

9,999 Commandments? Six Ways Rule Flows Have Been Reduced or Streamlined

This edition of *Ten Thousand Commandments* begins with a survey of approaches the Trump administration took in its first two years to fulfill promises to streamline red tape. The report then puts Trump's numbers in historical context and examines some specifics of implementation of Trump's Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," and subsequent White House guidance to eliminate two regulations for every "significant regulatory action" issued.³⁶

Assessing agencies' priorities and results to date illustrates some limitations for the prospects for continued streamlining of rules and regulations when the presidential pressure lets up, particularly given that the 116th Congress is unlikely to enact a legislative package aimed at regulatory reform. Barack Obama unapologetically wielded the "pen and phone" to expand federal reach over private affairs.³⁷ Donald Trump, too, has used the pen and phone, in significant part to attempt to undo Obama programs and otherwise streamline regulation.³⁸ However, it is also the case, that Trump expresses and exhibits substantial regulatory impulses of his own, including toward certain kinds of regulation that undermine the reform agenda; that will be reviewed as well. The overarching reality is that the government is far larger than ever, and Trump's executive branch reorganization initiative undertaken alongside regulatory streamlining resulted in the elimination of no regulatory agencies.³⁹

Presidents come and presidents go, but few systematically and in such prolonged fashion attempt to roll back regulations or statutes. Agencies and outside advocacy groups react strongly to protect the administrative state,

and legal challenges to Trump's regulatory rollback and Executive Order 13771 have ensued.⁴⁰ A poor record in court so far has been widely noted for Trump's attempted streamlining.⁴¹ These include rebukes to Trump's efforts to delay certain implementation of the U.S. Environmental Protection Agency's (EPA) Waters of the United States rule, a chemical disaster preparedness and disclosure rule, and more.⁴²

The administrative state's fundamental incompatibility with limited government is readily observable in the rulemaking process itself. The 1946 Administrative Procedure Act (APA) requires adherence to process for rolling back rules or changing policy, not just for issuing a rule in the first place as court losses show.⁴³ The APA's rulemaking process allows for wiggle room via its "good cause" exemption, by which an agency may deem notice and comment for certain rules as "impracticable, unnecessary, or contrary to the public interest," but that leniency seems not to have applied to rollbacks.⁴⁴ Therefore, rules cannot be eliminated via the same "good cause" exemption. Rather, a rule can only be replaced with a new rule or legislation.⁴⁵ Further eroding accountability, the logic of the administrative state has generated a judicial philosophy known as "*Chevron* deference," whereby courts yield to agencies' interpretations of the enabling statutes under which they write their rules, as long as the agency's interpretation has some rational basis.⁴⁶

The two-for-one executive order was explicit regarding its own limitations. The Trump approach in Executive Order 13771 seems executed well within the rule of law, within the confines of the administrative state.⁴⁷

*Trump expresses
and exhibits
substantial
regulatory
impulses of his
own.*

*The
administrative
state’s
fundamental
incompatibility
with limited
government is
readily observable
in the rulemaking
process itself.*

Executive Order 13771 asserts: “Nothing in this order shall be construed to impair or otherwise affect ... the authority granted by law to an executive department or agency.... This order shall be implemented consistent with applicable law.”⁴⁸ Reforming or revoking major regulations, like the EPA’s Waters of the United States or Clean Power Plan rules, takes years. As Heritage Foundation analyst James Gattuso said of Trump’s first year: “Given the procedural and institutional obstacles to repealing a rule, it is unlikely that any administration would be able to achieve substantial deregulation.”⁴⁹ The court losses are a rebuke, but they also highlight the permanence of an entrenched administrative state immune to unilateral reduction in scope. This is not necessarily a bad thing from a long-term perspective, as it can help shift the focus to where it belongs: on a Congress that has delegated away much of its lawmaking power to executive branch agencies.

Curiously, while the impression is given by opponents that Trump’s rollbacks are illegal and harming health and safety,⁵⁰ some critics call Trump’s boast a “deregulation myth.”⁵¹ Some have written that the administration “claims credit for some regulatory actions begun under Obama.”⁵² Trump is both overreaching and not accomplishing anything. Both cannot be true. The problem with these criticisms was acknowledged by then-Office of Management and Budget (OMB) Director Mick Mulvaney (now White House chief of staff), who has affirmed that when it came to rollbacks of Obama “midnight rules” and not-yet-implemented rules in the pipeline, “None of them are very sexy. ... None of them are very glamorous. None of them really rise to the level of getting national attention. But think about that—860 of them.”⁵³

Meanwhile, Executive Order 13771 did not apply either to rules from independent agencies like the Federal Communications Commission (FCC) or the Consumer Finance Protection Bureau (CFPB) or to rules mandated by Congress, as opposed to those driven by agencies themselves. Substantial regulatory

streamlining of these require either new rule-making or legislation.

The reality is that the administrative state is alive and well, powering ahead, and the president alone can only do some very limited streamlining.⁵⁴ In a sense, Executive Order 13771 affirmed a separation of powers in rulemaking by underscoring what a president and his agencies may *not* do.⁵⁵ As such, Executive Order 13771 represents a voluntary weakening of executive power regarding certain regulation (we are not addressing wider policy matters in this context). The underlying message of Executive Order 13771 is that if something needs to be regulated, Congress should pass a law.

In the meantime, in implementing Executive Order 13771 and reporting results, the Trump administration now explicitly separates actions deemed “Deregulatory” from those deemed “Regulatory.” This move could have staying power with subsequent administrations. In Box 1, sector-specific executive actions are noted in areas such as financial regulation, antiquities and national monuments, offshore resource access, education, and health care. In addition to these, Trump’s regulatory rollbacks—limited given their largely unilateral implementation within the inertia of a rigid preexisting administrative state—have consisted of six main elements:

First, 14 rules that had been finalized during the closing months of the Obama administration and on track to take effect were eliminated using the Congressional Review Act in 2017, via individual resolutions of disapproval passed by Congress and signed by Trump.⁵⁶ The rules removed were generally not headline-grabbing reforms, nor all major ones.⁵⁷ There were hundreds of rules eligible to be turned back, which provides the sometimes-needed reality check that, “Many companies like existing rules or want more of them,” especially when they provide advantages over rivals.⁵⁸ An additional rule and one guidance document from the Consumer Financial Protection Bureau were also eliminated by resolution of disapproval in 2018.

Second, the Trump administration withdrew or delayed 1,579 Obama rules that were in the pipeline but not yet finalized, broken down as follows:⁵⁹

- 635 withdrawn;
- 244 made inactive;
- 700 delayed.

Third, streamlining permitting for bridges, pipelines, transportation, telecommunications, and other infrastructure is being interpreted as creating a more favorable climate for infrastructure planning. This manifested in several ways, such as the permitting-related executive actions noted in Box 1, the Commerce Department’s permit streamlining action plan,⁶⁰ and some elements, with caveats, of the 2019 Trump Budget proposal addressing infrastructure reform.⁶¹

Fourth, to the limited extent possible within congressional requirements and an autopilot administrative state, agencies have largely abstained from issuing significant new rules. Trump’s total final rule counts were 3,281 in 2017 and 3,367 in 2018, respectively, compared to Obama’s 2016 tally of 3,853 (these are calendar years). Of Obama’s finalized rules, 486 were categorized as “significant.” The “significant” subset for Trump has been 199 and 108 in 2017 and 2018 respectively. Lower counts can still overstate Trump’s rulemaking activity since some were delays or rollbacks.⁶²

Fifth, technically speaking, Trump exceeded his one-in, two-out regulatory goals for adoption of significant regulatory actions in both fiscal years so far (along with net regulatory cost savings of \$33 billion), but rule offsets are becoming harder to accomplish.⁶³ Adding to confusion, there exists a bewildering rulemaking nomenclature that places regulations into an array of categories encompassing such terms as rules, significant rules, major rules, economically significant rules, guidance, and more.⁶⁴ The point of the spear of the Trump program is the capping of net new regulatory costs at zero, a mini-regulatory-budget of sorts. The eliminations are a tool for that: “By requiring a reduction in the number of regulations, the order

incentivizes agencies to identify regulations and guidance documents that do not provide sufficient benefits to the public,” as OMB Office of Information and Regulatory Affairs (OIRA) Administrator Neomi Rao noted in the “Introduction to the Fall 2018 Regulatory Plan.”⁶⁵ Since the administration is acting without any bipartisan support from Congress, rewriting rules under Administrative Procedure Act strictures becomes the increasingly urgent priority as President Trump’s Executive Order 13771 one-in, two-out campaign matures. In implementing the streamlining process, two OMB guidance documents on the executive order were issued after the order itself.⁶⁶ A separate executive order established Regulatory Reform Task Forces in the agencies.⁶⁷ Agencies also sought to establish procedures by inviting public input on rule streamlining.⁶⁸

In 2017, the White House maintained that the goal of one-in, two-out for regulations was exceeded with a claimed 22-to-one out/in ratio, since only three “significant” new regulatory actions were imposed during that fiscal year, while 67 reductions were made.⁶⁹ Interestingly, among the initial 67 rule reductions, nine appeared to be revocations or alterations of sub-regulatory guidance, notices, orders, or information collections. Six rules included in the roundup of 67 were among the 15 eliminated via Congressional Review Act resolutions of disapproval. Some independent agency rules removed by the CRA were not taken as “credit” for two-for-one purposes since the order did not bind independent agencies. Examples of these included a Consumer Financial Protection Bureau arbitration rule,⁷⁰ a Securities and Exchange Commission (SEC) rule on foreign resource extraction payment disclosure,⁷¹ and a FCC broadband privacy regulation.⁷² The FCC’s elimination of Obama-era net neutrality rules⁷³ and modernization of broadcast ownership rules⁷⁴ may be the most significant on the list of successes. But, like all substantial final rules, new rulemaking proceedings will be lengthy.

In 2018, OIRA reported in “Regulatory Reform Results for Fiscal Year 2018” that “Agen-

cies issued 176 deregulatory actions and 14 significant regulatory actions,” for an overall 12-to-one ratio.⁷⁵ Fifty-seven of these deregulatory actions were deemed significant, so, “Comparing significant deregulatory to significant regulatory actions yields a ratio of 4 to 1.”⁷⁶ Here is a summary of the two Trump fiscal years of claimed significant reductions (although it is not required that each of the eliminated items rise to the level of “significant”):

Significant Regulatory Actions	FY2017	FY2018	Total
Regulatory	3	14	17
Deregulatory	67	57	124
Claimed ratio of rules out to rules in	22/1	4/1	7/1

When agencies are discouraged from issuing rules, they may rely increasingly heavily on such sub-regulatory guidance.

Box 2 summarizes the Trump administration’s claimed 176 completed regulatory eliminations or reductions by agency, showing significant and nonsignificant components, along with a breakdown of the claimed \$23 billion in present value cost savings for fiscal year the 2018⁷⁷ (or about \$1.6 billion annualized⁷⁸). As Box 2 shows, the Department of Health and Human Services issued both the most claimed deregulatory rules and over half in claimed cost savings.

There are ample critiques of the reality of the claimed cost reductions as in 2017, of their effect on the economy, of their neglect of benefits,⁷⁹ and charges of “taking exaggerated credit for small reductions.”⁸⁰ But, as then-acting OIRA Director Dominic Mancini stated, “EO 13771 deregulatory actions are not limited to those defined as significant under EO 12866 or OMB’s *Final Bulletin on Good Guidance Practices*.”⁸¹ Rather, they just needed to offset whatever significant rule was issued. There were other eliminations beyond what the White House took credit for, such as with respect to guidance documents and independent agency streamlining. Detail on precisely what the rules are from each agency, the full list—of 176 deregulatory (57 significant and 119 deemed nonsignificant) and 14 regulatory actions—is provided in

OMB’s “Regulatory Reform Report: Completed Actions for Fiscal Year 2018.”⁸²

As for the “regulatory budget,” OMB claims agencies have achieved over \$33 billion in savings over the past two fiscal years, and anticipates additional savings in FY 2019 of another \$18 billion. As seen below, this would be a total of nearly \$50 billion if it occurs (not including savings from changes being contemplated separately in vehicle fuel economy rules).⁸³

FY 2017 Savings	\$8.148 ⁸⁴
FY 2018 Savings	\$23.432 ⁸⁵
FY 2019 Savings (anticipated)	\$17.905 ⁸⁶
Total	\$49.485

In contrast with Trump’s claimed savings, a November 2017 Heritage Foundation analysis of available information on the Obama administration’s regulatory record isolated the major rules listed in the Government Accountability Office (GAO) database affecting only the private sector and distinguished between those that were deregulatory and regulatory. The report concluded: “During the Obama years, the nation’s regulatory burden increased by more than \$122 billion annually as a result of 284 new ‘major’ rules.”⁸⁷

Sixth, The Trump administration has arguably taken more steps than any predecessor to address the proliferation of significant guidance documents and other sub-regulatory decrees or “regulatory dark matter” that can have concrete regulatory effect.⁸⁸ The exception may be President George W. Bush’s Executive Order 13422, which subjected significant guidance to OMB review,⁸⁹ and his administration’s 2007 OMB Good Guidance Practices memorandum.⁹⁰ Trump’s executive orders and directives encompass not just “significant regulatory actions,” but significant guidance on a case-by-case basis.⁹¹ The Trump administration not only has declined to issue regulatory guidance to the extent the Obama administration did, but has asked agencies to reduce it. Meanwhile agencies have revoked guidance and directives that were not included among the proclaimed regulatory reductions.⁹²

**Box 2. Completed EO 13771 Deregulatory (Significant and other) Actions,
Regulatory Actions, and Claimed Cost Savings, FY2018**

	Deregulatory Actions			Regulatory Actions	Present Value Savings
	Total	Significant	Other		
Executive Department/Agency	176	57	119	14	(\$23.432)
Dept. of Agriculture	8	3	5	3	\$(398)
Dept. of Commerce	14	3	11	1	\$(814)
Dept. of Defense	4		4		\$(70)
Dept. of Education	24	4	20		\$(37)
Dept. of Energy	4	1	3		\$(387)
Dept. of Health and Human Services	25	18	7	4	\$(12.487)
Dept. of Homeland Security	13	2	11		\$(164)
Housing and Urban Development	2	1	1	1	\$(507)
Dept. of Interior	18	3	15		\$(2.519)
Dept. of Justice	5	3	2		\$(79)
Dept. of Labor	11	9	2		\$(3.280)
Dept. of Transportation	23	2	21	1	\$(1.237)
Dept. of the Treasury	4	2	2		
Veterans' Affairs	3	2	1	1	\$(212)
Environmental Protection Agency	10	4	6	3	\$(1.228)
DoD/GSA/NASA (Federal Acquisition Regulation)	2		2		
General Services Administration	2		2		\$(8)
National Aeronautics and Space Administration	1		1		\$(5)
Office of Personnel Management	1		1		
Small Business Administration	2		2		
TOTAL	176	57	119	14	\$(23.432)

Source: White House OMB, Regulatory Reform Results for Fiscal Year 2018, <https://www.reginfo.gov/public/do/eAgendaEO13771>.

When agencies are discouraged from issuing rules, they may rely increasingly on such sub-regulatory guidance. To address this and to bolster the diminishing returns of the two-for-one program, Trump should supplement Executive Order 13771 with a new executive order explicitly addressing agency interpretive rules, policy statements, guidance, and other regulatory dark matter.⁹³ Regulatory reform legislation faces barriers in both the House and Senate. However, the Guidance

Out of Darkness (GOOD) Act, sponsored by Sen. Ron Johnson (R-Wisc.) and Rep. Mark Walker (R-N.C.), could gain some traction.⁹⁴ Guidance reform is an area with bipartisan appeal, especially given recognition by the Administrative Conference of the United States of potential abuse of guidance documents.⁹⁵ The Trump effort can continue to help eliminate, better classify, disclose, streamline, and check rulemaking by guidance.