

Ten Thousand Commandments

An Annual Snapshot of the Federal Regulatory State

2021 Edition

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Executive Summary

Now a relic, spending control and deficit restraint are indispensable to a nation's stability and long-term economic health. What little alarm arose over lack of spending restraint under President Donald Trump's administration, even with the benefit of a healthy economy, never stemmed disbursements.¹ Fiscal conservatives long ago lost the appetite for addressing spending.² Even before the rocketing spending generated by the coronavirus outbreak, spending on debt service threatened to rival the entire defense budget, especially as interest rates rise.³ Meanwhile, COVID-19 has only escalated magical thinking that government outlays create wealth. Today's mantra is, "When you run out of other people's money, keep spending anyway."

This year, the Congressional Budget Office's January 2021 *Budget and Economic Outlook*, covering 2021 to 2031, shows discretionary, entitlement, and interest spending of \$6.552 trillion in FY 2020 (up from \$4.4 trillion last year), with an unprecedented COVID-induced deficit of \$3,132 trillion.⁴ While

spending is projected to decline in the new 2021 fiscal year and for a short time beyond, the Congressional Budget Office puts outlays beyond the \$7 trillion level before the end of the decade. The national debt now stands at \$27.8 trillion.⁵ It was slightly under \$20 trillion when Trump took office just over four years ago.

As imposing as all that is, the cost of government extends even beyond what Washington collects in taxes and the far greater amount it spends. Federal environmental, safety and health, and economic regulations and interventions affect the economy by hundreds of billions—even trillions—of dollars annually. This situation has been aggravated by COVID-19. Unlike on-budget spending, regulatory costs and burdens caused by government are largely obscured from public view and operate like a hidden tax.⁶ As the least disciplined aspect of government activity, regulation can be appealing to lawmakers. Budgetary pressures can incentivize lawmakers to impose off-budget regulations on the private sector rather than add to

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unpopular deficit spending. A government child care or job training initiative could involve either increasing government spending or imposing new regulations that require businesses to provide those benefits. Just as firms generally pass the costs of some taxes along to consumers, some regulatory compliance costs and mandates borne by businesses will percolate throughout the economy, finding their way into consumer prices and workers' wages.⁷

When the U.S. federal administrative state began its growth a century ago, few likely imagined the tangle of rules it would yield and how those would envelop the economy and society. Over several decades, rules have accumulated year after year with little retrenchment. Over the past four years, there were some reversals in this regard, such as a slowdown in the issuing of new rules and some rollbacks of existing ones, but there remain reasons for concern.

One of the Trump administration's first directives was a memorandum to executive branch agencies titled "Regulatory Freeze Pending Review."⁸ Presidents routinely take similar steps to review predecessors' pending actions and prioritize their own.⁹ Biden proved no different, but he went further in singling out dozens of rules for review.¹⁰ Regulations published in the *Federal Register* with effective dates preceding Biden's arrival would not be available to freeze but could still be overturned via Congress' use of the Congressional Review Act.¹¹ The Trump administration went further in issuing a series of actions related to general regulatory process reform, pursuing reform of the executive branch itself, and streamlining internal agency processes and timeliness of regulatory approvals. Some of Trump's executive actions during his term went the other way by imposing burdens; among them were trade restrictions, anti-dumping, "buy American" agendas, and more.¹² Nonetheless, the extensive executive actions aimed at liberalization were both broad-based and sector-specific to areas such as financial regulation, antiquities and national monuments, offshore resource

access, education, health care,¹³ agricultural biotechnology, and more (see Box 1).

Since the federal government heavily influences society through regulation as well as spending, lawmakers should thoroughly track and disclose regulatory costs and perform periodic housecleaning. The limited cost-benefit analysis currently undertaken by agencies relies largely on agency self-reporting, covers only a fraction of rules, and omits vast categories of intervention.¹⁴ Regulators can be reluctant to acknowledge when a rule's benefits do not justify its costs, particularly when explicitly encouraged to amplify benefits and downplay costs.¹⁵ In fact, one could and should expect agencies to devise new and suspect categories of benefits to justify rulemaking when so incentivized.¹⁶

The regulatory impulse is largely driven by Congress' longstanding delegation of its lawmaking power to executive branch regulatory agencies, and by its overbroad assumption of lawmaking power over citizens' lives in the first instance. Addressing that situation effectively will require the restoration of Congress' duties and confines under Article I of the Constitution rather than mere administrative law reforms. That change could take the form of requiring congressional votes on significant or controversial agency rules before they become binding. Getting lawmakers on the record as supporting or opposing specific rules would help reestablish congressional accountability and affirm a principle of "no regulation without representation."¹⁷

Federal regulatory transparency report cards, similar to the presentation in *Ten Thousand Commandments*, could be issued each year to distill information for the public and policy makers about the scope of the regulatory state.¹⁸ Scattered government and private data exist on the number of regulations issued by agencies and their costs and effects. Improving and compiling some of that information can shed light on the scope of the federal regulatory enterprise. That goal is central to the annual *Ten Thousand Commandments* report.

Box I. Prominent Executive Actions on Regulatory Process Reform during Trump's Term

2017

- Presidential Memorandum, Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, January 24, 2017.¹⁹
- Executive Order 13766, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, January 24, 2017.²⁰
- Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, January 30, 2017.²¹
- Executive Order 13772, Core Principles for Regulating the United States Financial System, February 8, 2017.²²
- Executive Order 13777, Enforcing the Regulatory Reform Agenda, February 24, 2017.²³
- Executive Order 13781, Comprehensive Plan for Reorganizing the Executive Branch, March 13, 2017.²⁴
- Executive Order 13789, Identifying and Reducing Tax Regulatory Burdens, April 21, 2017.²⁵
- Executive Order 13790, Promoting Agriculture and Rural Prosperity in America, April 25, 2017.²⁶
- Executive Order 13792, Review of Designations under the Antiquities Act, April 26, 2017.²⁷
- Executive Order 13791, Enforcing Statutory Prohibitions on Federal Control of Education, April 26, 2017.²⁸
- Executive Order 13795, Implementing an America-First Offshore Energy Strategy, April 28, 2017.²⁹
- Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, August 15, 2017.³⁰
- Executive Order 13813, Promoting Healthcare Choice and Competition across the United States, October 12, 2017.³¹

2018

- Presidential Memorandum, Memorandum for the Secretary of the Interior: Supporting Broadband Tower Facilities in Rural America on Federal Properties Managed by the Department of the Interior, January 8, 2018.³²
- Executive Order 13821, Streamlining and Expediting Requests to Locate Broadband Facilities in Rural America, January 8, 2018.³³
- Presidential Memorandum, Promoting Domestic Manufacturing and Job Creation—Policies and Procedures Relating to Implementation of Air Quality Standards, April 12, 2018.³⁴
- Executive Order 13847, Strengthening Retirement Security in America, August 31, 2018.³⁵
- Presidential Memorandum, Promoting the Reliable Supply and Delivery of Water in the West, October 19, 2018.³⁶
- Presidential Memorandum, Developing a Sustainable Spectrum Strategy for America's Future, October 30, 2018.³⁷

2019

- Executive Order 13855, Promoting Active Management of America's Forests, Rangelands, and Other Federal Lands to Improve Conditions and Reduce Wildfire Risk, December 21, 2018.³⁸
- Executive Order 13891, Promoting the Rule of Law through Improved Agency Guidance Documents, October 9, 2019.³⁹
- Executive Order 13892, Promoting the Rule of Law through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, October 9, 2019.⁴⁰
- Executive Order 13879, Advancing American Kidney Health, July 10, 2019.⁴¹
- Executive Order 13878, Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing, June 25, 2019.⁴²
- Executive Order 13874, Modernizing the Regulatory Framework for Agricultural Biotechnology Products, June 11, 2019.⁴³
- Executive Order 13868, Promoting Energy Infrastructure and Economic Growth, April 10, 2019.⁴⁴

2020

- Executive Order 13969, Expanding Educational Opportunity through School Choice, December 28, 2020.⁴⁵
- Executive Order 13914, Encouraging International Support for the Recovery and Use of Space Resources, April 6, 2020.⁴⁶
- Executive Order 13924, Regulatory Relief to Support Economic Recovery, May 19, 2020.⁴⁷
- Executive Order 13927, Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities, June 4, 2020.⁴⁸
- Executive Order 13950, Combating Race and Sex Stereotyping, September 22, 2020.⁴⁹
- Executive Order 13956, Modernizing America's Water Resource Management and Water Infrastructure, October 13, 2020.⁵⁰
- Executive Order 13957, Creating Schedule F in the Excepted Service, October 21, 2020.⁵¹

2021

- Executive Order 13979, Ensuring Democratic Accountability in Agency Rulemaking, January 18, 2021.⁵²
- Executive Order 13980, Protecting Americans from Overcriminalization through Regulatory Reform, January 18, 2021.⁵³

The 2021 edition of *Ten Thousand Commandments* is the latest in an annual series that examines the scope of the federal regulatory state to help illustrate the need for measures like regulatory budgeting and ultimately congressional accountability. This report contains seven major elements:

1. A bulleted summary of highlights.
2. An overview bookending the ways the Trump administration attempted to stem the flow of regulations and roll back old ones.
3. A detailed discussion of Trump’s own regulatory impulses—implemented, pending, and potential—that could undermine the legacy of his deregulatory effort.
4. An overview of the scope of the regulatory state, including a taxonomy of categories and instances of unmeasured costs of regulation and intervention, and depictions of its considerable size compared with federal budgetary components and gross domestic product.
5. An analysis of trends in the numbers of rules and regulations issued by agencies, based on information provided in the *Federal Register* and in “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions.” This section also provides a brief survey of memoranda, notices, and other “regulatory dark matter,” and examines the results after four years of Trump’s “one-in, two-out” process for new regulations and its limitations.
6. Recommendations for reform that emphasize disclosure and improving congressional accountability for rulemaking.
7. An appendix containing historical tables of regulatory trends over past decades.

For the nation’s stability and economic health, the regulatory process should be made as transparent as possible and should be brought under greater democratic accountability and constitutional norms. Some highlights from the report follow.

- Apart from sector-specific executive orders and memoranda, the Trump

administration streamlined regulation in seven prominent ways :

- Elimination of 15 rules and one guidance document via the Congressional Review Act;
- Agency restraint in initiating large, significant rulemakings after delay or withdrawal of hundreds of Obama administration rules in the pipeline;
- Multipronged streamlining of permitting for pipelines, bridges, 5G broadband, rural broadband, and other infrastructure;
- Progress, albeit with declining marginal returns, on the presidential requirement that agencies eliminate at least two rules for every one issued;
- Steps toward addressing agency guidance documents and other sub-regulatory decrees;
- COVID-related waivers and streamlining of regulation; and
- Self-initiated “rules for rulemaking” from agencies under Trump.
- Bookending four years of “one-in, two-out” for federal regulations under former President Donald Trump as prescribed by his Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” the administration claimed the FY 2020 ratio was 3.2 to 1 (and 1.3 to 1 if only significant deregulatory actions were counted).
- *Agencies’ stated priorities and “inventories” of rules were warning signs for Trump’s deregulatory agenda all along.* While the Trump administration claimed to have met internal goals of implementing a “one-in, two-out” process for federal regulations and freezing costs, the longer horizon signaled agencies poised to reverse course and to issue substantially more regulatory actions than deregulatory ones. That impulse to regulation is unencumbered under Biden’s new executive directives to agencies.
- *Major new regulation is Trump’s own creation.* President Trump’s regulatory streamlining was offset by his own actions and favorable comments or lobbying for regulatory intervention in the following areas:

- Antitrust
- Hospital and pharmaceutical price transparency mandates and price controls
- Speech and social media content regulation
- Privacy, encryption, and algorithm regulation
- Threats to privacy: amplified government databases, biometrics, and surveillance
- Online taxes
- Bipartisan large-scale infrastructure spending with regulatory effects
- Trade restrictions
- Farm bill and agricultural intervention
- Subsidies with regulatory effects
- Telecommunications interventions, including for 5G infrastructure
- Personal liberties incursions: health tracking, vaping, supplements, and firearms
- Financial regulation
- Industrial policy in frontier sectors, such as scientific research, artificial intelligence, and the creation of the Space Force
- Novel welfare and labor regulations
- COVID-related regulation as opposed to deregulation
- Given the limited available federal government data and reports, and contemporary studies—and the federal government’s failure to provide a regularly updated estimate of the aggregate costs of regulation—this report employs a placeholder estimate for regulatory compliance and economic effects of federal intervention of \$1.9 trillion annually. It does so for purposes of context and rudimentary comparison with federal spending and other economic metrics. This report also presents an outline of the vast sweep of intervention and policies for which costs are disregarded and unfathomed.
- Federal spending topped \$4 trillion in 2018, then surged to \$6.5 trillion in 2020 with COVID-related spending and bailout efforts. These federal outlays are projected to be \$5.76 trillion in FY 2021 (not counting new COVID spending packages added during the course of 2021). The burden of regulatory intervention is equivalent to 33 percent of these projected federal outlays.
- Regulatory costs of \$1.9 trillion amount to 9 percent of U.S. gross domestic product, which was estimated at \$21.17 trillion in 2020 by the Commerce Department’s Bureau of Economic Analysis.
- When regulatory costs are combined with the peak COVID federal outlays of \$6.552 trillion in 2020, the federal government’s share of the entire economy amounted to at least 40 percent (30 percent is the typical figure; state and local spending and regulation would add to that).
- If it were a country, U.S. regulation would be the world’s eighth-largest economy (not counting the United States itself), ranking behind Italy and ahead of Brazil.
- The regulatory hidden “tax” rivals federal individual and corporate income tax receipts combined, which totaled \$2.076 trillion in 2020 (\$1.812 trillion in individual income tax revenues and \$264 billion in corporate income tax revenues).
- Regulatory costs rival corporate pretax profits of \$2.237 trillion.
- If one assumed that all costs of federal regulation flowed all the way down to households, U.S. households would “pay” \$14,368 annually on average in a regulatory hidden tax. That amounts to 17 percent of the average pretax income of \$82,852 and 23 percent of the average expenditure budget of \$63,036. The regulatory “tax” exceeds every item in the household budget except housing. That means that an average American household “spends” more on embedded regulation than on health care, food, transportation, entertainment, apparel, services, or savings.
- Calendar year 2020 concluded with 3,353 final rules in the *Federal Register*, up from 2019’s 2,964 final rules, which was the lowest count since records began

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being kept in the 1970s and is the only ever tally below 3,000. (In the 1990s and early 2000s, rule counts regularly exceeded 4,000 annually.) An additional 202 Trump administration rules were added between New Year's Day and Inauguration Day 2021.

- During calendar year 2020, while agencies issued those 3,353 rules (some of them deregulatory), Congress enacted “only” 178 laws. Thus, agencies issued 19 rules for every law enacted by Congress. This “Unconstitutionality Index”—the ratio of regulations issued by agencies to laws passed by Congress and signed by the president—highlights the entrenched delegation of lawmaking power to unelected agency officials. The average ratio for the previous decade was 28.
- In 2017, Trump's first year, the *Federal Register* finished at 61,308 pages, the lowest count since 1993 and a 36 percent drop from President Barack Obama's 95,894 pages, which had been the highest level in history. The 2020 *Federal Register* tally rose to 86,356 pages, which is the second-highest count ever. However, Trump's rollbacks of rules—and historically there are still fewer rules overall—also necessarily add to rather than subtract from the *Register*.
- The Weidenbaum Center at Washington University in St. Louis and the George Washington University Regulatory Studies Center in Washington, D.C., jointly estimate that agencies spent \$88 billion in fiscal year 2020 to administer and police the federal regulatory state. This on-budget sum is in addition to compliance and economic burdens.
- At the end of calendar year 2020, 2,149 proposed rules had been published in the *Federal Register*, which was Trump's highest count. His 1,834 in 2017 is the all-time low. The only other count to occur below Trump's levels was Obama's 2,044 in 2009.
- In contrast to the 3,353 rules finalized in calendar year 2020, there is also the flow in the pipeline itself to consider. According to the fall 2020 Unified Agenda of Federal Regulatory and Deregulatory Actions, 69 federal departments, agencies, and commissions have 3,852 regulatory actions in the pipeline at various stages of implementation (recently completed, active, and long-term stages). Of the 3,852 rules, 653 were deemed “Deregulatory” via Trump's now-defunct Executive Order 13771, broken down as follows:
 - Of 2,636 rules in the active phase, 496 are deemed deregulatory.
 - Of 630 completed rules, 101 are deemed deregulatory.
 - Of 586 long-term rules, 56 are deemed deregulatory.
- Of the 3,852 regulations in the Agenda's pipeline (completed, active, and long-term stages), 261 are “economically significant” rules, which the federal government describes as having annual economic effects of \$100 million or more. Of those 261 rules, 36 were deemed deregulatory for purposes of Trump's now-cancelled Executive Order 13771 (14 at the completed stage, 20 at the active stage). Only two are at the planned long-term rule phase.
- Since 1993, when the first edition of *Ten Thousand Commandments* was published, agencies have issued 111,065 rules. Since the *Federal Register* first began itemizing them in 1976, 208,155 final rules have been issued.
- The Trump administration's spring and fall 2020 editions of the Unified Agenda of Regulatory and Deregulatory Actions contained a combined 97 completed “economically significant” rules (the counts were 70 in 2017, 35 in 2018, and 88 in 2019). The yearly average for Barack Obama's eight years was 69; George W. Bush's average over his term was 49. Trump's average was 72, but his Agendas are the first to contain rules expressly designated deregulatory. There were 21 of them in 2020.
- During calendar year 2020, the Government Accountability Office (GAO) issued 90 reports on “major” rules—a category similar to but broader than economically significant—as the Con-

gressional Review Act requires. In the first year of the Trump administration, the count was 49, the lowest ever. President George W. Bush's administration averaged 63 major rules annually in eight calendar years. President Obama's administration averaged 86. Obama's eight years accounted for 691 major rules, compared with Bush's 504. Trump's four-year total was 274 for an average of 69, but a significant portion were deemed deregulatory. (These tallies emphasize calendar year, and therefore ignore pre-inauguration days attributable to a predecessor in transition years.)

- Of the 3,852 regulations in the pipeline, 635 affect small businesses. Of those, 330 required a regulatory flexibility analysis (an official assessment of small-business impacts), down from 412 in 2016 before Trump took office. An additional 285 were otherwise noted by agencies to affect small businesses in some fashion. Overall, 83 rules affecting small business were deemed "deregulatory" compared with 102 a year earlier.
- The five most active rule-producing executive branch entities—the Departments of Commerce, Health and Human Services, the Interior, Transportation, and the Treasury—account for 1,563 rules, or 41 percent of all rules in the Unified Agenda pipeline. The top five most active independent agencies account for another 341 rules.

- President Trump issued 69 executive orders in 2020 (after 47 in 2017, 35 in 2018, and 63 in 2019). From the nation's founding through the Obama administration, more than 15,285 executive orders had been issued. President Obama issued a total of 276, similar to President George W. Bush's 291. Before the 20th century, most presidents had issued no more than a few dozen. In contrast, Woodrow Wilson issued 1,803, Calvin Coolidge issued 1,204, and Franklin D. Roosevelt issued 3,467.
- President Trump issued 59 presidential memoranda that appeared in the *Federal Register* in 2020, after 26 in 2017, 30 in 2018, and 38 in 2019. During the eight calendar years encompassing President George W. Bush's presidency, 131 memoranda were published in the *Federal Register*, whereas President Obama's eight years saw 257 published. The *Federal Register* is not a complete compendium of executive actions, however.
- Public notices in the *Federal Register* normally exceed 24,000 annually, with uncounted guidance documents and other proclamations with potential regulatory effect among them (moreover, other guidance documents are issued that do not appear in the *Register* at all). In 2020, 22,480 notices were issued. There have been 638,935 public notices since 1994 and well over a million since the 1970s.