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 three 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.[43]

Assessing agencies' priorities and results to date illustrates some limitations for the prospects for continued streamlining of rules and regulations when presidential attention turns elsewhere (particularly given that the 116th Congress will not enact a legislative regulatory reform package). Barack Obama unapologetically wielded the "pen and phone" to expand federal reach over private affairs.[44] Donald Trump, too, has used the pen and phone, in significant part to attempt to undo Obama programs and otherwise streamline regulation.[45] However, Trump also expresses substantial regulatory impulses of his own that arguably undermine his administration's reform agenda; that will be reviewed here as well. The overarching reality is that the federal government is far larger than ever, and Trump's executive branch reorganization initiative undertaken alongside regulatory streamlining has resulted in the elimination of no regulatory agencies.[46]

Presidents come and presidents go, but few systematically and in such prolonged fashion attempt to freeze and roll back rulemaking. Agencies and outside advocacy groups react strongly to protect the administrative state, and legal challenges to Trump's regulatory rollback and Executive Order 13771 predictably ensued.[47] A poor record in court for some Trump streamlining measures has been widely noted.[48] These included early judicial rebukes to Trump's efforts to delay implementation of certain elements of the EPA's Waters of the United States rule and of a chemical disaster preparedness and disclosure rule.[49]

The administrative state's fundamental incompatibility with limited government is readily observable in the rulemaking process itself. The 1946 Administrative Procedure Act 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.[50] The Administrative Procedure Act's rulemaking process allows for wiggle room to grow regulation 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.[51] Therefore, rules cannot be eliminated via the same "good cause" exemption. Rather, a rule can be replaced only with a new rule or legislation.[52] 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," which is not much of a restraint.[53]

The two-for-one executive order was explicit regarding its own legal limitations. The Trump approach in Executive Order 13771

The Administrative Procedure Act allows for wiggle room to grow regulation via its "good cause" exemption.

seems executed well within the rule of law, as much as that concept applies in the context of the administrative state.[54] 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."[55] 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."[56] And sure enough, early on, then-Office of Management and Budget (OMB) Director Mick Mulvaney (who then served as White House acting chief of staff until March 2020) 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."[57] The big changes, like recodification of the Waters of the United States[58] and Clean Power Plan rules, took time but eventually did occur.[59]

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The court losses were 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 with transitory membership that has delegated away much of its lawmaking power to executive branch agencies and their career personnel.

Curiously, while the impression is given by opponents that Trump's rollbacks are illegal and undermine health and safety and "safeguards"[60] in their sweeping character, other progressive commentators, covering all the bases presumably, call Trump's boasts a "deregulation myth."[61] Complaints, sometimes contradictory, range from the dismissive observation that the administration "claims credit for some regulatory actions begun under Obama"[62] to the claim that Trump merely wants to offload red tape to the government.[63] We find progressives' characterization of a "war on regulation"[64] and Paul Krugman's outlandish claim that "Donald Trump Is Trying to Kill You."[65] We have claims that the "rollback has largely been a bust. In some cases, in fact, it's been an outright fraud."[66] So Trump is both overreaching and not accomplishing anything, according to progressives and other opponents. Both cannot be true.[67]

The success or failure dispute notwithstanding, the reality is that the administrative state is alive and well, powering ahead. While improvements can be made to the implementation of Executive Order 13771[68] and to newer orders issued to restrain abuse of guidance documents, a president can achieve only a limited streamlining in a systemic imbalance tilted toward escalating administrative state power.[69] Executive Order 13771, in an arena in which agencies make most law, underscores what a president may *not* do acting alone.[70] 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 of Article I of the Constitution: 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 designation could have staying power and be carried forward by subsequent administrations.

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 spearheaded by agencies themselves. Substantial regulatory streamlining of these require either new rulemaking or legislation.

Trump's regulatory rollbacks over the past three years—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 CRA in 2017, via individual resolutions of disapproval passed by Congress and signed by Trump.[71] The rules removed were generally not headline-grabbing reforms, nor all major ones.[72] There were hundreds of rules eligible to be rolled back, which provides the reality check that businesses often favor regulation that provide advantages over rivals.[73] An additional rule not originated under Obama and one guidance document from the Consumer Financial Protection Bureau were also eliminated by resolution of disapproval in 2018. In similar fashion, when Trump leaves office, rules issued in the waning months of his presidency, including those meant to streamline, would be similarly vulnerable.

Second, the Trump administration withdrew or delayed 1,579 Obama administration rules that were in the pipeline at the time of inauguration but not yet finalized, as follows:[74]

- 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.[75] This manifested in several ways, such as the permitting-related executive actions noted in Box 1, the Commerce Department's permit streamlining action plan (which contained a collection of rule recommendations),[76] and some elements, with caveats, of the 2019 Trump Budget proposal addressing infrastructure reform.[77]

Fourth, to the limited extent possible, agencies have largely abstained from issuing significant new regulatory initiatives. While more significant rules have been removed than added, such rules still have been added. Trump's total final rule counts were 3,281 in 2017; 3,368 in 2018; and 2,964 in 2019, compared to Obama's 2016 tally of 3,853 (these are calendar years).[78] Of Obama's finalized rules, 486 were categorized as "significant." The "significant" subset for Trump has been 199, 108, and only 66 for the past three years, respectively. Even these lower rule counts can still overstate agencies' conventional rulemaking activity, since some "rules" have been and are Executive Order 13771–driven delays or rollbacks of existing rules.

***Fifth*,** the Trump administration technically exceeded the one-in, two-out goals for adoption of significant regulatory actions in the first two fiscal years,[79] but the increasing difficulty of rule offsets led to not quite meeting the objective in fiscal year 2019 without rounding up. [80] In implementing the streamlining process, two OMB guidance documents on the one-in, two-out executive order were issued after the order itself.[81] Further, another 2017 executive order established Regulatory Reform Task Forces at various agencies.[82] Agencies also sought public input on rule streamlining.[83] But these changes are bumping against limits. Since the administration is acting without any bipartisan support from Congress, rewriting rules under the strictures of the Administrative Procedure Act becomes the only option left as Trump's Executive Order 13771 one-in, two-out campaign matures, and that affects the ratio considerably.

However, while it inevitably becomes harder to eliminate more than two rules for each added without Congress contributing to the effort, the point of the spear of the Trump deregulatory program is the capping of net new regulatory costs at zero, for which the regulatory eliminations are a tool—a mini-regulatory budget of sorts. "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,"

Businesses often favor regulation that provide advantages over rivals.

Table 1. Significant Regulatory Actions

	FY2017	FY2018	FY2019	Total
Regulatory	3	14	35	52
Deregulatory	67	57	61	185
Claimed ratio—rules out/rules in	22/1	4/1	1.7/1	3.6/1

noted then-OMB Office of Information and Regulatory Affairs (OIRA) Administrator Neomi Rao in the "Introduction to the Fall 2018 Regulatory Plan."[84] In that respect, the administration claimed net regulatory cost savings of $50.9 billion in total present-value regulatory costs across the government between 2017 and 2019, with $13.5 billion of that occurring in 2019.[85] The trajectory of out/in follows:

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.[86] Six rules included in the roundup of 67 were among the 15 eliminated via Congressional Review Act resolutions of disapproval. Interestingly, among the initial 67 rule reductions, nine appeared to be revocations or alterations of sub-regulatory guidance, notices, orders, or information collections.

A bewildering rulemaking nomenclature places regulations into an array of categories encompassing such terms as rules, significant rules, major rules, economically significant rules, guidance, and more.[87] Some independent agency rules were removed via CRA procedures but not taken as "credit" for two-for-one purposes, since the order did not bind independent agencies. Examples of these included a CFPB arbitration rule,[88] a Securities and Exchange Commission (SEC) rule on foreign resource extraction payment disclosure,[89] and an FCC broadband privacy regulation.[90] The FCC's elimination of Obama-era net neutrality rules[91] and modernization of broadcast ownership rules are among significant undertakings not included in two-for-one, but like all substantial final rules, new rulemaking proceedings can be lengthy.[92]

In 2018, OIRA reported in "Regulatory Reform Results for Fiscal Year 2018" that "Agencies issued 176 deregulatory actions and 14 significant regulatory actions," for an overall 12-to-one ratio.[93] Fifty-seven of these deregulatory actions were deemed significant, so comparing significant deregulatory to significant regulatory actions yielded a four-to-one ratio.[94]

In 2019**,** OIRA reported in "Regulatory Reform Results for Fiscal Year 2019" that "Agencies issued 150 deregulatory actions and 35 significant regulatory actions," for an overall 4.3-to-one ratio.[95] Sixty-one deregulatory actions were significant, so comparing significant deregulatory to significant regulatory actions yields a ratio of 1.7 to 1.[96]

Below is a summary of the three Trump fiscal years of claimed significant reductions. The overall ratio stands at about 3.6 to one, as shown in Table 1.

Box 2 summarizes the Trump administration's 2019 claimed 150 completed regulatory eliminations or reductions by agency, showing significant (59) and other/non-significant (91) components, along with a breakdown of the claimed $13 billion in present value cost savings for fiscal year 2019.[97] As Box 2 shows, the Department of Health and Human Services issued the most claimed significant deregulatory rules (11) and led in claimed cost savings ($11.4 billion); Veterans Affairs and the EPA account for most of the cost added. While overall the "no net new costs" directive is apparently being met given the body of agency activity surveyed by OMB, it appears to not neces-

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	150	61	89	35	($13,470.9)
Dept. of Agriculture	13	5	8		$(2,152.0)
Dept. of Commerce	18	0	18		$(73.2)
Dept. of Defense	4	2	2		$(21.5)
Dept. of Education	4	2	2		$(3,081.5)
Dept. of Energy	5	2	3		$(305.9)
Dept. of Health and Human Services	14	11	3	13	$(11,400.7)
Dept. of Homeland Security	11	4	7	3	$(781.1)
Housing and Urban Development	2	2	0	1	$(365.0)
Dept. of Interior	18	4	14		$(1,452.8)
Dept. of Justice	1	0	1	1	$20.8
Dept. of Labor	8	8	0	2	$(7,959.3)
Dept. of Transportation	23	8	15	4	$(2,319.2)
Dept. of the Treasury	4	3	1	1	$61.7
Veterans' Affairs	3	1	2	3	$8,129.9
Environmental Protection Agency	18	4	14	6	$8,392.4
DoD/GSA/NASA (Federal Acquisition Regulation)	1	1	0	1	$(8.8)
Office of Personnel Management	1	1	0		
Small Business Administration	1	1	0		$(16.3)
U.S. Agency for International Development	1	0	1		$(138.50)
TOTAL	150	59	91	35	$(13,471.0)

Source: White House OMB, Regulatory Reform Results for Fiscal Year 2019, https://www.reginfo.gov/public/do/eAgendaEO13771.

sarily be happening by individual agency in a given year. As noted, deregulatory campaigns take years.

Again, there are ample critiques of the reality of the claimed cost reductions, of their effect on the economy, of their neglect of benefits,[98] and charges of "taking exaggerated credit for small reductions."[99] But, as then-acting OIRA Director Dominic Mancini stated in 2017, "EO 13771 deregulatory actions are not limited to those defined as significant under EO 12866 or OMB's *Final Bulletin on Good Guidance Practices*."[100] Nonsignificant deregulatory rules issued may contribute to cost savings. Additionally, there have been eliminations beyond what the White House took credit for, such as with guidance documents and independent agency streamlining. Details on precisely what the rules are from each agency, the full list—of 150 deregulatory (59 significant and 91 nonsignificant) and 35 regulatory actions—is provided in OMB's "Regulatory Reform Report: Completed Actions for Fiscal Year 2019."[101]

Regarding the net zero "regulatory budget," we noted that OMB claims agencies have achieved $50.9 billion in savings over the past three fiscal years.[102] The White House claims to anticipate additional savings in FY

2020, topping another $51.6 billion, with the Department of Transportation and the EPA to contribute the vast bulk of cost reductions, and the Department of Homeland Security adding the most cost.[103] As it happens, the savings goal of $18 billion for 2019 was not met.[104] Still, as seen below, savings would total roughly $100 billion if the new goals are met (the individualized yearly annual reports depict slightly less savings, about $45 billion, than OMB claims now).[105]

- FY 2017 savings: $8.148 billion[106]
- FY 2018 savings: $23.432 billion[107]
- FY 2019 savings: $13.471 billion[108]
- FY 2020 savings (anticipated): $50.949 billion[109]
- Total: $96.000 billions

The Obama administration's cost picture contrasted sharply with Trump's claimed savings. A November 2017 Heritage Foundation analysis of available information on the Obama regulatory record isolated the major rules listed in the GAO database affecting only the private sector and distinguished between those that were deregulatory and those that were 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."[110]

Each of the prior three fiscal years' rollbacks are detailed in OMB's respective "Regulatory Reform Results" tabulation.[111] Many are obscure, as noted, but there are still prominent examples of rule rollbacks and alterations beyond prominent aforementioned ones such as the Clean Power Plan, Waters of the United States, and other environmental rules.[112] In some instances, independent agencies participated in rollbacks despite not being subject to executive orders. Among much else, notable rules and proposals for rollback have included:

- The Fish and Wildlife Service's "improvements to the implementing regulations of the ESA [Endangered Species Act] designed to increase transparency and effectiveness" regarding critical habitat designation, unoccupied territory subject to inclusion, and adding or removing species to the endangered list using the "best available scientific and commercial information."[113]
- An EPA and National Highway Traffic Safety Administration withdrawal of the California waiver on vehicle emissions afforded by the Clean Air Act.[114]
- An proposed EPA rule on "strengthening transparency" and limitations on "secret science."[115]
- A Department of Energy final rule withdrawing energy conservation standards for incandescent light bulbs issued under the Obama administration on January 19, 2017.
- A Department of Labor final rule expanding retirement savings options to make it easier for employers to band together and create joint retirement plan options for employees.[116]
- A 2020 proposed rule issued by the White House aimed at updating or modernizing the 1978 National Environmental Policy Act's implementing regulations with respect to environmental reviews of infrastructure projects.[117]
- A final rule from the Treasury Department's Office of the Comptroller of the Currency raising of thresholds for stress testing for banks and savings and loans.[118]
- A final rule from the Office of the Comptroller of the Currency, Federal Reserve, and Federal Deposit Insurance Corporation raising limits for prohibitions on interlocking managements.[119]

Some proposed rules reductions and streamlining that likely will contribute to one-in, two-out seem economically significant in the normal sense of that term, but do not get characterized as such under the one-in, two-out regime. Examples include:

- Alcohol and Tobacco Tax and Trade Bureau notices of proposed rulemaking on relaxing container standards and requirements for wine[120] and distilled spirits;[121]
- Modernization of authorizations for supersonic flights;[122]

- Lessening of restrictions on logging in federal forests put in place during the Clinton administration;[123] and
- The Department of Housing and Urban Development's proposed rule to "amend HUD's interpretation of the Fair Housing Act's disparate impact standard to better reflect" Supreme Court interpretation and address the abuse of such claims with respect to neutral policies.[124]

Notably, treaties are not normally considered regulation, yet relevant in the current context but not counted are savings from withdrawal from the Paris climate agreement.[125]

As the OMB's own breakdown of specific regulations and rollbacks makes clear, regulations are still being added in the two-for-one era. While some rules are intended to cut or streamline, overarching regulatory regimes exist apart from any president and cannot be undone by one.

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 and "regulatory dark matter" that can have regulatory effect.[126] The most prominent to this point had been President George W. Bush's Executive Order 13422, which subjected significant guidance to OMB review,[127] and his administration's 2007 OMB Good Guidance Practices memorandum.[128] Trump's initial executive orders and directives encompassed not just "significant regulatory actions," but significant guidance on a case-by-case basis.[129] Meanwhile, agencies have revoked guidance and directives that were not included among the proclaimed regulatory reductions.[130] Continued emphasis on guidance documents is important since agencies discouraged from issuing rules may rely more heavily on such sub-regulatory guidance. Addressing guidance more explicitly can also be important for reckoning with the diminishing returns of the two-for-one program.

In 2019, two prominent developments happened at the White House level. April 11 brought an update of a 20-year-old OMB memo to agencies called "Guidance on Compliance with the Congressional Review Act."[131] The April 2019 OMB memo reinforced the ignored reality that guidance documents are "rules" and underscored the ignored legal obligations agencies have to send new rules and guidance to both Congress and the GAO before they can take effect, and to ensure that rule status—whether they are major or not—gets formally established before rules are published and considered binding. The level of compliance with these important directives on disclosure and accountability remains unclear, although it is the case that final rule counts dropped substantially in 2019, which could signify some positive effect.[132]

The most significant step in addressing guidance document abuse was the Trump administration's issuance in October 2019 of two new executive orders (among those listed earlier in Box 1).

- Executive Order 13891, Promoting the Rule of Law through Improved Agency Guidance Documents, October 9, 2019.[133]
- Executive Order 13892, Promoting the Rule of Law through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, October 9, 2019.[134]

Executive Order 13891, "Improved Agency Guidance Documents," seeks to enable a now-lacking infrastructure for disclosure of guidance documents by creating a "single, searchable, indexed database" at every executive branch agency. Creating those indexes will be streamlined at the outset by an agencies-wide rescission of guidance that "should no longer be in effect." The order discusses actively "rescinding" guidance documents, but those not added to the database would be void regardless. Where existing guidance is retained or new guidance is issued, its nonbinding nature shall be affirmed. It also required the development of procedures for the public to petition for revocation or alteration.

For the subset of "significant guidance documents," there are further requirements. These are:

Regulations are still being added in the two-for-one era.

- New processes for public notice and comment (subject to "good cause" waiver);
- Public responses from agencies before significant guidance documents are finalized;
- Signoff on significant guidance by a presidentially appointed official; and
- OIRA review under Executive Order 12866 to affirm benefits justify costs (as well as adherence to other regulatory oversight executive orders in effect).

These requirements were followed up on by an implementation memo aimed at clarifying and reinforcing agencies' duties and compliance.[135] The risk now is that agencies undermine the April 2019 OMB order and Trump's executive orders on guidance deliberately or simply through disregard.[136]

Like the one-in, two-out order, the new guidance orders have their detractors. The Center for Progressive Reform complained of the "transparency and fairness" order that "Rather than solving a real problem … seems more focused on creating a myth that agencies are running around punishing companies with arbitrary enforcement actions. That just doesn't happen in reality."[137] The bipartisan Administrative Conference of the United States would differ on that score.[138] Yet, it should not be surprising that proponents of stricter regulations might seek to use restrictions on guidance to target guidance intended to lessen regulatory burdens.[139]

Agencies have housed regulatory reform "task forces" since early in the Trump administration, and they are now charged with revising rulemaking and guidance procedures and publishing them under the new executive order. Apart from the White House guidance executive orders, some agencies have taken steps individually. For example, the Department of Transportation took initiative by building on Trump's initial executive orders on regulatory streamlining with what has been called a "rule on rules," addressing processes and transparency for rules, guidance, enforcement, and due process.[140] While Trump's executive orders can be revoked by a new president, this final rule incorporating some of the principles presents hurdles (not insurmountable, of course) to immediate rollback since the benefits of transparency and accountability would have to be denied. To a less formal but still significant extent, in moves that will likely incorporate guidance, bodies like the Department of Transportation[141] and the Environmental Protection Agency maintain their own running online tallies to provide up-to-date public information.[142] Relatedly, the FCC, though as an independent agency not bound by any Trump executive order, issued a January 2020 white paper enumerating steps taken on "Eliminating and Modernizing Outdated Regulations."[143]

While regulatory reform legislation in general faces substantial barriers in both the House and Senate, guidance reform is an area with bipartisan appeal, especially given recognition by the Administrative Conference of the United States of the potential for abuse and misunderstandings surrounding guidance documents. Measures like the Guidance out of Darkness Act, sponsored in the 116th Congress by Sen. Ron Johnson (R-WI) and Rep. Mark Walker (R-NC), could conceivably gain traction in coming years.[144] Unlike the one-in, two-out order likely to be revoked by a future Democratic president, the attention to guidance documents and their proliferation can amount to a real legacy for the Trump administration. This development can inform the broader goal of Article 1 Restoration in the future. The Trump effort can continue to help eliminate, better classify, disclose, streamline, and check guidance as well as traditional rulemaking and regulations.

In the next section, however, we look at expansion of or threatened regulations of Trump's own making, increases in burdens or restrictions of liberty that are not attributable to the preexisting administrative state that Trump inherited.