

On the Other Hand ... Trump's Own Regulatory Impulses Threaten to Derail Successes

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President Trump has pruned rules and costs and held down regulatory output with more enthusiasm than other presidents.⁹⁶ But on the flipside of Trump's regulatory savings, Trump sports regulatory impulses of his own that could derail or even eclipse the rollback agenda in 2019 and beyond.⁹⁷ 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 merger⁹⁸) are well known, but there are additional warning signs of regulatory initiatives that have heightened or emerged since the last edition of *Ten Thousand Commandments*.

On October 17, 2018, the day the 2018 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, Trump said, "I think within a period of about another year, we will have just about everything that we've wanted."⁹⁹ On the contrary, there remains much work to be done regarding comprehensive regulatory reform, especially given the administrative state's propensity to grow and built-in defenses against its rollback.

Among the bigger obstacles is the fact that one cannot get rid of regulations; one can generally at best replace a rule with another rule.¹⁰⁰ As former OIRA Administrator Susan Dudley points 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. Since this can take two years or longer, agencies should have at least issued proposals by now for rules they would like to wrap up before the end of Trump's four-year term.¹⁰¹

There is much on the books to address in this fashion. But more important, Trump's own regulatory impulses are a concern, particularly where he demonstrates prominent public agreement with regulatory advocates on issues such as antitrust and regulatory action against tech firms and traditional media companies.

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.¹⁰² But on the other hand, President Trump has been explicit about invoking antitrust action against some tech and telecom firms, striking a discordant tone with the rest of the deregulatory agenda. As a 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."¹⁰³ The Justice Department's attempt to block the merger failed.¹⁰⁴

The president has also said that Google, Facebook, and Amazon may be in a "very anti-trust situation,"¹⁰⁵ and said he was "in charge"

and “looking at it,”¹⁰⁶ in an environment in which some have called for the breakup of those companies.¹⁰⁷ Trump also tweeted that Comcast may be violating antitrust laws,¹⁰⁸ although after mulling it over (such delay of transactions is itself a regulatory cost), the Justice Department did not investigate the Comcast-NBCUniversal alliance.¹⁰⁹ Having already contemplated record-level fines against alleged Facebook privacy violations,¹¹⁰ a new Federal Trade Commission “technology task force” will increase scrutiny of acquisitions beyond current practice.¹¹¹

Speech, social media, and tech regulation.

Trump and many on the left agree on regulation of social media search and speech, although each have their own reasons.¹¹² When Trump economic adviser Lawrence Kudlow was asked in summer 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.”¹¹³ Google is a private entity, search results are free speech, and Google cannot censor; only governments can.¹¹⁴ The entire Internet and all its underlying capabilities remain intact, unaffected by Google’s existence. Yet Trump has tweeted extensively about social media censorship¹¹⁵ and even threatened NBC’s broadcast license.¹¹⁶ 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.”¹¹⁷ Related to concerns about the social media environment, regulators have considered a record-high fine against Facebook for alleged privacy violations.¹¹⁸

Infrastructure and bipartisan big spending with regulatory effects. Trump has taken significant executive actions to liberalize infrastructure permitting.¹¹⁹ Ominous, though, is talk of a potential arrangement

with House Speaker Nancy Pelosi (D-Calif.) of some sort of big infrastructure federal spending package—at a time when the United States has returned to Obama/Bush-level trillion-dollar deficits, and interest payments are headed toward higher-than-defense levels.¹²⁰ Both parties show an inclination toward spending stimulus in the form of infrastructure, when markets should be better empowered as an alternative.¹²¹ Too often, the only bipartisanship found in Washington is in passing big spending bills. Proposed spending levels call for \$1 trillion in direct federal spending, with plenty of regulatory set-asides and stipulations.¹²² Heavy government spending in economic quarters will always have regulatory effects and alter the trajectory of industries engaged in large-scale transactions. And Trump has championed the use of eminent domain to build a wall on the southern border. Eminent domain is nothing new, but Trump’s variety uniquely invokes the potential use of a “military version” of such power.¹²³

Trade restrictions. While the president—who once referred to himself as “Tariff Man”¹²⁴—has blamed some of 2018’s market downturn (much since recovered as of this writing) on Democrats taking control of the House of Representatives, trade barriers and tariffs create direct costs, regulatory uncertainty, and market losses—likely greater than Trump’s regulatory savings. Trade wars do not work because tariffs hurt Americans.¹²⁵ 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.”¹²⁶ If one were to assume this burden started in December 2018, Trump’s to-date claimed regulatory savings of \$31.6 billion will be overtaken within two years by increased costs imposed by trade barriers. Anecdotes of harm also abound, such as craft distillers lamenting the trade war killing export plans with Europe¹²⁷ or the oddity of reparative payments to farmers damaged by trade restrictions.¹²⁸ The fixation on reciprocity in

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trade deals will increase costs of household-level imports like e-commerce purchases by ejecting de minimis exemptions.¹²⁹ The tech sector, including artificial intelligence (AI) innovation, is vulnerable to trade restrictions. For example, Adam Thierer and Jennifer Huddleston Skees of the Mercatus Center note: “the Trump Administration [is pondering] a potentially massive expansion of export restrictions on a wide variety of technologies. More than a dozen different AI or autonomous system technologies appear on the list for consideration.”¹³⁰ In a notable fusion of trade restrictions and infrastructure spending, Trump also issued an executive order on “Strengthening Buy-American Preferences for Infrastructure Projects.”¹³¹

Telecommunications. Some in the Trump administration have floated a proposal to build a nationalized 5G network.¹³² That elicited a rapid letter to the administration in response from U.S. Sens. Ted Cruz (R-Texas) and Catherine Cortez Masto (D-Nev.)¹³³ and introduction of antinationalization legislation in the 116th Congress.¹³⁴ Proposals such as these have long-term effects, such as the compounded costs of long delays of cellular technology and induced airwave scarcity.¹³⁵

Farm bill and agriculture. Many interventionist policies have moved along with a life of their own apart from Trump, but these deserve to be called out as overly regulatory when perpetuated. The \$860 billion farm bill, signed in December 2018, was a prominent example. Rep. Justin Amash (R-Mich.) characterized it appropriately in May 2018, tweeting that, “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.”¹³⁶ Trump, however, saw things differently: “[T]he House will vote on a strong Farm Bill, which includes work requirements. We must support our Nation’s great farmers!”¹³⁷ It can also be the case that stealth regulatory measures or requirements can 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.”¹³⁸ The USDA move also highlights the reality that rules operate beyond presidential control and move along on autopilot. An example is a proposed bioengineered food disclosure requirement,¹³⁹ 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.¹⁴⁰

Food, drugs, and firearms. Reform legislation of the Food and Drug Administration (FDA) has expanded access to certain needed medications.¹⁴¹ While nothing has materialized yet, the Trump administration rattled the pharmaceutical industry with charges that companies were “getting away with murder” and voicing support of government drug-price negotiation.¹⁴² The administration has introduced a regulatory proposal of questionable legality for pharmaceutical price-listing mandates in television advertisements.¹⁴³ With FDA guidance already in the making, even information generated largely by individuals is not immune from suppression, as the FDA intends to regulate health-tracking apps and software as medical devices.¹⁴⁴ The agency is also implementing regulations on vaping and smokeless tobacco products, which, as an alternative to cigarettes, save lives.¹⁴⁵ There are indications from the FDA that it may consider costly and unhelpful labeling regulation for nondairy products that use the term “milk.”¹⁴⁶ The administration also continues to implement Obama-era menu-labeling rules¹⁴⁷ and is strengthening enforcement of regulation of dietary supplements.¹⁴⁸ Related to other health regulation, new postal regulations on international shipments require providing identifying information and contents, aimed at addressing the opioid abuse issue.¹⁴⁹ Finally, in a move controversial to his base, Trump has moved to ban bump stocks used on semiautomatic weapons by designating them as machine guns.¹⁵⁰

Subsidies. Much fiscal spending has disregarded regulatory effect, displacing private action and steering. Trump is a fan of the Export-Import Bank,¹⁵¹ long a showcase for cronyism and corporate welfare.¹⁵² The Environmental Protection Agency is considering subsidies for “talking car” technologies that communicate hazard and other information.¹⁵³ Trump is also supporter of ethanol subsidies and preferences, warning in campaign mode in October 2018 that Democrats would be anti-ethanol.¹⁵⁴ As a general matter, subsidies or corporate welfare aggravate problems of a president being able to, as Rep. Justin Amash put it, “act as a central planner in chief to bribe and coerce companies.”¹⁵⁵

Internet tax. The Internet sales tax was upheld in the Supreme Court case *South Dakota v. Wayfair*.¹⁵⁶ The Competitive Enterprise Institute’s Jessica Melugin wrote about that decision, observing 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.”¹⁵⁷ While the ruling was by no means Trump’s doing, the president had seemed to favor an Internet tax, perversely seeing it as a shot at Amazon, despite the company being one of the online sales tax’s most high-profile proponents.¹⁵⁸

Finance. The Securities and Exchange Commission is labeling digital currency products as “securities” in a bid to claim jurisdiction over them, a move that would saddle cryptocurrency developers with new layers of red tape.¹⁵⁹ In addition, new Treasury regulations on foreign equity stakes in U.S. biotech firms would subject those firms to greater review.¹⁶⁰ Especially troubling is the reported potential support in the administration for a “global minimum tax” in the name of tax harmonization.¹⁶¹

Industrial policy or market socialist mechanisms. Overabundance of taxpayer funding of scientific and technology research is incompatible with a future of optimally and lightly regulated science and technology specifically, and with limited government

generally. However, addressing infrastructure and other broad initiatives in his February 5, 2019, State of the Union address, 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.”¹⁶²

A probable showcase for this emphasis was a February 11, 2019, executive order on “Maintaining American Leadership on Artificial Intelligence.”¹⁶³ Executive orders are not law, but they can influence policy, and this one promotes “sustained investment in AI R&D in collaboration with industry, academia,” and others. It also calls for federal collection of data, among other centrally coordinated moves. It 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.”

This is concerning on its own, but it occurs in an environment in which much AI research at the federal level happens at the Department of Defense. The Pentagon, the day after Trump’s AI executive order, released its own AI strategy, subtitled “Harnessing AI to Advance Our Security and Prosperity,” describing use, plans, and ethical standards in deployment.¹⁶⁴ 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 fusion of government and private AI deployment is troubling. Where one tech titan’s motto had been “Don’t Be Evil,” a fitting admonition now for the sector as a whole is “Don’t Be Government.” We cannot foresee how future presidents will regard such overly cozy government and private alliances. Their legitimization at the top in this manner makes it harder to achieve regulatory liberalization and any separation of technology and state in the future. The establishment of a “Space Force” is related to this phenomenon, given that commercial space activities have barely taken root beyond NASA contractors and partners.¹⁶⁵ Making the (AI-driven) force

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a new 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.¹⁶⁶ The space force move was preceded by a presidential directive on space traffic management complete with tracking, cataloging, and data sharing with government.¹⁶⁷ It is worth remembering that most debris in space is there thanks to NASA, not private entrepreneurs.

Welfare regulations. Whereas there is no constitutional authority for federal government involvement in job training, a policy program we already mentioned, a “national strategy for training and retraining workers for high-demand industries” is in play.¹⁶⁸ In addition, the announced “nationwide paid family leave” plan included in the Trump budget has been taken up by legislators on both sides of the aisle, surely in order to be expanded beyond its initial federal government targets.¹⁶⁹

The foregoing comprises an incomplete catalog of active policy implementations with regulatory heft that run counter to the administration’s point-of-the-spear deregulatory campaign. Rules and regulations individually 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 things unintended and unforeseen—especially if the nuclear option on the Senate legislative filibuster comes to fruition.

The conventional administrative state and big-spending appropriations framework exert a considerable force. Trump cannot and has not stopped it all, but he has added his own pro-regulatory elements to the landscape.

Congress has not passed comprehensive regulatory liberalization in nearly a quarter century, and deregulation under Executive Order 13771 will become harder as quick-to-rid regulations are exhausted. As the University of Pennsylvania’s Coglianese states, “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.”¹⁷⁰ The pertinent question is whether any executive branch regulatory liberalization can be maintained over time given the administrative state’s barriers 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 operate under an instruction from OMB Director Mick Mulvaney that deregulation should be their “highest priority”—the permanent bureaucracies are likely biding their time.¹⁷¹ Without congressional action, much of the Trump streamlining phenomenon will be transitory, especially if he were to back 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 rollbacks, so expectations for executive-branch-only reforms must be tempered.¹⁷²