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First Steps for the Trump Administration: Rein in the Regulatory State Free Market Reforms to Revive America's Wealth-Creating Potential

By Clyde Wayne Crews, Jr.*

President-elect Donald Trump has instructed members of his transition team to “develop a list of executive actions we can take on day one to restore our laws and bring back our jobs.” That is a welcome step. But many regulatory reform efforts take the existing regulatory state’s fundamentals for granted. So if a Trump administration is to make headway in paring back the administrative state, it is not enough to analyze rules better and to cut a few. A pruned weed is a healthy weed. Rather, statutes should be revisited, and agencies downsized and eliminated.

Over the past few decades, Congress has yielded a considerable amount of lawmaking power to unelected bureaucrats at federal regulatory agencies. Recently, the House leadership finally seemed to acknowledge that the balance of power between the different branches must be restored. Reviving the American economy will require reining in an unelected administrative state that is holding back innovation in energy, communications, autonomous cars and aircraft, robotics, and frontier economic sectors.

The administrative regulatory state has little to fear from the current watchdog apparatus, the White House Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs, which reviews only a fraction of rules and often misses deadlines. That could change if Trump makes the most of his promised regulatory moratorium and toughens review and analysis of regulations. Trump could boost audits and cost analysis dramatically via executive order and work with Congress to bring now-exempt independent agencies into the fold.

Recommendations

Strengthen Regulatory Oversight by Executive Order. President Reagan’s Executive Order 12291 required agencies to justify rules and required rules to be reviewed by OMB. It also allowed the Office of Management and Budget Director to declare agencies’ rules “major,” triggering more review. (Major often refers to rules with estimated annual costs of \$100 million or more.) Rule counts and *Federal Register* pages alike dropped more than one-third. A later (Clinton) order “reaffirmed primacy” of agencies, weakening review. In recent years reporting and disclosure via the regulatory *Unified Agenda* and the OMB regulatory cost-benefit *Reports to Congress* have deteriorated but can be strengthened with “report cards” better quantifying costs of new and planned rules, and retroactively reviewing rules.

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Expand Executive Restrictions over Agency Guidance Documents, Memoranda, and other “Regulatory Dark Matter.” While every year Congress passes just a few dozen laws, federal regulatory agencies issue over 3,000 regulations—but lawmaking by the unelected does not end there. Agencies also issue thousands of guidance documents, interpretive bulletins, notices, memoranda, proclamations, and even blog posts that carry regulatory force, but do not go through the formal rulemaking process. Worse, it is difficult to “weigh” this regulatory dark matter, as its components are scattered under numerous monikers and across various websites, if publicized at all. A George W. Bush-era directive subjected the “economically significant” subset of agency guidance to review. That process still partly endures, but needs a boost in order to hold guidance to standards more akin to those that apply to rules, including OMB review and the Administrative Procedure Act’s notice-and-comment requirements. Notably, the Congressional Review Act’s 60-day resolution of disapproval process applies to guidance, so Congress and the administration can work together to repeal burdensome guidance that way.

Work with Congress to Implement a Pro-Growth Agenda. President Barack Obama’s controversial executive actions, which hinged on a Hillary Clinton electoral victory, are vulnerable. In like fashion, Trump’s executive actions can be overturned by his successor. Permanence for executive actions requires accompanying legislation. Legislative liberalization efforts can include using the Congressional Review Act to revoke recently finalized Obama regulations. But that is only a first step.

Overregulation did not begin in 2016. Trump should insist upon congressional affirmation of rules, guidance, and other agency proclamations likely to have significant economic impact, or that are otherwise controversial. He should support most recently passed regulatory reform bills, but go even further in telegraphing support for a congressional agenda to:

- Repeal or amend enabling statutes that sustain regulatory excesses (such as at the Departments of the Interior and Energy, and the Environmental Protection Agency;
- Abolish, downsize, cut the budgets of, and deny appropriations to aggressive agencies, sub-agencies, and programs that routinely pursue regulatory actions not authorized by Congress;
- Eliminate and sunset rules; and
- Prevent agencies from creating new rules in areas where Congress has not explicitly authorized and distinctly voted to delegate legislative authority, especially in frontier sectors like Internet applications, drones, robotics, and artificial intelligence.

Short of agency elimination, Trump should insist upon such a “full-stop” approach to address not only the problem of agency overreach, but that of Congress having delegated power to such an extent that agencies think they are unbounded and can regulate anything.

State of Play

The 114th Congress passed numerous regulatory reform bills, and in 2016, Speaker Paul Ryan (R-Wisc.) issued an expansive set of congressional task force reports touting reform and a broader agenda to restore the primacy of Congress, as stipulated under Article 1 of the Constitution. With Vice-President elect Mike Pence’s bridge to congressional leadership and

Trump’s willingness to visit and enlist Senate Democrats, some regulatory reform efforts can be achieved without threat of filibuster.

A bipartisan interest in regulatory reduction commissions exists. Alaska Sen. Dan Sullivan’s RED Tape Act would implement a one-in, two-out mechanism for pruning the total number of rules, and encompass regulatory dark matter—something all regulatory reform bills should include. Congress should pass, and the President sign, the Regulations from the Executive in Need of Scrutiny (REINS) Act, which would require Congress to vote on all major rules—those with estimated annual costs of \$100 million or more—before they can go into effect. The 2017 House budget resolution contained a statement of principles on regulatory budgeting, which could help bring greater transparency to the costs of federal regulations much like the fiscal budget puts hard numbers on federal spending. The modern administrative regulatory state is increasingly abusive and unaccountable. It is long past time to rein it in.

For Further Reading

Clyde Wayne Crews Jr., “Channeling Reagan by Executive Order: How the Next President Can Begin Rolling Back the Obama Regulation Rampage,” *OnPoint* No. 218, Competitive Enterprise Institute, July 14, 2016, <https://cei.org/content/channeling-reagan-executive-order>.

Clyde Wayne Crews Jr., “How a New President Can Roll Back Bureaucracy, Pts. 1 through 13,” Competitive Enterprise Institute blog, October 18, 2016, <https://cei.org/blog/how-new-president-can-roll-back-bureaucracy-part-13-establish-office-no>.

Ryan Young, “REINing in Regulatory Overreach,” *OnPoint* No. 223, Competitive Enterprise Institute November 15, 2016, <https://cei.org/content/reining-regulatory-overreach>.

Clyde Wayne Crews Jr., “One Nation Ungovernable? Confronting the Modern Regulatory State,” 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), pp. 117-181, <https://www.fraserinstitute.org/sites/default/files/One-Nation-Ungovernable-Confronting-Modern-Regulatory-State-by-Crews.pdf>.

Clyde Wayne Crews Jr., “Mapping Washington’s Lawlessness: A Preliminary Inventory of ‘Regulatory Dark Matter,’” *Issue Analysis* 2015 No. 6, Competitive Enterprise Institute, December 2015, <https://cei.org/content/mapping-washington%E2%80%99s-lawlessness>.