

# Swamp Things—Trump’s Discordant Regulatory Impulses Offset His Deregulatory Successes and Expanded the Administrative State

President Trump attempted to prune rules and costs and held down regulatory output with more enthusiasm than other presidents. But Trump also added regulation.

A president is limited in the ability to unilaterally roll back much of the administrative state. Increases in regulation are propelled as if by autopilot, driven by sweeping legislation that delegates enormous power to agencies.<sup>196</sup> Agencies always answer the question “Is there call for regulation?” in the affirmative. This ratcheting upward of federal administration—with rare retrenchment apart from the aborted Trump effort—is endemic of institutionalized social-policy spending and regulation, the cost of which is rarely measured beyond the purely budgetary element.<sup>197</sup>

On the flipside of Trump’s regulatory savings, the former president’s own regulatory impulses derailed and even eclipsed the roll-back agenda.<sup>198</sup> Not every Trump executive order reduced regulatory intervention; many opened the door to it. Trump’s proclivity for trade restrictions and his zeal for antitrust and media regulation (such as swipes at Amazon and the AT&T–Time Warner merger) were apparent early.<sup>199</sup>

Trump’s one-in, two-out and net-zero “regulatory budget” notwithstanding, more burdens may have been added than subtracted with regard to the broader federal administrative state. Just as some streamlining of regulatory action does not appear in the *Federal Register*, the kinds of interventions put in play in the Trump years and in 2020’s pandemic scenario may not show up immediately or lend themselves to measurability.

Notably, on October 17, 2018, the day the 2018 fiscal year 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, where 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.”<sup>200</sup> Yet there was much that remained to be done regarding comprehensive regulatory reform, and there was some backtracking as well.

Many less well-known regulatory initiatives emerged during the Trump tenure, such as the president’s approval of a permanent reauthorization of the Land and Water Conservation Fund (LWCF) boosting federal purchases of private lands,<sup>201</sup> his boasting of “the largest public lands package in a decade, designating 1.3 million acres ... of new wilderness,”<sup>202</sup> and his signing in 2020 of the Great American Outdoors Act, which allocates funding to the LWCF for a federal government that already owns a large portion of the continent. “From an environmental standpoint and from just the beauty of our country standpoint, there hasn’t been anything like this since Teddy Roosevelt, I suspect,” Trump said.<sup>203</sup>

In a related discordant move, the Trump administration received criticism from environmental groups over its expansions of drilling leases and rights on public lands and in the Arctic.<sup>204</sup> Conflicting with that move was Trump’s presidential memorandum placing a moratorium on oil and gas drilling and offshore windmill operations off the Gulf and Atlantic coasts of Florida and the other

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southeastern Atlantic states.<sup>205</sup> Trump reiterated after his ban at an Ocala, Florida, rally that “Florida didn’t want to see sludge coming onto their beaches.”<sup>206</sup>

Among the bigger complications for any streamlining agenda is that one cannot get rid of regulations; at best, one can generally replace a rule with another rule.<sup>207</sup> As former OIRA Administrator Susan Dudley (now director of the George Washington University Regulatory Studies Center) pointed 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.<sup>208</sup>

The careerist-dominated nature of the administrative state does not give any president much time, yet there is much on the books that a president can address unilaterally. Even less fortunate, Trump’s own regulatory impulses became dominant over his streamlining agenda, particularly where he exhibited solidarity with regulatory advocates on issues such as antitrust policy, regulatory action against high-tech firms and traditional media companies, and industrial and social policy.<sup>209</sup> What follows are areas where the administration added regulation or aggressively signaled support for intervention. This section will conclude with observations about rules with ambiguous effect and the complexities those present in streamlining bureaucracy.

**Antitrust.** On the one hand, the Trump administration took 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.<sup>210</sup> But on the other hand, President Trump casually invoked antitrust action against media, tech, and telecom firms, striking a discordant note with the deregulatory agenda. A hint of what was to come occurred when 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.”<sup>211</sup> The Justice Department’s attempt to block the merger ultimately failed.<sup>212</sup> Similarly, Trump tweeted accusations in 2018 that Comcast may have violated antitrust laws.<sup>213</sup> However, after mulling it over (such delay is itself a regulatory cost), the Justice Department did not investigate the Comcast-NBCUniversal alliance.<sup>214</sup> The former president declared Google, Facebook, and Amazon to be potentially in a “very antitrust situation,”<sup>215</sup> and asserted he was “in charge” and “looking at it,”<sup>216</sup> at a time when politicians and pundits across the political spectrum have called for the breakup of those companies.<sup>217</sup>

In early 2019, the Federal Trade Commission (FTC) announced a “technology task force” to assess alleged antitrust violations in the tech sector and increase scrutiny of acquisitions.<sup>218</sup> In the wake of that, and in contrast to the administration’s recognition of the misuse of guidance elsewhere, the FTC issued guidance on how the antitrust laws should apply to the technology sector and defended its own role in policing it.<sup>219</sup>

In other antitrust developments, authorities have considered an injunction against Facebook’s procedures for interoperability across platforms<sup>220</sup> and its acquisitions.<sup>221</sup> And much of the antitrust pursuit against big tech has fused with the desire to regulate the platforms’ treatment of content. The FTC is also investigating Amazon, having started interviews in 2019 with businesses that sell on the site.<sup>222</sup> Other signals pointed to a potential antitrust agenda by the Department of Justice and FTC beyond big Internet firms.<sup>223</sup> The FTC, for example, began a challenge to an acquisition transaction in DNA sequencing,<sup>224</sup> and the Justice Department investigated alleged coordinated meat price increases.<sup>225</sup> At least some of these initiatives can be expected to continue under the Biden administration.

**Hospital and pharmaceutical price transparency mandates and price controls.** Reform legislation affecting the Food and Drug

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Administration (FDA), known as “right to try,” has expanded the public’s access to certain needed medications,<sup>226</sup> and the lifting of regulatory burdens expanded access to medicines and telemedicine during the COVID outbreak. However, the COVID-related regulatory pullbacks were modest and limited in scope, particularly when compared with Congress’s offsetting intervention.<sup>227</sup>

Worse, the Trump administration sought to bring the down the costs of prescription drugs using blunt tools like price controls and other mandates. This began in late 2016, when Trump, before his inauguration, accused the pharmaceutical companies of “getting away with murder” and expressed support of government drug-price negotiation.<sup>228</sup> The administration that year introduced a proposal to require pharmaceutical price-listing mandates in television advertisements.<sup>229</sup> A federal judge blocked the subsequent rule from the Department of Health and Human Services.<sup>230</sup> Demonstrating Trump’s own contention that regulation drags down markets, the drugmakers’ shares rose upon the blocking of the rule.<sup>231</sup>

Some Republicans in the U.S. Senate proposed price controls through the tying of U.S. drug prices to lower prices charged in some other countries,<sup>232</sup> which would affect availability and medication research and innovation.<sup>233</sup> Trump was reported to support the idea in the wake of the judicial rejection of compelled TV ad listings.<sup>234</sup>

The former president issued an executive order in mid-2019 on hospital price transparency that, while it expanded Health Savings Accounts and Flexible Spending Accounts, included negotiated rates for services and shoppable items.<sup>235</sup> This presaged finalization of a rule in November 2019 about which the president boasted, “Under the new price transparency rule ... hospitals will soon be required to publish the price of everything from individual medical supplies to the total cost of common procedures.”<sup>236</sup>

In 2020, Trump set insulin and injectable epinephrine price caps under Executive Order

13937, “Access to Affordable Life-Saving Medications,” pegging them to the price paid by Federally Qualified Health Centers.<sup>237</sup> September 13, 2020, brought Executive Order 13948 on “Lowering Drug Prices by Putting America First,”<sup>238</sup> to the ongoing consternation of pharmaceutical industry leaders.<sup>239</sup>

**Speech and social media content regulation.** Trump and many on the left agree in supporting regulation of social media search and speech, although each camp has its own reasons for it, so the issue remains alive in 2021, especially after Trump’s own removal from social media.<sup>240</sup> When Trump economic adviser Lawrence Kudlow was asked in the summer of 2018 about the administration’s openness to regulating Google search results, his response was: “We’ll let you know. ... We’re taking a look at it.”<sup>241</sup> As a private entity, the search results Google offers up represent free speech of Google’s own. In that respect, Facebook, Google, Twitter, and other private platforms cannot censor; only governments can do that.<sup>242</sup> But the matter escalated under Trump.

Early in his term, Trump had raged and tweeted extensively about media censorship, and not just of the social media variety.<sup>243</sup> A look at that offers some context for where we are now in 2021. At one point in 2017, candidate Trump even threatened NBC’s broadcast license,<sup>244</sup> and in June 2018 called for a boycott of AT&T over CNN’s coverage of himself.<sup>245</sup>

Asked at a November 7, 2018, press conference if he would regulate social media companies, Trump 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. ... And when you start regulating, a lot of bad things can happen. But I would certainly talk to the Democrats if they want to do that. And I think they do want to do that.”<sup>246</sup> And in June 2019, Trump said he was “all in” for a “no brainer” constitutional amendment proposed by Sen. Steve Daines (R-MT) to ban burning of the American flag.<sup>247</sup>

In May 2019, the Trump administration set up a tattletale Tech Bias Story Sharing Tool—which was quickly discontinued—for members of the public to report to the White House allegations of online bias and censorship, such as account suspension or termination.<sup>248</sup> That was followed by a July 11, 2019, White House Social Media Summit featuring a number of right-of-center personalities.<sup>249</sup>

After considering the matter in 2019,<sup>250</sup> the Trump White House in 2020 issued an executive order to combat alleged anti-conservative social media bias.<sup>251</sup> This move occurred in an environment in which both conservatives and progressives were calling for changes to the regulatory environment of social media and big tech, specifically online platforms' accountability for user-generated content, which is governed by Section 230 of the Communications Decency Act. The Trump Justice Department also weighed in with legislative proposals to change Section 230.<sup>252</sup> These efforts are likely to backfire on conservatives who accuse online companies of being biased against them.<sup>253</sup>

Under Section 230, users—not online media companies like Facebook or YouTube—can be held liable for content posted on the companies' platforms. That has allowed the flourishing of a vibrant online market of ideas. Watering down Section 230's protections would threaten that vibrancy, since it would incentivize companies to monitor the content posted on their platforms. That could result in less content overall, and much less airing of unpopular views online.

An FCC investigation into narrowing the scope of protections for tech companies under Section 230—in response to a petition from the Trump administration in July 2020—never materialized into a rule.<sup>254</sup> In December 2020, Congress voted to override Trump's veto of the National Defense Authorization Act, which he had exercised in part because it failed to eliminate the Section 230 protections that he claimed give “unlimited power to Big Tech companies.”<sup>255</sup> Following Trump's exit, this fight is still ongoing.<sup>256</sup>

***Privacy, encryption, and algorithm regulation.*** Regulations aimed at social media during the Trump era went beyond market-power and speech concerns. In July 2019, the Federal Trade Commission approved a record-level fine against Facebook for alleged privacy violations involving consulting firm Cambridge Analytica's gaining improper access to user data.<sup>257</sup> While abuses merit punishment, the agreement could result in very close regulatory supervision of the company that could set precedent.<sup>258</sup>

Another major but much smaller privacy settlement was that of the FTC with YouTube over the video streaming service's collection of children's information without parents' consent. Illegal behavior and violation of contract need to be addressed, but overzealous responses can flop, as well as affect firms that have not misbehaved. As former FTC chief technologist Neil Chilson noted on Twitter: “The FTC has shifted in a way that will require platforms to police user-generated content more heavily. This is an incremental change for big platforms who already have large staffs to review content; it is a much bigger deal for small players.”<sup>259</sup>

Then in December 2020, the FTC announced a major investigation into the “privacy and data collection practices of major tech firms,” including Facebook, Amazon, YouTube, and Twitter.<sup>260</sup> According to *Axios*, “In launching the study [proposed by a Republican FTC commissioner a year earlier], the FTC is using its authority to do wide-ranging studies for no specific law enforcement purpose.”<sup>261</sup>

Other Trump administration proposals to extend regulation in the areas of technology and privacy include the following:

- High-level security officials in the Trump administration sought to bar encryption that law enforcement cannot circumvent.<sup>262</sup>
- The FTC has discussed in hearings concerns regarding algorithms that share user data in behind-the-scenes “auctions” that influence the advertisements viewers see.<sup>263</sup>

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- The FTC hosted a workshop to “examine consumer protection issues related to video game ‘loot boxes,’ in-game rewards players can buy while playing a video game.” This agency’s efforts dovetailed with those of some legislators, who are inclined to treat phone-centered lifestyles and video gaming as “addiction” and to elevate government-as-parent in response.<sup>264</sup>

***Anti-privacy: amplified government databases, biometrics, and surveillance.*** The government’s overenthusiasm for surveillance is itself a major form of regulation. Consider the following examples.

In 2019, the Trump White House put forward proposals to respond to threats of gun violence, supposedly to prevent mass shootings. Those involved efforts to monitor and track individuals with mental illness, or suspected of such, via smartphones and wearable health-monitoring devices that the FDA likely would regulate.<sup>265</sup>

In September 2020, the Department of Homeland Security sought to increase information collection on private individuals by proposing a costly—over \$6 billion—rule “that any applicant, petitioner, sponsor, beneficiary, or individual filing or associated with an immigration benefit or request, including United States citizens, must appear for biometrics collection without regard to age unless DHS waives or exempts the biometrics requirement.”<sup>266</sup> The DHS, now one of the costliest agencies, for months had been preparing regulation requiring biometric face scans of all travelers, including U.S. citizens, entering or leaving the country.<sup>267</sup> As *The New York Times* put it, “Unlike most of the efforts the administration has pushed, the rules intended to tighten immigration standards would expand federal regulations, instead of narrowing them.”<sup>268</sup>

Then, in December 2020, the Trump administration’s Centers for Disease Control and Prevention (CDC) instructed states to submit personal information—including names, birth dates, ethnicity, and ad-

resses—of individuals vaccinated against COVID-19, which raised alarm over misuse of a federal vaccine registry.<sup>269</sup>

***Online taxes.*** Taxes influence behavior and have regulatory effects. The tech sector is a natural target, given regulators’ designs on it. When the Internet sales tax was upheld in the 2018 Supreme Court case *South Dakota v. Wayfair, Inc.*,<sup>270</sup> the Competitive Enterprise Institute’s Jessica Melugin observed 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.”<sup>271</sup> While the ruling was by no means Trump’s doing, the president had seemed to favor an online sales tax, perhaps seeing it as a shot at Amazon, despite that company being one of the online sales tax’s most high-profile proponents.<sup>272</sup> On the international stage, French President Emmanuel Macron proclaimed on Twitter: “Some digital players pay very little tax. This is an injustice that destroys jobs. @realDonaldTrump and I have just agreed to work together on an agreement at the @OECD level to modernize international tax rules.”<sup>273</sup>

***Bipartisan large-scale infrastructure spending with regulatory effects.*** Often, the only bipartisanship seen in Washington is for passing big spending bills. Both parties show a great inclination toward fiscal stimulus in the form of infrastructure spending.<sup>274</sup> Although Trump issued several significant executive actions aimed at liberalizing infrastructure permitting and expansion,<sup>275</sup> that was countered by talk of a potential arrangement with House Speaker Nancy Pelosi (D-CA) on some form of major federal infrastructure spending package.<sup>276</sup> Proposed spending levels before the pandemic called for \$1 trillion in direct federal spending, with plenty of regulatory set-asides and stipulations that never materialized following Trump’s first impeachment.<sup>277</sup> Proposed dollar amounts then rose after the COVID-19 outbreak.<sup>278</sup>

Large-scale government infrastructure spending has massive, but undocumented, regulatory effects. It alters the trajectory and competitive environment of industries

engaged in large-scale transactions. At the agency level, the FCC's Rural Digital Opportunity Fund spent tens of billions of dollars in subsidies to bring old-school telephony into the modern age, with new mapping approaches to expand it in the future.<sup>279</sup> At one point, Trump championed the use of eminent domain to contribute to building a wall on the southern border, invoking the potential use of a "military version" of an already-awesome power.<sup>280</sup>

**Trade restrictions.** Trade wars do not work because tariffs hurt Americans.<sup>281</sup> Barriers create direct costs, regulatory uncertainty, and market losses—likely greater than the regulatory savings that Trump achieved. In a 2019 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."<sup>282</sup> If one were to assume this trade barrier cost burden commenced in December 2018 and stayed constant, Trump's claimed regulatory savings before 2020 of \$51 billion would be eclipsed in about three years. Another assessment maintains that the trade war tariffs wipe out the typical household's savings from the tax reform package enacted under Trump.<sup>283</sup>

In a notable fusion of trade restrictions and infrastructure spending, Trump issued a January 2019 executive order on "Strengthening Buy-American Preferences for Infrastructure Projects."<sup>284</sup> That was followed in the summer of 2019 by an order for "Maximizing Use of American-Made Goods, Products, and Materials" in federal contracting, a regulatory sentiment with which Biden sympathizes.<sup>285</sup> A fixation on reciprocity in trade deals can increase costs of household-level imports like e-commerce purchases by ejecting de minimis exemptions.<sup>286</sup>

Anecdotes of harms from Trump trade policies abounded. The tariffs that were to boost the steel industry were deemed not to have had their desired effect.<sup>287</sup> Other unantici-

pated effects included craft distillers' cancelling of export plans with Europe,<sup>288</sup> calls for helping Maine's lobster industry suffering from the trade war,<sup>289</sup> and the oddity of reparative payments to farmers damaged by the trade war.<sup>290</sup> Harm to farmers increased in 2019,<sup>291</sup> compounded by the restorative aid benefiting the largest farmers.<sup>292</sup> Trump saws nothing amiss in the latter, upping the ante in January 2020 and proclaiming of a spending package, "We're signing a monster. A big, beautiful monster. Forty to fifty billion dollars to our farmers. . . . I keep saying go buy larger tractors."<sup>293</sup> What are meant as dispute resolutions can result in overly managed, backward-looking trade.<sup>294</sup>

Frontier sectors, including artificial intelligence (AI) innovation, are vulnerable to trade restrictions as well. For example, regarding the Trump administration's pondering of a "potentially massive expansion of export restrictions on a wide variety of technologies," Adam Thierer and Jennifer Huddleston of the Mercatus Center at George Mason University noted that more "than a dozen different AI or autonomous system technologies appear on the list for consideration."<sup>295</sup>

Other notorious elements of the trade war with China included Trump's call for companies to leave China altogether, and for importers to police drug trafficking.<sup>296</sup> Shares of UPS, Amazon, and FedEx fell after Trump tweeted, "I am ordering all carriers, including Fed Ex, Amazon, UPS and the Post Office, to SEARCH FOR & REFUSE ... all deliveries of Fentanyl from China (or anywhere else!)." <sup>297</sup> Trump's advisers claimed the benefits of tariffs were forthcoming, but by the end of the former president's term, the trade war never achieved the purported objective of boosting U.S. manufacturing or reversed its decline.<sup>298</sup> As summed up by *Bloomberg News*, "China won Trump's trade war and got Americans to foot the bill."<sup>299</sup> The repeal of never-needed regulations was a groundbreaking development in 2020, and the failure to remove never-needed trade barriers is one of the most unfortunate missed opportunities.<sup>300</sup>

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***Farm bill and agricultural intervention.*** Many interventionist policies move along with a life of their own, but some deserve to be called out as overly regulatory, particularly when accentuated by an ostensible champion of deregulation like Trump. The \$860 billion farm bill, signed in December 2018, was a prominent example. Rep. Justin Amash, a former Republican, characterized it appropriately in May 2018, tweeting: "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."<sup>301</sup> Trump, however, saw things differently: "The House will vote on a strong Farm Bill ... We must support our Nation's great farmers!"<sup>302</sup> This led to the absurd situation in which checks from the federal government composed 40 percent of American farmers' income in 2020—to make up for farmers' losses caused by tariffs.<sup>303</sup>

Stealth regulatory measures or requirements can also accompany what on the surface appear to be 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."<sup>304</sup> That USDA move highlighted the reality that rules operate beyond presidential control.

***Subsidies with regulatory effects.*** Government spending often has regulatory effects, such as the displacement of private action by government-chosen ends, and the creation of marketplace distortions. These outcomes can come from unexpected quarters; the EPA, even during the Trump administration, considered subsidies for "talking car" technologies to communicate hazard and other information.<sup>305</sup> As a general matter, subsidies contribute to a president being able to, as Rep. Amash put it, "act as a central planner in chief to bribe and coerce companies."<sup>306</sup> As president, Trump left no doubt about his support of the Export-Im-

port Bank,<sup>307</sup> which has long been deemed a showcase for cronyism and corporate welfare.<sup>308</sup> It was reauthorized in 2019, and now continues its primary job of securing below-market financing for Boeing's largely state-owned customers.<sup>309</sup>

Trump also aggressively supported ethanol subsidies, warning (while in campaign mode in October 2018) that Democrats would be anti-ethanol.<sup>310</sup> His EPA issued a 2019 rule boosting the amount of ethanol allowed in gasoline blends during summer months.<sup>311</sup> In addition, Trump set about reassuring farmers in mid-2019: "Farmers are going to be so happy when they see what we are doing for Ethanol. ... It will be a giant package, get ready! At the same time I was able to save the small refineries from certain closing. Great for all!"<sup>312</sup>

***Telecommunications interventions.*** The FCC's approach has been deregulatory, as noted, even as an independent agency not subject to Trump's one-in, two-out directive. But the FCC's long legacy of top-down, "expert" administrative control has cemented its impulse for new regulation to cope with mundane matters—like caller ID spoofing or robocalling—with inordinate fines when competitive markets in telecommunications might have put such matters to rest ages ago.<sup>313</sup> The embedded regulatory compulsion to address the routine makes it problematic to keep regulators away from more serious concerns in any sector, especially on the economic frontier. In the past, the public good or common property approach in telecommunications regulation led to the compounded costs of delays of cellular technology's availability to the public and induced airwave scarcity.<sup>314</sup> Unfortunately, we have not seen much of a shift away from that.

For example, early in the Trump administration, there were growing calls to build a nationalized 5G network.<sup>315</sup> That initial effort elicited a response letter to the administration from Sens. Ted Cruz (R-TX) and Catherine Cortez Masto (D-NV)<sup>316</sup> and the introduction of anti-nationalization legis-

lation in the 116th Congress.<sup>317</sup> A nationalized 5G effort would create extensive, costly long-term effects. Military justifications for investment and intervention into the development of a national 5G wireless network persisted from the Trump White House late in 2020—even in the face of some pushback from the Pentagon—with various security and international competition rationalizations offered, such as the rise of the likes of China’s Huawei Technologies.<sup>318</sup> And in October 2020, NASA announced it was partnering with Nokia to build a 4G network on the Moon.<sup>319</sup> These pressures are not likely to fade during the Biden administration.

Closer to Earth, and less ambitious than a national 5G network, is the FCC’s plans for subsidized rural 5G.<sup>320</sup> We find other mixed-bag proposals in the Trump era in the form of a December 2020 rule to promote “accelerated deployment of 5G and other advanced wireless services by facilitating the collocation of antennas and associated equipment on existing infrastructure while preserving the ability of state and local governments to manage and protect local land-use interests.”<sup>321</sup> This is all well and good, but it illustrates the problems created by the siloed nature of regulation of national infrastructure and the attendant neglect of more ambitious multiple uses of rights of way. For example, while 5G infrastructure grows, electric vehicle charging networks could grow alongside it.<sup>322</sup> It is long past time for regulation to catch up to that reality.

Policy makers in the Trump administration expressed a great deal of concern over foreign competition in telecommunication platform services. A June 2019 executive order, “Securing the Information and Communications Technology and Services Supply Chain,” aimed at preventing foreign adversaries’ use or acquisition of “any information and communications technology or service.”<sup>323</sup> This executive order was elevated to a proposed rule from the Commerce Department,<sup>324</sup> which appeared to arrogate an alarming degree of unilateral power to interfere in or block foreign transactions with entities controlled or influenced by

whomever the administration declares to be an “adversary.”<sup>325</sup> While Commerce invited comments at the time, it made clear that “the determination of a ‘foreign adversary’ for purposes of implementing the Executive order is a matter of executive branch discretion and will be made by the Secretary.”<sup>326</sup>

Related developments emerged in 2020 over assorted Trump administration acquisition rules halting agencies’ transactions with Chinese-owned businesses such as Huawei,<sup>327</sup> as well as executive orders targeting interactions with Chinese-owned online platforms like TikTok and WeChat, some of which faced or are facing legal challenges.<sup>328</sup> This course of action culminated in a January 2021 Trump executive order banning the payment platform Alipay and several other apps on privacy and security grounds.<sup>329</sup> These decisions, while problematic in some ways, do represent tough balancing acts. As former Cato Institute trade analyst Daniel Ikenson put it: “Economic protectionism is never a solution. But no less sacred than the rights of individuals to exchange freely the fruits of their labor is the obligation of government to protect its citizens from threats foreign and domestic.”<sup>330</sup> Carried beyond sound public protections, however, crony capitalism finds a close relation in “gatekeeper capitalism.”<sup>331</sup>

***Personal liberties incursions: health tracking, vaping, supplements, and firearms.***

Privacy and surveillance concerns are a major personal liberty issue, yet there are many others. While on the one hand, the FDA is said to be approving drugs at greater speed (which has worried some),<sup>332</sup> the agency under Trump engaged in numerous regulatory or potentially regulatory pursuits beyond the aforementioned Department of Health and Human Services’ hospital and drug disclosure/pricing regulations.

For example, in 2019, FDA guidance aimed to assert authority to clarify when the agency would regulate health-tracking apps and software as medical devices.<sup>333</sup> It is already regulating (“approving”) robotic exosuits for rehabilitation.<sup>334</sup> The agency also spent energy on regulations on vaping and smokeless

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tobacco products, which, as an alternative to cigarettes, save lives.<sup>335</sup> Trump did halt the push for a ban of all flavored e-cigarettes, but a federal appeals court has upheld FDA regulation of e-cigarettes' regulation as tobacco products.<sup>336</sup> In December 2019, as part of a defense spending bill, Trump signed into law a ban on the sale of vaping products to those under age 21.<sup>337</sup>

Also in 2019, in a move challenged on free speech grounds, the FDA sought to mandate graphic, photorealistic images on cigarette packages, in addition to the traditional surgeon general warning.<sup>338</sup> The FDA also pursued costly labeling regulation for non-dairy products that use the term "milk."<sup>339</sup> The administration also continued to implement Obama-era menu labeling rules,<sup>340</sup> and continued strengthening enforcement of the regulation of dietary supplements.<sup>341</sup> In one campaign, the FDA warned companies, while not banning the herb, to stop selling kratom as a treatment for opioid addiction or cancer.<sup>342</sup>

Postal regulations aimed at combating opioid abuse sought to require identifying information and content disclosures on international shipments.<sup>343</sup> In a move controversial to his own base, Trump moved to ban bump stocks used on semiautomatic weapons by designating them as machine guns.<sup>344</sup> Finally, late in Trump's term, the Bureau of Alcohol, Tobacco, Firearms, and Explosives escalated scrutiny of makers of do-it-yourself gun kits.<sup>345</sup>

**Financial regulation.** Along with executive actions to liberalize the financial sector, the Trump administration signed legislation rolling back excesses of the 2010 Dodd-Frank law said to overburden smaller institutions.<sup>346</sup> As part of a fiscal 2020 spending package, Trump signed the Setting Every Community Up for Retirement Enhancement (SECURE) Act, which allows small businesses to band together to offer retirement plans and for part-time employees to participate in employer retirement plans.<sup>347</sup> Other steps toward liberalization included policies from the Consumer Financial Protection Bureau (now a fixture) easing the testing of certain

financial products and streamlining consumer disclosures.<sup>348</sup>

But as in other sectors, the Trump administration exercised regulatory impulses of its own in the financial arena, particularly with respect to new online offerings that threaten incumbent firms and the existing financial regulatory landscape. Prominent were efforts to regulate cryptocurrencies and to establish government-run electronic payment systems.

The Securities and Exchange Commission sought to regulate cryptocurrencies as "securities," which would saddle cryptocurrency developers with new layers of red tape.<sup>349</sup> Many companies failing to register their "tokens" were targeted with hefty penalties and restraining orders by the Trump-era SEC.<sup>350</sup> Yet the SEC had been given no legal jurisdiction over cryptocurrencies and tokens; its assertions and actions to the contrary constitute a power grab.<sup>351</sup>

While Democratic members of Congress proposed barring big tech's digital currencies,<sup>352</sup> Trump administration officials sought a clampdown. In July 2019, then-Treasury Secretary Steven Mnuchin called crypto a "national security" issue and said digital currency providers must be regulated and not allowed to operate in the shadows.<sup>353</sup> That same month, Federal Reserve Chair Jerome Powell testified in the Senate that Facebook's Libra "raises serious concerns" and "cannot go forward" without satisfying the government over money laundering and other concerns, and told senators that Fed oversight was "an interesting idea." In a three-part Twitter thread, the then-president expressed his distaste for crypto, stating that he is "not a fan of Bitcoin and other Cryptocurrencies, which are not money," that they are "highly volatile" and will have "little standing or dependability." He continued that if tech firms want to "become a bank," they must seek charters and become subject to all "Banking Regulations."<sup>354</sup>

In December 2020, statements that cryptocurrency regulation was on the way continued from the administration.<sup>355</sup> And

naturally, if you have income from cryptocurrencies or even use cryptocurrency in small retail transactions, the IRS expects to hear from you, despite a lack of clarity in the tax code on how and to what extent cryptocurrency should be taxed.<sup>356</sup>

In August 2019, the Federal Reserve announced efforts to create “FedNow,” a payment processing system designed to directly compete with private banks’ processing of electronic payments.<sup>357</sup> And in February 2020, at a conference hosted by the Stanford Graduate School of Business, Fed Governor Lael Brainard, an Obama appointee, said that the Fed is “conducting research and experimentation related to distributed ledger technologies and their potential use case for digital currencies, including the potential for a CBDC [central bank digital currency].”<sup>358</sup> In its enthusiasm to implement its “FedNow” scheme, the Fed may have skirted laws like the Congressional Review Act and the Paperwork Reduction Act.<sup>359</sup> Peter Wallison of the American Enterprise Institute called the Fed an agency with too much to do that should leave the payments system to the private sector.<sup>360</sup>

In addition, the Treasury Department contemplated regulations on foreign equity stakes in U.S. biotech firms in order to subject those firms to greater review.<sup>361</sup> Also troubling was the reported potential support in the former administration for a “global minimum tax” in the name of tax harmonization.<sup>362</sup> A late pro-regulatory development in the Trump administration was the Office of the Comptroller of the Currency’s issuing of the “fair access to financial services” rule, a “fairness doctrine” for banks to prevent discrimination based on political viewpoints or activities, which would undermine financial institutions’ freedom of association.<sup>363</sup> Yet, like the efforts to water down Section 230, that would likely backfire on conservatives worried about corporate leftward bias, such a rule could just as easily require lending to abortion clinics as well as to gun stores.<sup>364</sup>

***Industrial policy and interventionist impulses in frontier economic sectors.*** Overabundant taxpayer funding of scientific and

technology research is incompatible with a future of lightly regulated science and technology specifically, and with limited government generally.<sup>365</sup> Neither major political party takes that view in today’s rule-of-experts, send-tax-dollars-home America. Addressing infrastructure and other broad initiatives in his February 5, 2019, State of the Union address, for example, President Trump called for legislation “including investments in the cutting edge industries of the future” and proclaimed, “This is not an option; this is a necessity.”<sup>366</sup> Along with the regulatory effects of the strings attached to such spending, it is counterproductive for the sciences and their practical applications to proceed walled off from one another in an arbitrary legislative appropriations environment.

Artificial intelligence (AI) serves as a cautionary tale. The Trump administration OMB’s final “Guidance for Regulation of Artificial Intelligence Applications” was issued in November 2020,<sup>367</sup> and followed up in December 2020 by Executive Order 13960, “Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government.”<sup>368</sup> This process began in February 11, 2019, with Executive Order 13859, “Maintaining American Leadership on Artificial Intelligence,” which established the “AI Initiative.” That was followed by the March 19, 2019, launch of the federal hub AI.gov (changed to whitehouse.gov/ai, a link now broken under Biden). Executive orders are not law, but they can influence policy, and Trump’s initial one promoted “sustained investment in AI R&D [research and development] in collaboration with industry, academia,” and others. Executive Order 13895 also called for federal collection of data, among other centrally coordinated moves. The order stated: “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.”<sup>369</sup>

This impulse toward “federalization” was concerning on its own, but AI and policy surrounding it occur in an environment in

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***Overabundant taxpayer funding of scientific and technology research is incompatible with a future of lightly regulated science and technology.***

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*Where one tech titan's motto had been "Don't Be Evil," a fitting admonition now for the AI sector is "Don't Be Government."*

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which much federal AI research happens at the Department of Defense. The Pentagon, on the day after Trump's AI executive order, released its own AI strategy, describing use, plans, and ethical standards in deployment.<sup>370</sup> Where is a definition of AI codified in federal statute? In the John S. McCain National Defense Authorization Act for Fiscal Year 2019.<sup>371</sup> Alas, when it comes to robotics and the military, Isaac Asimov's famous Laws of Robotics (devised to protect humans) are programmed out, not in. Where one tech titan's motto had been "Don't Be Evil," a fitting admonition now for the AI sector is "Don't Be Government."

The OMB's initial draft "Guidance for Regulation of Artificial Intelligence Applications," which was directed at heads of federal executive branch agencies, struck the right tone.<sup>372</sup> It aimed at engaging the public, limiting regulatory overreach, eliminating duplication and redundancy across agencies, improving access to government data and models, recognizing that one size regulatory shoe does not fit all, using performance-based objectives rather than rigid rules, and avoiding overprecaution.<sup>373</sup> Michael Kratsios, then chief technology officer of the United States, called the guidance the "first-of-its-kind set of regulatory principles to govern AI development in the private sector" to "address the challenging technical and ethical questions that AI can create."<sup>374</sup>

But make no mistake. These were a set of regulatory principles. The guidance stated: "When considering regulations or policies related to AI applications, agencies should continue to promote advancements in technology and innovation, while protecting American technology, economic and national security, privacy, civil liberties, and other American values, including the principles of freedom, human rights, the rule of law."<sup>375</sup> The guidance mentioned "American values" five times, without recognizing the degree of incompatibility of the administrative state itself with those values.

As such, the guidance contained numerous elements that characterize the preset regula-

tory trap in which frontier industries find themselves. The guidance correctly noted, "The deployment of AI holds the promise to improve safety, fairness, welfare, transparency, and other social goals, and America's maintenance of its status as a global leader in AI development is vital to preserving our economic and national security." On the other hand, it asserted that "AI applications could pose risks to privacy, individual rights, autonomy, and civil liberties that must be carefully assessed and appropriately addressed."<sup>376</sup> But governments, not competitive free enterprise, are the primary threat to these values, even in their own use of the very technology in question, which is largely military.

Agencies want to get in on the regulatory game, and the guidance unnecessarily invited them in. In evaluating "benefits and costs" of regulatory alternatives, agencies are to evaluate "impacts to equity, human dignity, fairness, potential distributive impacts, privacy and civil liberties, and personal freedom."<sup>377</sup> This process has long favored agencies that seek to extend their authority. This bias will be especially endemic in the wake of Biden's "Modernizing Regulatory Review" directive, which nullifies the balancing of costs versus benefits. The guidance also urged agencies to "consider whether a change in regulatory policy is needed due to the adoption of AI applications in an already regulated industry, or due to the development of substantially new industries facilitated by AI."<sup>378</sup> Regulating the latter, as a blank canvas, will prove irresistible. No agency has an "Office of No" to resist top-down discretion.

The notion that large companies often favor regulations that disadvantage rivals is true of AI regulation: "Companies cannot just build new technology and let market forces decide how it will be used," says one leading tech CEO.<sup>379</sup> While companies may not like overly burdensome regulations in general, established players—especially given the government contracting and military presence in AI—will appreciate federal approaches that forestall those with a different idea. Following are a few additional concerns with the guidance at this stage.

- The first item in the “Template for Agency Plans” asked agencies to establish “Statutory Authorities Directing or Authorizing Agency Regulation of AI Applications” and instructs them to “[l]ist and describe any statutes that direct or authorize [their] agency to issue regulations specifically on the development and use of AI applications.”<sup>380</sup> No definition of AI existed at the time of this request, which will likely serve as a rationale to justify future regulation.
- The guidance failed to engage Congress or recognize its primacy, and did not call on agencies to consult with Congress for clarity.
- The guidance invoked executive orders and OMB guidance and pursuits like maximizing net benefits and the preparation of “regulatory impact analyses” as restraints on excessive AI regulation, but those have not been able to restrain the proliferation of rules, facilitate regulatory streamlining, or ensure a hands-off approach. On the contrary, they are apt to be used to reinforce rather than resist calls for regulation.
- The guidance considered the expansion of antitrust regulation: “Agencies should also consider that an AI application could be deployed in a manner that yields anticompetitive effects that favor incumbents at the expense of new market entrants, competitors, or up-stream or down-stream business partners.”<sup>381</sup>
- The guidance suggested the possibility of more social policy regulation: “AI applications have the potential of reducing present-day discrimination caused by human subjectivity.”<sup>382</sup> It also stated: “When considering regulations or non-regulatory approaches related to AI applications, agencies should consider ... issues of fairness and non-discrimination with respect to outcomes and decisions produced by the AI application at issue.”<sup>383</sup> Further, it said, “[T]here is a risk that AI’s pursuit of its defined goals may diverge from the underlying or original human intent and cause unintended consequences—including those that negatively impact privacy, civil rights, civil liberties, confidentiality, security, and safety.”<sup>384</sup>
- The OMB directive may create vulnerability to the very guidance documents that the administration is seeking to restrain elsewhere. In the noted call for a premature inventory of sector-specific statutory authority, it encouraged agencies to use their conclusions regarding their authority “to issue non-regulatory policy statements, guidance, or testing and deployment frameworks.”
- Relatedly, there may be opportunities for rent-seeking in well-meaning attempts to “allow pilot programs that provide safe harbors” and at “collaboration with industry, such as development of playbooks and voluntary incentive frameworks.”<sup>385</sup> The White House guidance also encouraged “Federal engagement in the development of technical standards and related tools in support of reliable, robust, and trustworthy systems that use AI technologies” and said that, “Federal engagement with the private sector on the development of voluntary consensus standards will help agencies develop expertise in AI and identify practical standards for use in regulation.”<sup>386</sup> Such “voluntary consensus standards” will only be favored by some firms and entrepreneurs.

Sometimes, the source of problems is misdiagnosed. The OMB guidance called on agencies to “encourage the consideration of safety and security issues throughout the AI design, development, deployment, and operation process.”<sup>387</sup> But the government is more prone to try to undermine encryption used in private-sector applications, and—especially given government’s heavy “collaborative” role—to indemnify companies when things go wrong. The guidance also stretched the bounds of the possible. It acknowledged that “current technical challenges in creating interpretable AI can make it difficult for agencies to ensure a level of transparency necessary for humans to understand the decision-making of AI applications.”<sup>388</sup> No one can do this; it is the nature of black box machine learning.

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*The former administration's AI proclamations belong in the regulatory rather than the deregulatory camp.*

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The former administration's AI proclamations belong in the regulatory rather than the deregulatory camp, so it is good that "strong" AI (the potentially sentient, self-improving version) was ostensibly not addressed. Republicans and Democrats alike seek major government funding of science generally, including a proposal to appoint a "manufacturing czar."<sup>389</sup> Internationally, other governments are moving toward regulation along with the United States.<sup>390</sup> This state of affairs is not the fault of any individual policy makers, but is more likely due to the lack of a constituency for a hands-off approach. Unfortunately, in part due to Trump's order and subsequent guidance, we can confidently predict that future presidents will expand cozy government alliances with a subset of private-sector winners, and perhaps even promote a sort of cartelization. The legitimization of this concept at the top by an ostensibly deregulation-oriented president will make it harder to achieve regulatory liberalization and a separation of technology and state in the future.

The establishment of the Space Force, enacted in the National Defense Authorization Act of 2020,<sup>391</sup> presents the same potential for lock-in of a federally dominated frontier sector, given that commercial space activities have barely taken root beyond NASA contractors and partners.<sup>392</sup> Making the AI-driven Space Force a sixth branch of the armed forces is bound to affect both freedom of exploration and commercial space activities, heavily influencing technology investment in a still-nascent sector.<sup>393</sup> Unsurprisingly, entrepreneurs blame regulation for undermining commercial applications of space technology.<sup>394</sup>

The Space Force was preceded by a presidential directive on space traffic management, complete with tracking, cataloging, and data sharing with government.<sup>395</sup> It is worth remembering that most debris in space that is used to justify calls for regulation is there thanks to NASA, not private entrepreneurs.<sup>396</sup> "Normalizing" commercial space activities for a "diverse portfolio of actors and approaches" is incompatible with

heavy regulation.<sup>397</sup> But a light touch is not what we can likely expect from the revival of an intergovernmental National Space Council<sup>398</sup> and space policy directives propulsion that emerged in 2020.<sup>399</sup> Streamlined Federal Aviation Administration regulations on "streamlined commercial space launch and re-entry license requirements" issued in October 2020 are allegedly meant to replace "prescriptive regulations with performance-based" ones over the course of 785 pages.<sup>400</sup> Similarly, an October 2019 executive order established a President's Council of Advisors on Science and Technology that declares:

Through collaborative partnerships across the American science and technology enterprise, which includes an unmatched constellation of public and private educational institutions, research laboratories, corporations, and foundations, the United States can usher extraordinary new technologies into homes, hospitals, and highways across the world. These technologies would have American values at their core. By strengthening the ties that connect government, industry, and academia, my Administration will champion a new era of American research and innovation, which will give rise to new discoveries that create the industries of the future.<sup>401</sup>

This directive appeared in the wake of Executive Order 13885, "Establishing the National Quantum Initiative Advisory Committee,"<sup>402</sup> aimed at implementing the 2018 National Quantum Initiative Act in its goal of "supporting research, development, demonstration, and application of quantum information science and technology."<sup>403</sup> These national industrial policy developments can be expected to accelerate under Biden.<sup>404</sup>

The takeaway from this section and earlier ones is that a great deal of industrial policy-oriented moves that were proposed or enacted under Trump—including on antitrust, 5G and other major infrastructure, financial plat-

forms, artificial intelligence, space, and other big science—can further entrench government intervention and displace more market-oriented approaches that might enable the scaling back of the federal role in the future.

***Novel welfare and labor regulations.*** Noted earlier is the propensity for federal government involvement in job training. The Trump administration launched a “national strategy for training and retraining workers for high-demand industries,” spearheaded by Ivanka Trump.<sup>405</sup> In other labor regulation, the president signed into law the Fair Chance Act, which bars government and contractors from inquiring into job applicants’ criminal history before making an offer. Some companies follow such guidelines already, but this move was meant to “ban the box,” the familiar job application query into whether or not one has been convicted of a crime.<sup>406</sup> It represented a form of regulation that can backfire and aggravate the discrimination problem it was purported to solve—but as often happens, only the public will suffer from the move, not those who imposed a faulty rule.<sup>407</sup>

In addition, a “nationwide paid family leave” plan was touted by Trump in his second State of the Union address,<sup>408</sup> an issue since taken up by legislators on both sides of the aisle.<sup>409</sup> Senators released a “bipartisan framework” for mandated family leave in the summer of 2019.<sup>410</sup> The plan ultimately came to fruition in the same December 2019 compromise defense spending package that included the creation of the Space Force.<sup>411</sup> “In the end,” as Sen. Ron Johnson (R-WI) put it: “President Trump should get full credit for this because he’s the one who made it happen. I know the Democrats won in the House, but this would not have happened had not President Trump strongly supported it.”<sup>412</sup>

This development represents another example of the extent to which regulation is fiscally driven. As Ivanka Trump, speaking in her role representing the federal government, put it: “It’s very hard for people to say, well, employers should provide this benefit—if we are unwilling to provide it ourselves. So you

have to lead by example.”<sup>413</sup> Such mandates impose costs on businesses that never show up in the federal budget.

Also in the summer of 2019, Trump signed legislation that required all federal buildings to provide a room for nursing mothers to breast feed, including members of the public, as well as federal employees. The mandate is so specific that it requires that “rooms provide privacy and contain a chair, working surface, and an electric outlet for breast pumps,” as National Public Radio described it.<sup>414</sup>

***COVID-related regulation as opposed to deregulation.***

And by the way, I’d love to do stimulus, but Crazy Nancy doesn’t want to do it.<sup>415</sup>

—Donald Trump, West Salem, Wisconsin, October 27, 2020

When somebody is the president of the United States, the authority is total and that is the way it’s gonna be. It’s total. It’s total. And the governors know that. When somebody is the President of the United States, the authority is total.<sup>416</sup>

—Donald Trump, April 2020

Despite proclamations of holding total authority over forcing states to reopen early in the pandemic, the early phase of Trump’s COVID response—evident in a reluctant embrace of the awesome emergency powers granted by Congress in the Defense Production Act (dozens of actions from preventing hoarding of medical supplies<sup>417</sup> to production or prioritization of them<sup>418</sup>)—was that of a president not taking the usual approach of seizing power during a crisis.<sup>419</sup> Instead, the administration worked to deregulate and make regulatory waivers permanent in the name of both fighting COVID and providing economic relief. Nonetheless, regulation expanded in a number of ways under Trump during the COVID response in a manner that deregulation was incapable of offsetting.

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First, the coronavirus-related bailout statutes themselves created new government regulatory programs, for which permanence is likely.<sup>420</sup> For example, labor regulations similar to those covered above were signed into law by Trump in the form of the Families First Coronavirus Response Act, which expanded paid sick leave and family and medical leave at the time businesses were least able to afford it.<sup>421</sup> Another major development—too sweeping to explore fully here—was the degree to which government entered credit markets and supported some businesses, but not others, through unprecedented Federal Reserve direct lending to companies and a Paycheck Protection Program, with loan forgiveness. Such programs are subject to abuse by questionable recipients enabled by the absence of watchdogs.

Second, given the administrative state's pervasiveness, even supposedly deregulatory efforts aim at making government programs, even questionable ones, work "better," which can preempt efforts by future generations aimed at moving these programs out of government hands and into private management and realms.

Third and most troubling was Trump's August 2020 pandemic-related executive orders that expanded regulation and executive overreach.<sup>422</sup> They were in part meant to extend lapsed components of the Coronavirus Aid, Relief, and Economic Security (CARES) Act when the administration failed to negotiate a new stimulus agreement with House Democrats.<sup>423</sup> Perhaps most invasive and detrimental to property rights was the executive order on housing assistance and "lawful measures to prevent residential evictions and foreclosures."<sup>424</sup> These moratoriums on evictions unfairly force landlords, who are often themselves struggling members of the middle class, to bear the burden of the crisis.<sup>425</sup> As Rep. Thomas Massie (R-KY) expressed it on Twitter, "CDC inserting itself into private rental contracts, effectively transferring control of private property from the lawful owner to the renter, is possibly the most socialist action our government has taken in decades ... and without an act of

Congress!"<sup>426</sup> He also noted, "Rental contracts are governed by state law. There is no federal authority to overturn them."<sup>427</sup>

There were three memoranda: an extension of supplemental unemployment benefits using emergency funds,<sup>428</sup> a payroll tax deferral until year-end for certain earners,<sup>429</sup> and student loan relief and deferrals.<sup>430</sup> Trump made it clear that he was taking his cues from the Obama-era Department of Homeland Security's Supreme Court-validated unilateral action on Deferred Action for Childhood Arrivals (DACA).<sup>431</sup> Trump, who had criticized Obama's actions, claimed on Twitter: "The DACA decision, while a highly political one, and seemingly not based on the law, gives the President of the United States far more power than EVER anticipated."<sup>432</sup>

The conundrum over constitutionality or perception of Trump's COVID-relief executive actions<sup>433</sup> is rooted in the erosion of the Constitution and its regime of limited government. Trump's late-term actions—unlike other actions taken to roll back the expansion of government—expanded federal authority at the expense of state sovereignty, individual rights, and local communities' ability to adapt and respond to the next crisis or disaster.<sup>434</sup>

The above is an incomplete catalog of active policy implementations and proposals with substantial regulatory heft that ran counter to the administration's deregulatory campaigns generally and as summarized by OMB in each year's "Regulatory Reform Report: Completed Items for Fiscal Year." That official roundup catalogs many less dramatic examples of the kinds of regulatory actions noted here.

Individual rules and regulations 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 interventions unforeseen and unintended—or perhaps not so unintended. The administrative state and big-spending

appropriations framework exert a considerable influence. Trump could not and did not stop it all, which is to be expected, but he also added his own pro-regulatory predispositions to the landscape, which are enough to outweigh his claimed billions in cost savings from regulatory streamlining.

There were ambiguities in Trump-era actions as well. Changes with ambiguous effect may be rooted in factors that predate Trump. For example, some items get deemed deregulatory compared with the status quo, such as streamlining of subsidized small-business loans, yet are still distortionary of the market.

In March 2019, Trump issued an executive order mandating “free speech” at colleges that receive federal research or education grants.<sup>435</sup> Free speech is nonnegotiable in society, but such a directive would not be an issue were government not funding education and inflating its cost in the process. Also illustrative of ambiguities was Trump’s revocation of an Obama “gainful employment” rule cutting off funding to poorly performing for-profit colleges, while leaving nonprofit ones alone. The question of whether either type should receive federal funding was never considered.<sup>436</sup> A similar situation exists with respect to a Trump rule that invoked “Federal conscience and anti-discrimination laws” that take into account religious objections to providing certain services, or that prevent certain abortion referrals by health clinics that receive federal dollars. Had there been no federal funding, there would have been no (or less) “regulation” over which views deserve a hearing.

Other prominent directives include:

- Joint State Department and Department of Homeland Security issuances on “inadmissibility on public charge grounds”<sup>437</sup> in response to Trump’s intent to suspend immigration that would “Financially Burden the United States Healthcare System, in Order to Protect the Availability of Healthcare Benefits for Americans”;<sup>438</sup>

- The Department of Agriculture’s changes to the Supplemental Nutrition Assistant Program’s eligibility and asset rules;<sup>439</sup>
- Work requirements for the able-bodied with no dependents;<sup>440</sup> and
- A Department of Housing and Urban Development proposed rule on public housing eligibility and asset limitations.<sup>441</sup>

All these are characterized as regulatory and appear as part of the one-in, two-out “Regulatory Reform Report: Actions for Fiscal Year 2019.”<sup>442</sup> Relatedly, particularly given the COVID regulatory actions just discussed, 28 Small Business Administration rules related to the Paycheck Protection Program at the not completed stage were deemed economically significant by the time the Fall Unified Agenda appeared, yet were designated neither regulatory nor deregulatory.<sup>443</sup>

It is noteworthy in this regard that efforts to make government spending more difficult or to tighten benefits eligibility or qualifications for government programs get characterized as costs. Even components of the deregulatory repeal of the EPA’s Clean Power Plan were deemed regulatory in the Unified Agenda disclosures and in the 2019 Regulatory Reform Report.<sup>444</sup> That was also the case with the Trump SEC’s ostensibly deregulatory rewrite of the Obama Department of Labor’s “fiduciary rule” targeted at investment advisers. While better, these remain costly, and since the SEC is an independent agency, the rule did not appear in the one-in, two-out roundup.<sup>445</sup>

These peculiarities further show the difficulty of disclosure. Regulatory streamlining may do only short-term good. Congress has not passed comprehensive regulatory liberalization in nearly a quarter century, and streamlining via Executive Order 13771 became more difficult as quick-to-rid regulations were exhausted. As the University of Pennsylvania’s Gary Coglianese observed, “In a single year the regulatory rule book simply cannot be changed dramatically enough to make a palpable dent in the obligations im-

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*Large-scale federal initiatives morph over time into interventions unforeseen and unintended—or perhaps not so unintended.*

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*A pruned weed  
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posed on industry.”<sup>446</sup> Therefore, the pertinent question going forward should be whether any degree of executive branch regulatory liberalization can be maintained over time given the administrative state’s barriers and resistance 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 the FCC, EPA, and CFBP were led by pro-liberalization appointees—and at

one point operated under an instruction from then-OMB Director Mick Mulvaney that deregulation should be their “highest priority”<sup>447</sup>—the permanent bureaucracies were merely biding their time. Without congressional action on general reforms, much of the Trump streamlining phenomenon will be transitory, especially given the many added regulatory structures covered in this section. A pruned weed is a healthy weed when it comes to the administrative state’s half-hearted rollbacks.<sup>448</sup>