COMPETITIVE ENTERPRISE INSTITUTE

WEBmemo

**May 14, 2020** **No. 50**

# Pen, Phone, and Eraser?

## How Trump Can Unilaterally Advance Economic Recovery by Slashing Regulations

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There have now been several layers of congressional rescue-and-stimulus response to the coronavirus crisis, and there will be more "phases" to come. Given partisan discord, we have to be realistic and recognize that the sweeping "deregulatory stimulus" that is needed now as an alternative to unlimited-spending stimulus will not be fully adopted by Congress. That means there need to be more unilateral moves by President Trump to streamline regulation.

If Congress can spend to stimulate, Washington can also deregulate to stimulate. We have seen a newfound willingness by states and federal agencies to roll back hundreds of regulations impeding access to and provision of health care. It became apparent quickly that the accumulation of generations of regulations can hurt rather than help people. As my colleague Ryan Young outlined it, "Never Needed" regulations are those that:

- Slow distribution of proven medical diagnostic tests and devices.
- Block patients' remote access to medical providers.
- Increase the cost of energy at a time when Americans can least afford it.
- Make it more difficult to hire employees.
- Add another layer of bureaucracy or complexity to legal compliance.
- Block access to capital for consumers or businesses.[1]

Such red tape enjoys some deserved bipartisan disdain. Such never needed rules encompass those that have undermined resilience, worsened the crisis, impeded effective response and stand in the way of reboot.[2]

Congress can take steps to streamline regulation, such as via a regulatory reduction commission to get rid of never needed rules,[3] bipartisan legislation like that that proposed by Sens. James Lankford (R-OK) and Kyrsten Sinema (D-AZ) to give business more advance notice of upcoming rulemaking and set metrics for review of success for new rules,[4] and the Guidance Out of Darkness Act to require one-stop access to the "guidance documents" agencies sometimes deploy instead of regulations.[5]

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But given the political reality of broader partisan gridlock, it will be very difficult to push through major, resilience-building regulatory reforms. If Congress will not act on regulatory streamlining in the next "Phases" of recovery legislation, Trump has options for unilateral action. President Obama's "pen and phone" expanded the federal government reach unilaterally in times of relative calm. That implies that an administration to deregulate can roll government back as the economic crisis mounts alongside the COVID-19 outbreak. A brief list of relief and rescue follows.

**Remove and Suspend Existing Rules**. Given moves like Trump's executive order directing agencies to repeal two regulations for each new one enacted,[6] his streamlining of permitting for major infrastructure projects,[7] and its deregulatory responses to the crisis so far,[8] it is likely that the administration will seek to prioritize certain deregulatory responses to COVID-19. In that regard, the administration should seek to:

- Boost the two-for-one campaign;
- Increase agency flexibility to remove and suspend regulations rapidly such as by using "good cause" and interim final rules to pare down rules without going through the notice and comment process as required under the Administrative Procedure Act;[9] and
- Relax regulatory enforcement or prosecutorial discretion in cases where there is good faith on the part of the "violator," especially for small businesses.

The takeaway here is that rules that were never needed—not just those aggravating the health crisis but also those exacerbating the mounting economic one—should have been gone long before COVID-19 rolled around. They should not have been there in the first place, and they consume energy and effort by being removed now.

**Freeze New Rule Issuance and Require Congress to Approve Thawed Ones**. Past presidents, such as George H.W. Bush, issued temporary moratoria on new agency regulations.[10] White House officials should review the history of these and implement a new one to temporarily stall what the limited provisions of one-in, two-out do not restrain now.

In some respects, stalling agency rules now would not technically be a new freeze, but mere adherence to law. As it stands, the Congressional Review Act requires all agency rules and guidance documents to be submitted to both houses of Congress and to the Government Accountability Office before they can take effect. This has not been happening.[11]

Given that fact, Trump should reaffirm, in a new executive order, an obscure but important April 2019 memorandum to agencies by Office of Management and Budget (OMB) Director Russell Vought on "Compliance with the Congressional Review Act."[12] As it stands, there is little evidence of compliance with the memorandum. That means much regulation purportedly in effect is technically invalid.

The president can even take this step further. As aggressive as Trump has been on regulation, Mitt Romney, during the 2012 campaign, released a position paper with a provision even more hardcore than anything Trump has done with respect to reaffirming

Article I and restoring Congress's accountability for lawmaking. Romney wanted legislation to:

> [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.[13]

Trump should issue precisely such an order. This would constitute a more limited version of the Regulations from the Executive in Need of Scrutiny Act, better known by its acronym REINS Act, which would require Congress to approve major rules before they can take effect. The current crisis justifies the move, but so did the Constitution before today.

Trump can make even this command stronger. President Ronald 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, which would activate a requirement for a greater regulatory impact analysis.[14] As we emerge from the economic crisis, reaffirming that element of the original Reagan order should ensure more rules meet more significant scrutiny.[15]

These steps for new rulemaking— which should include bringing heretofore-exempt independent agencies into the process—would help efforts to both restore lawmaking authority to Congress, where it belongs, and address the economic crisis in a fundamental way.

**Sunset Laws, Agencies, and Regulations**. Rule suspensions and eliminations, plus control of the new rule outflow, are important. In addition, laws, agencies and rules in general ought to justify their existence to taxpayers (and affirm their constitutionality) periodically and disappear if they fall short. Rep. Kevin Brady (R-TX) has done the most recently to advance this foundational "sunsetting" idea.[16]

Rules and regulations live on, even if the unelected agency personnel that created them are in some cases long deceased. Yet, every regulation should have an expiration date and disappear unless consciously, soberly renewed—not just the troublesome ones that catch our eye in in pandemic-stricken 2020. Putting legacy rules and those created between now and the next crisis on the expiration review schedule would bank resilience for the next emergency.

Even when tried, setting expiration dates has not always worked, but previous efforts can be improved upon.[17] Further, the process will leave a paper trail for posterity to aid future efforts to rein in the administrative state. Sunsetting would mean that in the next crisis, we already will be out in front of the situation. It can help us to create the necessary backdrop to ensure that nothing artificial and bureaucratic stands in the way of recovery.

We need to know how many regulations come up for review that do not get reviewed or eliminated to be capable of reporting that number and which agencies are responsible for the lapse.

Ideally, when major rules get revived in a sunset regime, their continuation ought to hinge on congressional approval. Agencies exist to regulate; the objectivity of their reviews should be consistently met with a stalactite of salt. Agencies urging for rules under their purview to be sunsetted would be self-annihilating.

**Conclusion**. An effectively deployed regulatory reduction commission could seriously help pare down the regulatory state long before distant sunsetting deadlines force the issue.

Freezing of new rules and suspension of harmful existing ones can also help curb the growth of the administrative state.

Sunsetting of rules can relax the abuses stemming from Congress' over-delegation of power to unaccountable federal agencies, which is a major reason for today's proliferation of rules.

The administration should also be working with Congress on a "liberate to stimulate" campaign to not only facilitate economic recovery now, but also build resiliency for the future.

In a constitutional republic, presidential powers are rightly limited, but, as Obama noted, the executive does haves a pen and phone. As a corollary to that, he wields an eraser too, where appropriate.

**Notes**

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