REGULATORY REFORM

Congress should

- require that all new major regulations be approved by Congress; and
- include "sunset" provisions and carefully limit rulemaking authority when Congress delegates that power to federal agencies.

The president should

- use his current authority over rulemaking to improve the efficiency of federal regulation.

Lawmakers often vow to "rein in the regulatory state." Their proposals range from expanding the use of cost–benefit analysis for proposed rules and instituting regular review and critical analysis of existing regulation to giving Congress more power to strike down rules. Other ideas include statutory adoption of regulation-constraining policies previously implemented by executive order, such as former president Donald Trump's "one-in, two-out" edict for new rules.

Requiring Congress—as the representatives of the American people—to take greater responsibility for federal regulation is a good idea, as is critical analysis of both new and existing rules. However, these ideas imply that costly and inefficient federal regulation is the result of unaccountable rulemaking bureaucrats and that elected officials have little control over the regulatory state. That implication is false; there is ample evidence that federal agencies operate according to Congress and the president's direction. If lawmakers want the administrative state to operate differently, they need to give regulators different instructions and incentives.

Congressional Delegation and Its Effects

Article I, Section 8 of the Constitution gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . [all] Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." But laws often require lengthy explanations of how they are to be executed and how compliance is attained—that is, they require regulations. Lawmakers routinely delegate to federal agencies the authority to craft such rules.

Within limits, this makes sense. Good rulemaking requires more expertise and attention to minutiae than Congress exhibits. As long as agencies are "fleshing out the details" of legislation and not policymaking in place of elected legislators, such rulemaking is consistent with the principles of limited government as enshrined in the U.S. Constitution. As the Supreme Court ruled in *Wayman v. Southard* (1825), federal agencies can "fill up the details" of statutes and "vary minor regulations" provided they stay "within the broad outlines marked out by the legislation."

But as is the natural progress of things, *Wayman*'s limits have eroded over time, and Congress has handed increasingly broad policymaking authority to the bureaucracy. In *Hampton v. United States* (1928), the Supreme Court gave its imprimatur to this authority, ruling that a statute need only provide "an intelligible principle" of what Congress wants to accomplish, while the agencies can handle the balance of the policymaking.

This situation is a great deal for Congress. Members need only legislate some noble goal like "clean air" or "worker safety" or "securing the homeland," whereas federal agencies must make difficult decisions about how much employment or consumer expense or innovation to trade for Congress's desired benefit. Lawmakers get the acclaim for the noble goals while bureaucrats get the blame for policy costs and failures.

Nearly a century ago, agency policymaking had reached such a degree that Justice Benjamin Cardozo—hardly a limited-government jurist—lamented "delegation running riot" in his concurrence in *Panama Refining Co. v. Ryan* (1935), one of the few decisions to check such delegation. Nonetheless, the courts have continued to approve the expansion of bureaucratic policymaking. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.* (1984), the Supreme Court went so far as to limit judicial review over the basic question of whether specific agency rulemakings even reflect congressional intent.

This history should not be understood as saying that regulatory policymaking is in the hands of ideologically driven career bureaucrats who mischievously inflict burdensome regulations on Americans. Public choice economics points out that public employees are like their private-sector counterparts: they want

to keep and advance in their jobs and have a tolerable work environment. To do that, they must satisfy their superiors, who ultimately are the 4,000-odd presidential appointees seeded throughout the federal agencies, more than two-thirds of whom do not require Senate approval. Thus, Congress's delegation of rulemaking authority has not produced some "deep state" bureaucracy ruling America through regulation; rather, it has empowered presidential administrations to do so. And most administrations have happily used that power to carry out their agenda, sometimes going so far as to draw on legislation from decades ago that was intended to address matters that differ from what presidents want to tackle today.

Recent Presidents

This delegation of rulemaking authority might, at one time, have been acceptable to lawmakers. The president can be viewed as the elected representative of the entire nation and thus more likely to craft regulations that benefit Americans as a group, as opposed to senators and representatives beholden to parochial interests.

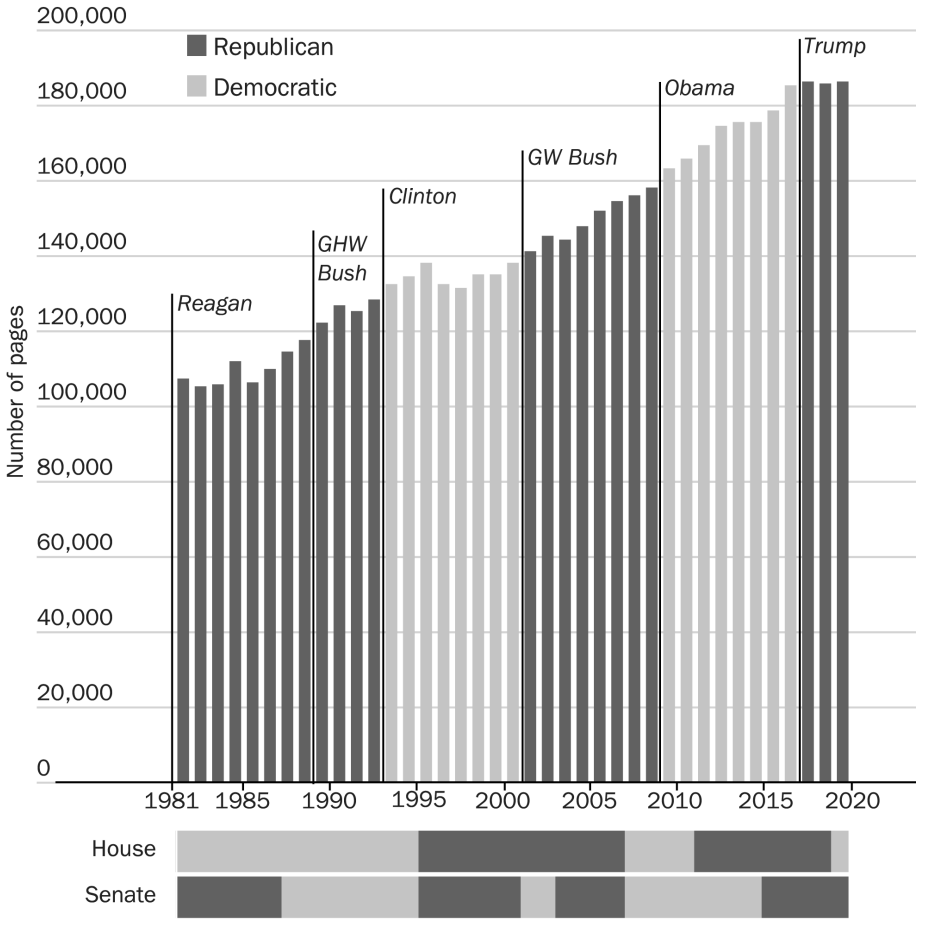
Besides, regular swings in control of the Oval Office give each party the chance to "course-correct" the other's regulatory policymaking. But this has not been happening in recent decades. Although Republicans often advocate *de*regulation, the two most recent GOP presidencies did not pursue deregulatory course corrections. As shown in Figure 1, regulation surged during the George W. Bush administration, in part because of legislation adopted in the war on terror. And rulemaking activity basically froze during the Trump administration, which can be interpreted as the regulatory burden's not growing any heavier, but it can also be interpreted as Trump's maintaining the burden from Barack Obama's administration. In fairness, rulemaking—whether regulatory or deregulatory—requires considerable administration diligence and procedural expertise. That history suggests that members of Congress, from both parties, may no longer want to curb the rulemaking power of the presidency.

Reform Ideas and Their Limitations

Proposals to reform the regulatory process can be divided into two groups: those that would constrain rulemaking at the agency level and those that would increase congressional oversight of regulation. Among the former are such ideas as increasing the use and rigor of cost–benefit and other critical analysis of existing and proposed rules, caps on the overall number of regulations and their aggregate compliance cost, and ad hoc, temporary suspensions of specific rules to boost economic activity or experiment with alternative regulatory schemes.

Figure 1

Total pages in the *Code of Federal Regulations*, 1981–2019



Source: Federal Register Statistics, *Code of Federal Regulations*, Total Pages and Volumes, 1938–2019.
Note: GHW Bush = George H. W. Bush; GW Bush = George W. Bush.

As meritorious as those ideas might appear, their benefits would likely be limited and perhaps nonexistent. Concerning constraints on agency rulemaking, if an administration favors some regulation, negative analysis results usually pose little impediment to its implementation. Likewise, positive analysis gives little boost to a regulation the administration opposes. Evidence of this effect is found in the many federal regulations whose costs dwarf their benefits. Administration priorities would also likely overcome caps on the number or cost of regulations.

There is more promise in proposals to give Congress greater ability to review, block, and repeal regulations. Among those proposals are the Regulations from the Executive in Need of Scrutiny (REINS) Act, which would require congressional approval via an expedited process of any new major regulation, and the inclusion of "sunset" clauses in legislation, which would force Congress to regularly revisit statutory delegations of rulemaking power. However, as demonstrated by the infrequent use of the Congressional Review Act—a regulatory oversight proposal that became law in 1996—an unlikely alignment of political factors is necessary for these powers to be exercised. Still, expansion of Congress's ability to check the executive branch's policymaking power via regulation is worthwhile.

The best policy would be for Congress to limit its delegation of policymaking authority to federal agencies and, by extension, to the president. Good public policy is the product of compromise and the balancing of different factions' interests, within the confines of limited governance. That is especially the case in a large, diverse nation whose domestic tranquility is best secured by obeisance to the Constitution and the nation's Founding ideals. As such, lawmakers should set federal policy and government agencies should carry it out and, at most, only "fill up the details" of what Congress legislates.

Suggested Readings

Adler, Jonathan H. "Would the REINS Act Rein in Federal Regulation?" *Regulation* 34, no. 2 (2011): 22–28.
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Niskanen, William A. "More Lonely Numbers." *Regulation* 26, no. 3 (2003): 22.
Schoenbrod, David. "From Chevron to 'Consent of the Governed.'" *Regulation* 41, no. 4 (2018/2019): 34–39.
Shapiro, Stuart. "Politics and Regulatory Policy Analysis." *Regulation* 29, no. 2 (2006): 40–45.
Van Doren, Peter, and Thomas A. Firey. "Regulation at 40." *Regulation* 40, no. 1 (2017): 30–37.
Viscusi, V. Kip, and Ted Gayer. "Safety at Any Price?" *Regulation* 25, no. 3 (2002): 54–63.

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