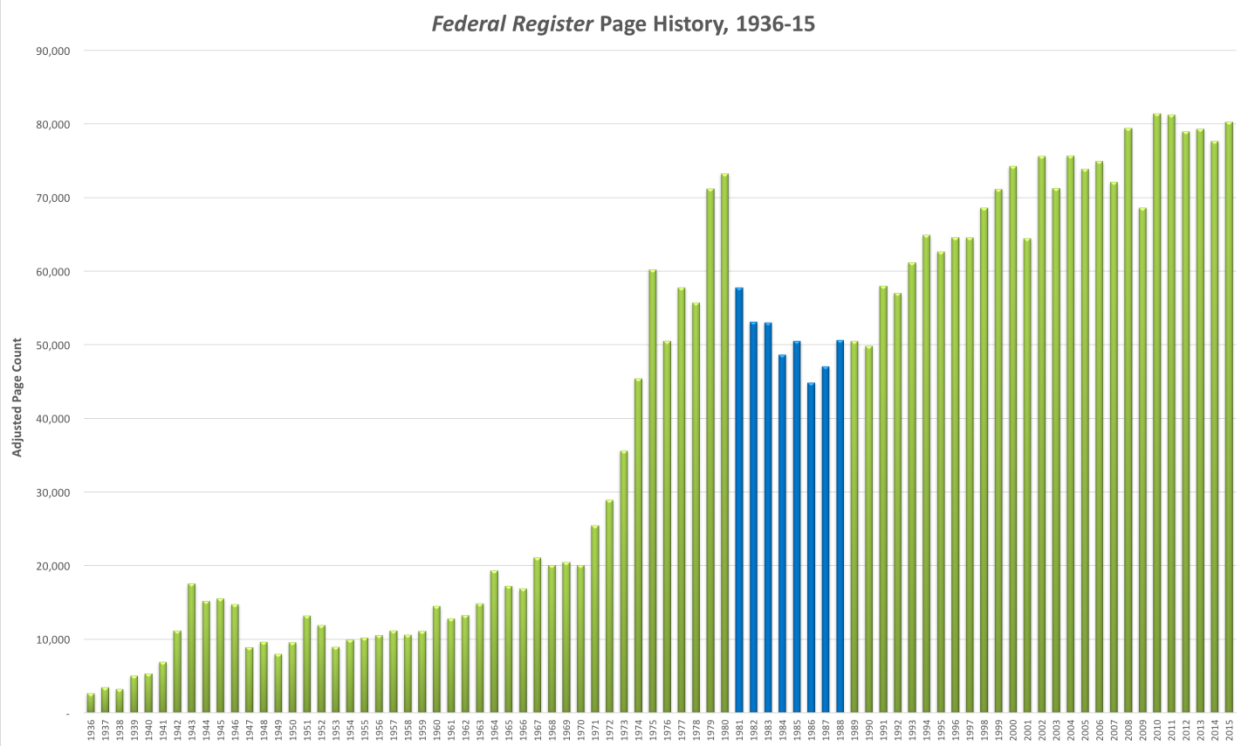
Independent agencies were exempt from E.O. 12291's effects, even though regulations promulgated by such agencies (including the Federal Trade Commission and the Securities and Exchange Commission) are often among the most costly. Nevertheless, the order's results were dramatic. As the first chart on page 2 shows, *Federal Register* pages skyrocketed during the 1970s after the creation of several new federal agencies, peaking at 73,258 in 1980.[6] By 1986, five years into the Reagan presidency, the number of *Federal Register* pages had declined to a low of 44,812— a 28,446-page drop. Meanwhile, the number of rules issued each year peaked at 7,745 in 1980. They declined during the Reagan administration to as low as 4,589.[7] And although the number of *Federal Register* pages began to creep back up during the George H.W. Bush administration, the number of final rules published each year continued to decline throughout Bush's presidency. Alas, these downward trends did not last long.

Shift into Reverse. On September 30, 1993, President Clinton replaced Reagan's E.O. 12291 with E.O. 12866, "Regulatory Planning and Review," which retained the central regulatory review structure but with significant changes:

- It "reaffirm[ed] the primacy of Federal agencies in the regulatory decision-making process," weakening OIRA's power and the "central" role of the White House in central review.[8]
- Reagan's 12291 required submitting all rules to OMB; Clinton's E.O. 12866 changed that to just "significant" rules, of which there are a few hundred annually.[9]
- The Reagan requirement that every rule's benefits "outweigh" costs to society was changed to a weaker stipulation that benefits should "justify" costs.

The Clinton order retained requirements for agencies to assess costs and benefits of "significant" proposed and final actions, assess "reasonably feasible alternatives," and attempt to "maximize net benefits," but the narrower scope of which rules were to be reviewed meant that, in practice, agencies were often not held to these standards. An executive order issued by President George W. Bush made a modest effort to restore some of E.O. 12291's rigor. It even extended OIRA review to "significant" guidance documents. But President Obama has added four regulatory orders rolling back the Bush reforms and reaffirming the Clinton order.[10]

In addition, independent agencies have remained exempt from central review, even as their influence has grown in the past three decades. For example, the Federal Communications Commission's net neutrality industry realignment, and the Securities and Exchange Commission's and Consumer Financial Protection Bureau's implementation and enforcement of the Dodd-Frank financial reform law put independent agencies in control of two of the most important sectors of the U.S. economy.



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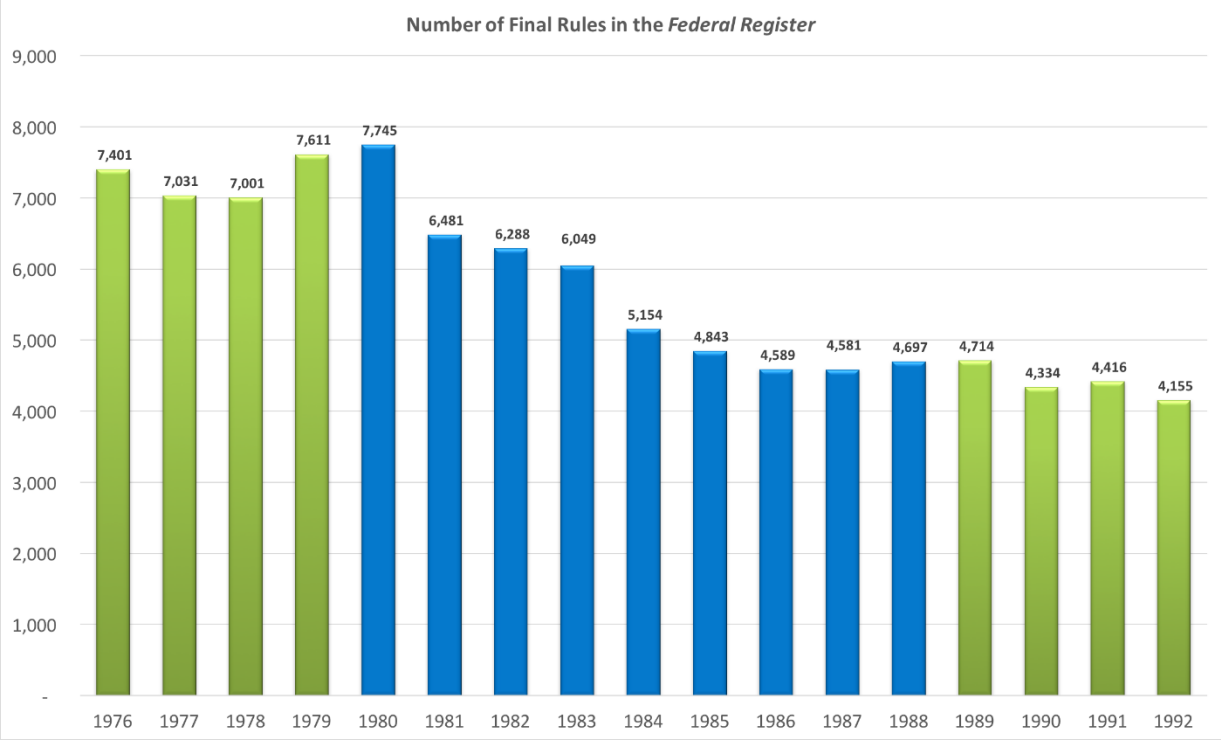

Source: National Archives

The number of new rules promulgated each year remained above 4,000 throughout the 1990s and up through 2005, reaching a high of 4,937 in 1996. They have since settled around the 3,400 mark annually. However, the "economically significant" subset of rules has risen, and the number of pages in the *Federal Register* has reached historic levels. Obama's page counts are the highest in history, accounting for six of the seven highest ever. The *Federal Register* reached 80,260 pages in 2015, its third highest total ever. That year, there were 24,694 *Federal Register* pages devoted to final rules. The record high was 26,417 in 2013.[11] Worse, the Obama administration has sought to avoid the public scrutiny inherent in agency rulemaking by expanding its use of pen and phone edicts, such as memoranda, bulletins, and executive orders.

Not only is the regulatory burden of these quasi-regulations substantial and growing, but we know increasingly less about the costs of actual proposed new rules. During calendar year 2015, 3,408 rules were finalized by over 60 federal departments, agencies, and commissions. Yet, OMB's most recent *Report to Congress on the Benefits and Costs of Federal Regulations* reviewed only a few hundred significant rules and 54 major rules, and presented net-benefit analysis for a mere 13.[12] In fact, OIRA has performed only 160 rule reviews since 2001 that incorporated both cost and benefit analysis, and another 86 with only cost analysis.[13]

Notably, a provision in Reagan's E.O. 12291 allowed the OMB director "to order a rule to be treated as a major rule" even when agencies did not, activating requirements for a Regulatory Impact Analysis. So, reaffirming the original Reagan order should ensure more rules are scrutinized by the White House, and that the costs of those rules are made public, leading to greater accountability and better control over excessively costly regulation.

Of course, rule counts do not include other executive actions, such as agency guidance documents, bulletins, memoranda, and other regulatory "dark matter" that are not officially considered "regulations" but have real-life rulemaking impact. These have gained greater prominence as the federal government intervenes in more areas of economic activity—including energy, finance, medicine, Internet, and cybersecurity. The George W. Bush administration's executive order 13422 brought significant guidance documents into OIRA's central review, but that addressed only a small portion of this dark matter problem. And even that was reversed by the Obama administration.

Furthermore, unlike new rules, most dark matter is not catalogued in any meaningful way, so neither Congress nor the public can readily appreciate just how many of these documents exist or how severe their prescriptions are. Few of these executive branch policy documents are subject to public input, so they escape the transparency and accountability mechanisms of the Administrative Procedure Act. An executive order designed to rein in runaway regulation should also require tallies of such proclamations to be cataloged and made public, to allow them to be scrutinized by the American public and reformed by Congress.

Legislative Solutions. Although restoring E.O. 12291 would be a good first step, a president committed to regulatory reform can be even more aggressive by strengthening that document and seeking legislative reform. During the 2012 campaign, Republican

presidential candidate Mitt Romney released a position paper declaring support for a law that would:

> [R]equire all "major" rules (i.e., those with an economic impact greater than $100 million) to be approved by both houses of Congress before taking effect. If Congress declines to enact such a law, a President Romney *will issue an executive order instructing all agencies that they must invite Congress to vote up or down on their major regulations and forbidding them from putting those regulations into effect without congressional approval*. [Emphasis added] [14]

The president must carry out the duly enacted laws of Congress, but today those laws are dwarfed by thousands of decrees from 400-plus *unelected* agencies. Regulatory agencies often promulgate new rules that expand the scope of authority that statutes provide, and they pile new rules on top of existing ones without regard to the burden of outdated or obsolete rules, or adherence to the limited protections of the Administrative Procedure Act.[15] And as noted, it is now routine for agencies to issue proclamations that, while not officially regulations, impose obligations on regulated parties that are rules in all but name. These can come via agency memoranda, guidance documents, interpretive bulletins, and even blog posts.[16]

Federal legislators should also act to restore the balance of power between the co-equal branches of government by requiring Congress to affirm major agency rules before they become binding on the public.[17] One current proposal, the Regulations from the Executive in Need of Scrutiny (REINS) Act, would move us toward that goal by requiring Congress to vote on all new major rules, those with at least $100 million in estimated annual costs.[18] Likewise, resolutions of disapproval to reject rules under the Congressional Review Act could be deployed more than they have been to date.[19]

Conclusion. Regulators can, and should, be regulated. The next administration will need to set the momentum for regulatory reform. An executive order like Reagan's Executive Order 12291 is a start. But cementing reform gains will require negotiating with Congress on legislation to achieve economic liberalization, eliminate obsolete bureaucracies and outmoded statutes, and restore lawmaking and regulating power to Congress.

Notes

1. Remarks by the President and the Vice President at U.S. Conference of Mayors Reception, The White House, January 23, 2014, https://www.whitehouse.gov/the-press-office/2014/01/23/remarks-president-and-vice-president-us-conference-mayors-reception.

[2] Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University, "Enforcing the President's Constitutional Duty to Faithfully Execute the Laws," Testimony before the Committee on the Judiciary, United States House of Representatives, February 26, 2014, http://jonathanturley.files.wordpress.com/2014/02/turley-enforcement-testimony.pdf.

[3] James Hohmann, "The Big Idea," *Washington Post's The Daily 202*, June 9, 2015, http://link.washingtonpost.com/public/4536447.

[4] For additional detail, see Clyde Wayne Crews Jr., "One Nation Ungovernable? Confronting the Modern Regulatory State," pp. 117-181 in Donald J. Boudreaux, ed., *What America's Decline In Economic Freedom Means for Entrepreneurship and Prosperity*, Fraser Institute and Mercatus Center at George Mason University (2015), http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/what-americas-decline-in-economic-freedom-means-for-entrepreneurship-and-prosperity.pdf.

[5] Executive Order No. 12291, "Federal Regulation," February 17, 1981, http://www.archives.gov/federal-register/codification/executive-order/12291.html.
[6] The number of *Federal Register* pages is often cited as a measure of the size of the federal regulatory state. While there are problems with using page counts as a proxy for measuring government growth, it remains worthwhile to track the *Federal Register*'s growth provided some caveats are kept in mind. The wordiness of rules will vary. A short rule could be costly and a lengthy one relatively cheap. Furthermore, the *Federal Register* contains administrative notices, corrections, presidential statements, other non-rule content, and blank pages.
[7] These include the Occupational Safety and Health Administration, Consumer Product Safety Commission, Environmental Protection Agency, and National Highway Traffic Safety Administration under Richard Nixon and the Department of Energy under Jimmy Carter.
[8] Executive Order No. 12866, "Regulatory Planning and Review," September 30, 1993, http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf.
[9] Curtis Copeland, "Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress," July 15 2014, White Paper, https://www.acus.gov/sites/default/files/documents/CRA%2520Report%25200725%2520%25282%2529.pdf.
[10] These are Executive Orders No. 13563 (Improving Regulation and Regulatory Review), 13579 (Regulation and Independent Regulatory Agencies), 13609 (Promoting International Regulatory Cooperation), and 13610 (Identifying and Reducing Regulatory Burdens). All are available at http://www.whitehouse.gov/omb/inforeg_regmatters#eo13610.
[11] Clyde Wayne Crews Jr., *Ten Thousand Commandments 2016: A Policymaker's Snapshot of the Federal Regulatory State*, Competitive Enterprise Institute, p. 3, https://cei.org/10KC2016.
[12] U.S. Office of Management and Budget, Office of Information and Regulatory Affairs, *2015 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. October 16, 2015, https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/draft_2015_cost_benefit_report.pdf.
[13] Clyde Wayne Crews Jr., "Less Than 1 Percent of Federal Regulations Get Cost-Benefit Analysis," Competitive Enterprise Institute Blog, November 17, 2015, https://cei.org/blog/less-1-percent-federal-regulations-get-cost-benefit-analysis.
[14] *Believe in America: Mitt Romney's Plan for Jobs and Economic Growth*, 2011. p. 63, https://grist.files.wordpress.com/2012/01/believeinamerica-planforjobsandeconomicgrowth-full.pdf.
[15] United States Government Accountability Office, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments*, December 2012, http://www.gao.gov/assets/660/651052.pdf.
[16] Clyde Wayne Crews, Jr., "Mapping Washington's Lawlessness: A Preliminary Inventory of "Regulatory Dark Matter," *Issue Analysis* 2015 No. 6, Competitive Enterprise Institute, December 9, 2015, https://cei.org/content/mapping-washington%E2%80%99s-lawlessness.
[17] Rep. J. D. Hayworth, "Congressional Responsibility Act of 1995," Extensions of Remarks in the *Congressional Record*, p. E20, January 4, 1996, https://www.gpo.gov/fdsys/pkg/CREC-1996-01-04/pdf/CREC-1996-01-04-pt1-PgE20-2.pdf.
[18] H.R.427, Regulations from the Executive in Need of Scrutiny Act of 2015, https://www.congress.gov/bill/114th-congress/house-bill/427?q=%7B%22search%22%3A%5B%22reins+act%22%5D%7D&resultIndex=2.
[19] Clyde Wayne Crews Jr., "Don't Spare the ROD: An Inventory of Resolutions of Disapproval under the Congressional Review Act," Competitive Enterprise Institute Open Market, November 4, 2015, https://cei.org/blog/dont-spare-rod-inventory-resolutions-disapproval-under-congressional-review-act.