

THE STATE OF THE ADMINISTRATIVE STATE: THE REGULATORY IMPACT OF THE TRUMP ADMINISTRATION

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Abraham Lincoln once stated “The past is the cause of the present, and the present will be the cause of the future. All these are links in the endless chain stretching from the finite to the infinite.” Surely, Lincoln was not referring to the regulatory history of the country with his observation, but it is apt when “the state of the administrative state” is being assessed. To understand the Trump Administration’s overall stance toward the administrative state and its particular regulatory actions, both the recent past and the likely impacts on the immediate future need to be considered. Beyond the daily attention-grabbing headlines and bold anti-regulatory rhetoric of President Donald Trump, his administration is building momentum implementing a significant amount of actual regulatory change which will have lasting impacts. The impacts are not only in the particular policy areas of focus, such as health, environmental, banking, immigration, but also on the administrative state itself in terms of its capacity.

The Administrative State: Past, Present and Future

The term “administrative state” was coined by Dwight Waldo in 1948 and he was steeply immersed in the already ongoing debate over the tension between democracy and bureaucracy that continues today.¹ Waldo maintained that public servants basically have a duty to protect democratic principles as they implement the laws of the land. He also held that due process and public access to the government are important obligations to balance against the efficiency goals of the scientific management approach to administration. Finally, he argued that government is not a business and can’t be run like one because its task is infinitely more challenging given the obligation to uphold the Constitution and democratic values. His views are in sharp contrast to those of Herbert A. Simon who wrote a book in 1947 entitled, *Administrative Behavior*.² His maximum efficiency approach insists bureaucrats have to separate values from facts. Simon won the Nobel Prize for economics in 1978, but he didn’t necessarily win the debate over the proper role and nature of the administrative state. That continues.

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¹ See Dwight Waldo, *The Administrative State: A Study of the Political Theory of American Public Administration* (Transaction Publishers 2d ed. 2006) (1948).

² See Herbert A. Simon, *Administrative Behavior* (New York: Free Press 4th ed. 1997) (1948).

Fundamentally today, some follow Waldo and what came to be known as the “Minnowbrook Perspective” which favors greater public participation in government and also believes there is accountability because elected officials are held responsible for their administration’s actions.³ Their perspective is that the administrative state is basically charged with applying expert knowledge to implement policies and solve public administration problems. Others are more skeptical that the bureaucracy should even exist. They argue that the current administrative state is beyond what the Founders intended and largely acts outside of the boundaries of the Constitution which vests all lawmaking power in the Congress. From this perspective, public servants are “making laws” because they promulgate rules that are binding. The basic legitimacy of most bureaucratic action is questioned because the delegation by Congress of authority to agencies to implement the laws is generally not seen as legitimate. In general, the overall size of government becomes a target and the bureaucracy is seen as disconnected from and not serving citizens while at the same time curtailing economic activity.⁴

The Trump Administration is by its own admission not just anti-regulatory, but is strongly anti-administrative state as well. References to “a deep state” conspiracy theory exemplify this President’s view that there is an influential and relatively permanent group within the bureaucracy that controls the government and operates mostly independently of changing administrations. From this perspective, attacking the bureaucratic state becomes a logical battle cry. Most previous Republican administrations, however, stopped short of that and focused their efforts on reducing “regulatory burdens.” As discussed below, only President Ronald Reagan came close to the anti-administrative state posture of the Trump Administration. In the past though there was still some checking between the branches when anti-regulatory efforts were applied selectively and pushed up against constitutional limits. It is not clear now that those checks are operating during the Trump era.

³ Minnowbrook is Syracuse University’s conference center in the Adirondack Mountains and is where Waldo held a now famous meeting in 1968 whose participants had to be under age 35 to discuss the role of public administration in our democratic society. The basic conclusion which very much reflected the fervor of the times was that public administration should serve the people and this would entail embracing an activist element to it.

⁴ See e.g., Michael S. Greves, *The Administrative State, Once More: What’s Law But a Second-Hand Devotion?*, LAW AND LIBERTY BLOG (Feb. 11, 2013), <https://www.lawliberty.org/2013/02/11/the-administrative-state-once-more-whats-law-but-a-second-hand-devotion/>; See also Chuck Devore, *The Administrative State Is Under Assault and That’s a Good Thing*, FORBES (Nov. 27, 2017, 1:53 PM), <https://www.forbes.com/sites/chuckdevore/2017/11/27/the-administrative-state-is-under-assault-and-thats-a-good-thing/#c8377c3393cc>.

Trump's anti-administrative state framing is evident in his administrative actions and also judicial ones. For example, consider the likely impact President Trump's newly appointed Supreme Court Justice Brett Kavanaugh could have on administrative law rulings. Kavanaugh's appointment was highly controversial and there are lingering legitimate concerns over his fitness for the Court given his judicial temperament and moral character. In addition, however, there are serious questions about how he applies particular legal doctrines. For instance, the League of Conservation Voters questions why Kavanaugh seems to apply the "*Chevron Doctrine*" regarding agency deference inconsistently and "only rel[ies] on agency interpretation when it results in rolling back environmental protections." Other environmental groups express concern over Kavanaugh's application of the "majors questions" doctrine (which disallows agencies to make rules in areas of significant social and economic matters for which Congress did not explicitly delegate authority). Specifically, environmentalists find that while he was a judge, Kavanaugh tended to only question federal regulations that were focused on polluting industries.⁵ Inconsistent application of legal doctrines is not principled, but it may fit a particular anti-regulatory agenda.

Trump's Anti-Administrative State Agenda and Public Policy Impacts

In general, the Trump Administration will oppose new regulations and seek to rollback existing ones. In October 2018, the Trump White House released its *Fall 2018 Unified Agenda of Regulatory and Deregulatory Actions* which documents how agencies have "greatly exceeded" the goals of the administration's "rule-busting" agenda.⁶ President Trump mandated in Executive Order 13771 that agencies should eliminate the costs of two rules for every new rule adopted. So far, the Administration has cut many rules, 176 in total with 57 of those considered significant rules, and only added 14 new significant regulations. According to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs issuing the *Unified Agenda* report, the Trump Administration's deregulation efforts have resulted in \$23 billion cost savings for FY 2018.⁷

⁵ Ellen M. Gimer, *Kavanaugh Tackles Doctrine That Loomed Over Climate Plan*, E&E NEWS (September 6, 2018), <https://www.eenews.net/stories/1060095983>.

⁶ Office of Information and Regulatory Affairs, *Fall 2018 Unified Agenda of Regulatory and Deregulatory Actions*, <https://www.reginfo.gov/public/do/eAgendaMain>; Niina Heikkinen, *Trump Updates Rule-Busting Agenda*, E&E NEWS (Oct. 17, 2018), <https://www.eenews.net/greenwire/stories/1060103555>.

⁷ *Ibid.*

The Brookings Institution's Center on Regulation and Markets is tracking deregulation under President Trump and issues monthly updates on the range of regulatory activity being undertaken to reduce the scope and overall size of the administrative state. The list of regulations targeted encompasses many areas impacting citizens, but rarely garners more than scant mention in the news. Many of these regulatory actions are reversing particular policies put in place by President Barak Obama's administration. President Trump started his attack with the well-covered attempts to dismantle President Obama's signature legislative achievement, the Patient Protection and Affordable Care Act (P.L. 111-148), i.e., Obamacare. Just as President Ronald Reagan discovered nearly 40 years ago when he attacked the administrative state, President Trump is also finding it to be a formidable task to actually "un-do" regulations.

Trump's frontal attack on Obamacare was checked by the Supreme Court, some states, and even parts of the healthcare industry. In any area of new regulation, it doesn't take long before a whole industry grows to support the implementation of the new regulations and those new interests often become a strong lobby. By the time President Reagan tried to eliminate environmental regulations, a new pollution control technology industry was well established and much of the regulated entities already had a decade invested in environmental compliance. Together these business interests meant that there was resistance beyond that of environmental groups to a rollback of those laws. A similar scenario is happening with respect to President Trump's attack on healthcare. Nevertheless, even when a total rollback isn't feasible in these cases, a loss of momentum and significant curtailing of a policy's full implementation occurs.

- A sampling of the types of anti-regulatory activity by the Trump Administration indicates how pervasive these efforts are. Some examples include:
- The U.S. Department of Labor's (DOL) Fiduciary Rule issued during the Obama presidency to impose broad obligations on all financial advisors to act in their clients' best interests was vacated by the courts and the DOL is not expected to challenge that ruling.
- The Federal Communication Commission (FCC) repealed the Net Neutrality regulations adopted in 2015.
- The U.S. Department of Education (DoEd) is extending the compliance date (again) for the Gainful Employment rules which would require for-profit colleges and any institutions receiving federal funds to report graduation and employment rates and be more accountable and transparent on such matters.

- The U.S. Department of Housing and Urban Development (HUD) is “streamlining” the Affirmatively Furthering Fair Housing (AFFH) rule which requires communities to analyze racial residential segregation and submit plans to HUD on how to reverse it in order to be eligible for federal housing aid.
- The Office of the Comptroller of the Currency proposed a rulemaking to revise the Community Reinvestment Act of 1977 which addresses redlining and encourages banks to address credit needs of low- and moderate-income neighborhoods in the communities they serve.
- The U.S. Environmental Protection Agency (EPA) may withdraw the “startup-shutdown, maintenance” (SSM) rule put in place in 2015 by the Obama Administration to require dozens of states to better control emissions during plant startups, shutdowns or maintenance.
- The EPA is proposing revisions to the methane emissions rules for oil and gas production adopted during the Obama era.
- The EPA and the National Highway Traffic Administration issued a proposed new Safe Affordable Fuel-Efficient (SAFE) Vehicles rule that would freeze the fuel economy standards for car model years 2021-26.

Other regulatory actions by the Trump Administration appear to be blatantly pro-business with no apparent concern for their anti-consumer impacts. For example, the Hog Carcass Cleaning rule has been removed so hog carcasses no longer have to be cleaned before an incision is made for evisceration. Cable providers no longer have to maintain a list of their current channel lineup. The Picture Tube Rule is also repealed which was a non-deceptive advertising rule regarding the dimensions of television screens. It is not clear how “burdensome” these particular regulations were, but for an anti-regulation administration eliminating them are wins in the battle against a “bloated” and “over-reaching” bureaucracy.

Lasting Impacts on Governmental Capacity

The Trump Administration is very much reacting to the recent past administration of President Obama, but also is strongly pursuing an anti-government agenda that harkens back to the Reagan Administration. Like President Reagan in the 1980s, President Trump is taking direct aim at reducing the size of the administrative state. In the same way that Reagan went far beyond what Presidents Richard Nixon and Gerald Ford were willing to support in pursuit of a “limited government,” Trump is moving even further past what

either of the Bush (George H.W. Bush and George W. Bush) administrations would embrace.

For example, President Nixon recognized the political expediency of supporting (even if often reluctantly) environmental laws and both the Clean Air Act of 1970 and the Clean Water Act of 1972 were enacted during his administration. Their implementation and that of over a dozen environmental laws passed in the early 1970s began by the Environmental Protection Agency which Nixon created by executive order.⁸ The Clean Air Act of 1990 was the last major revision of that law (or any environmental law) and only happened because President George H.W. Bush supported the “cap and trade” market-based regulatory approach to controlling sulfur dioxide (SO₂) emissions from coal-burning power plants. This law successfully addressed acid rain that resulted from those emissions and was a pressing environmental problem at that time.

Brent Blackwelder, accurately described as the longest serving environmental advocate in Washington, D.C., and President-Emeritus of Friends of the Earth, astutely observes, environmental legislation only passes Congress when there is bi-partisan support. That means in this particular policy area, there is little chance any major environmental initiatives will be enacted by the current highly-partisan Congress in the immediate future. Further, there is little protection from that institution from any attacks by the current administration on environmental regulations and programs already in existence.

The Trump Administration realizes that it may not be able to actually eliminate environmental laws, but just as was done in the Reagan Era, they can cripple the capacity of the EPA by drastically cutting its budget and staff size. It takes years to rebuild from such cuts and some would argue an agency never fully recovers from a capacity perspective. At the end of Reagan’s Administration, the EPA had shrunk to 14,400 employees and although by the late 1990s it had grown to 18,000, by the beginning of Trump’s term it was already down again to 15,000 and now is at an all-time low of 13,758.⁹ President

⁸ The Clean Water Act was enacted over President Nixon’s veto though and he created the EPA to prevent Congress and probably most specifically his political rival, Senator Edmund Muskie, from establishing a Department of the Environment. Nevertheless, Nixon could not afford politically to be anti-environment. When Newt Gingrich was Speaker of the House in the mid- to late 1990s the split of conservation and environmental concerns from the conservative and Republican Party platform began as he sought to draw as many stark contrasts as possible between what his party and the Democratic party supported.

⁹ See Timothy Cama, *EPA Staffing Falls to Reagan-Era Levels*, THE HILL (Jan. 9, 2018), <https://thehill.com/policy/energy-environmental/368090-epa-staffing-hits-reagan-levels>; Andrew BaTran ,

Trump and his former EPA Administrator Scott Pruitt tout this as evidence that they are reducing the size of government and regulatory burdens while saving the taxpayers money. It remains to be seen, however, what the actual costs of this de-regulation and reduced governmental capacity are. A Brookings Institution analysis, for example, notes that the proposed new SAFE Vehicles rule to freeze the average fuel economy standards could actually hurt the auto industry.¹⁰

It is ironic that at the same time then-Administrator Pruitt was increasing his security detail costs (with no justification for them) by over 110 percent with a skyrocketing price increase from \$1.6 million to \$3.5 million in less than a year, he was unabashedly working to gut the agency in the pursuit of reducing regulatory costs. He was forced to resign in July 2018 amidst ethics scandals and remains the subject of over a dozen federal investigations looking into them. Anne Gorsuch Burford, Reagan's EPA Administrator (and mother of the other Trump-appointed Supreme Court Justice Neil Gorsuch) also resigned under a cloud of controversy. She created problems for the agency when she met with an oil refinery company seeking regulatory relief from standards to limit the amount of lead in gasoline. She further stirred the pot when she engaged in a battle with Congress over releasing EPA records amid concerns over the alleged mishandling of the \$1.6 billion toxic waste clean-up Superfund Program. Congress held her in contempt and the Reagan administration abandoned their court battle in which they claimed that the documents were covered by executive privilege. Meanwhile, the EPA budget was reduced by 22 percent.

Today, there is serious concern about the diminished capacity of EPA given that those who have left are not being replaced and many of them were essential to critical missions of the agency. Nine department directors have left and about 200 scientists. Some estimate that EPA could have fewer than 8,000 employees by the end of Trump's first term.¹¹ As the Washington Post recently reported, EPA's Office of Enforcement and Compliance is down by over 15 percent and without bureaucrats to enforce the regulations compliance surely drops. Some career bureaucrats dedicated to the EPA's mission choose to leave rather than implement the Trump Administration's cuts. Often they do so believing they, as

Dennis Brady, and Juliet Eilperin, *Exodus Hits EPA in Era of Trump: Workforce Drops By 8 Percent*, THE WASHINGTON POST (Sept. 9, 2018), p. A1, A10.

¹⁰ Soshana Lew and Jason S. Miller, *The Trump Administration's Fuel-Efficiency Proposal is Unnecessary and Harmful*, WASHINGTON, D.C.: THE BROOKINGS INSTITUTION (Aug. 3, 2018), <https://www.brookings.edu/blog/the-avenue/2018/08/03/the-trump-administrations-fuel-efficiency-proposal-is-unnecessary-and-harmful/>.

¹¹ Cama, *supra* note 9.

one who worked there for 20 years put it, “could do better work to protect the environment outside the EPA.”¹²

Of special concern is the pending change to the membership requirements for the agency’s 22 scientific advisory boards which Pruitt initiated while still at EPA. Christopher Zarba who was the director of the EPA’s Scientific Advisory Board retired earlier this year as a result of the “censoring science” rule, as many commonly refer to it.¹³ The changes are seen as favoring industry interests and “seriously damaging” the agency’s ability to attract scientists for advisory board work and consequently negatively impacting rulemaking decision making capacity. It was recently reported, however, that Acting EPA Administrator Andrew Wheeler appears to be a more “cautious deregulator” and has postponed finalizing the rule until January 2020.¹⁴

The Legitimacy of the Administrative State—Whither Accountability?

Ultimately, the administrative state and government itself is only legitimate if it is accountable. Accountability in the Trump Administration is more difficult than even during the Reagan years because Congress is controlled by Republicans and at least to date has not checked questionable de-regulation efforts pursued by Trump’s agency heads. In addition, the Supreme Court is now also weighted to support President Trump’s agenda and is unlikely to provide many checks on the executive branch either. As noted above, during Reagan’s era, Congress did act to check the undermining of EPA and the courts also upheld the challenged provisions of many environmental laws.

Even in 2006, when George W. Bush was President and *Massachusetts v. EPA* (549 U.S. 497) was decided, the Supreme Court ruled in a split decision that the Agency could not “decide not to decide” with respect to regulating greenhouse gas emissions (GHG) to reduce climate change. This was because the Clean Air Act covered such pollutants as defined by the act since they could “endanger public health or welfare.” On this basis, the Court’s majority found that the agency did not have discretion to not set standards to control such emissions. The make-up of the Court now though is not likely to split in favor of forcing an agency to regulate to fulfill its obligations under a law.

¹² Dennis, *supra* note 9.

¹³ Sean Reilly, *Uneven Enforcement Follows Pruitt Edict on Science Panels*, E&E NEWS (Sept. 26, 2018), <https://www.eenews.net/stories/1060099261/print>; *see also*, Dennis, *supra* note 9; *see also* Heikkinen, *supra* note 6.

¹⁴ Reilly, *supra* note 13; Heikkinen, *supra* note 6.

So, where will accountability come from during the Trump Administration? Lawsuits are filed over most of the regulatory actions taken by this administration. This actually continues the longstanding state of affairs for EPA which since the 1980s is sued approximately 80 percent of the time when it issues new rules. Groups of states in particular, but also environmental groups, regularly file lawsuits to check regulatory actions by Trump's officials. Earlier this year, for example, 11 states and the District of Columbia sued EPA over the Trump Administration's attempt to roll back the climate rule put in place during the Obama era to address hydrofluorocarbons (HFCs) used in air conditioning, refrigerants, aerosols and foam-blowing.¹⁵ EPA was also sued by 17 states in support of the Obama Administration's climate rules for vehicles which the agency is set to revise.¹⁶ Recently, eight states' attorney generals filed lawsuits over the Migratory Bird Treaty Act which the U.S. Department of Interior is proposing to scale back.¹⁷ States also filed a "flurry of lawsuits" -- 23 states in this case—to challenge the repeal of the Net Neutrality Rule. These legal battles between groups of states and the federal government though tend to follow how well the political colors of red or blue for those states match that of whomever is holding the White House.

If Congress flips to the Democrats, even just the House, in November that institution may begin to check the Trump Administration some. In fact, many Democrats on Capitol Hill predict that administration officials can expect to be on the Hill frequently to testify before numerous committees for which the now minority members are eager to hold oversight hearings. Representative Elijah Cummings (D-MD) is the ranking member of the House Oversight and Government Reform Committee and he says, "The big word for us is 'accountability.' That is, making the president accountable, but also doing something else: making the Republicans in our Congress accountable because we have a responsibility to hold the executive accountable." House Minority Leader Nancy Pelosi (D-CA) puts it more colorfully noting that the if/when Democrats are in the majority they will "use every arrow in our quiver to find

¹⁵ Johnathan Stempel, *U.S. States Sue EPA, Pruitt for Rolling Back Climate Change Rule*, REUTERS (Jun. 27, 2018), <https://www.reuters.com/article/us-usa-climatechange-lawsuit/u-s-states-sue-epa-pruitt-for-rolling-back-climate-change-rule-idUSKBN1JN2UO>.

¹⁶ Chris Mooney, *California, 17 Other States Sue Trump Administration to Defend Obama-Era Climate Rules for Vehicles*, WASHINGTON POST (May 1, 2018), https://www.washingtonpost.com/news/energy-environment/wp/2018/05/01/california-17-other-states-sue-trump-administration-to-defend-obama-era-vehicle-efficiency-rules/?noredirect=on&utm_term=.1eeda684bc6b.

¹⁷ Michael Doyle, *States Sue Over Reduced Bird Protections*, E&E NEWS (Sept. 6, 2018), <https://www.eenews.net/greenwire/stories/1060096035?t=https%3A%2F%2Fwww.eenews.net%2Fstories%2F1060096035>.

the truth about what is happening in public policy” because they see the Trump Administration as “a culture of corruption, cronyism, and incompetence.”¹⁸

Even before that may happen, Senator Ed Markey (D-MA) introduced a Congressional Review Act (CRA) Resolution in April 2018 in an attempt to overturn the Net Neutrality Rule. This coincides with the actions brought by states’ attorney generals noted above and is an interesting use of the law by the minority to check the Trump Administration because the majority used it immediately after Trump became president to undo some of the Obama Administration’s regulations.¹⁹ There are other signs that actually come from the Republican side of the aisle that this Congress may be prodded to act more independently of the executive branch. The moderate Republican think-tank, The R Street Institute, recently issued a paper on “congressional law enforcement” and states the reminder that, “Congress does not work for the President.” As the paper’s author, J. Richard Broughton, who teaches law at the University of Detroit Mercy, further explains, “. . . when Congress chooses to forego self-defense (or, more precisely, defense of the Constitution’s formal arrangement) in favor of promoting a ‘shared agenda’ with the President, it breeds an evolving institutional weakness and allows its power—and its capacity for counteracting ambition with ambition, in Madison’s words—to atrophy.”²⁰ Zach Graves, also affiliated with the R Street Institute, is spearheading bi-partisan efforts to revive the Congressional Office of Technology Assessment and recently launched the Future Congress website (www.futurecongress.org) as “a resource hub for efforts to improve science and technology expertise in the legislative branch.” Developing more institutional capacity in Congress and encouraging the institution to reassert itself and operate more independently is in keeping with the constitutional principle of checks and balances and how it is supposed to work.

Finally, there is greater civic engagement in response to the Trump Administration’s regulatory actions that may deliver at least the House to the Democrats this fall. There is also pro-regulation activity, again in the form of market-based action, being promoted by some moderate Republicans for a

¹⁸ Robin Bravender and Geof Koss, *Dems Prepare ‘Flood’ of Energy, Climate Investigations*, E&E NEWS (Sept. 6, 2018), <https://www.eenews.net/stories/1060095957>.

¹⁹ The Congressional Review Act was passed under Speaker Gingrich’s leadership and signed by President Clinton in 1996. It put in place a procedure whereby Congress could review new federal regulations and overrule some through a joint resolution process. Until 2017 when Trump became president it was only used once, but the Republican Congress used it 14 times in 2017 to overrule Obama era regulations.

²⁰ Richard J. Broughton, *On Congressional Law Enforcement*, LEGBRANCH (Oct. 8, 2018), <https://www.legbranch.org/2018-10-8-on-congressional-law-enforcement/>; see also Richard J. Broughton, *Congressional Law Enforcement*, 64 Wayne L. Rev. 95 (2018).

carbon tax to control GHG emissions contributing to climate change. Specifically, the conservative Climate Leadership Council group is promoting the Baker-Shultz Climate Dividend Plan which is named for two former Republican Secretaries of State James A. Baker, III (President George H.W. Bush) and George P. Shultz (President Reagan) who helped develop and fully back the plan. It is in response to “the need for a conservative climate solution.”²¹ Could it be that the future of the Republican Party has some room for conservation and environmental concerns to be reconciled with conservative beliefs again?

As Lincoln observed, the links to the past and the path to the future are all tied up in present actions. The anti-administrative state actions of the Trump Administration are significant and pervasive. They will undoubtedly have lasting impacts. At the same time, however, our constitutional system is resilient and even when the system of checks and balances is challenged there are signs accountability will be reasserted. The ability to maintain an administrative state devoted to public service is dependent on that happening.

²¹ James A. Baker III, Martin Feldstein, Ted Halstead, N. Gregory Mankiw, Henry M. Paulson, Jr., George P. Shultz, Thomas Stephenson, and Rob Walton, *The Conservative Case for Carbon Dividends*, WASHINGTON, D.C.: CLIMATE LEADERSHIP COUNCIL (2018), available at <https://www.clcouncil.org/media/2017/03/The-Conservative-Case-for-Carbon-Dividends.pdf>.