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A Two-Year Lookback on Trump's Deregulatory Record

By: Susan Dudley | July 15, 2019

> ## In brief…
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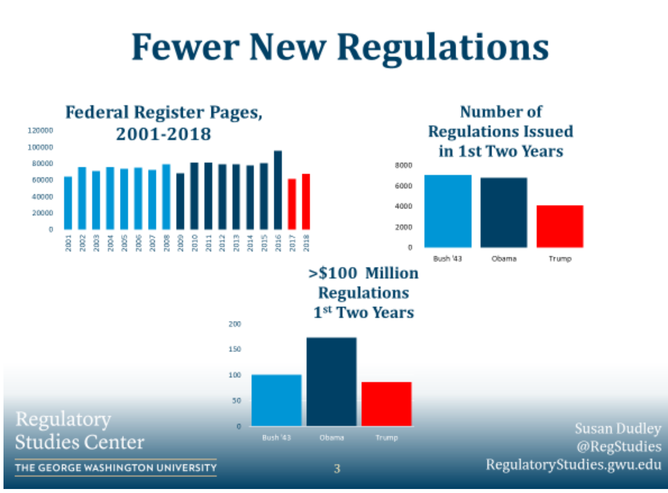
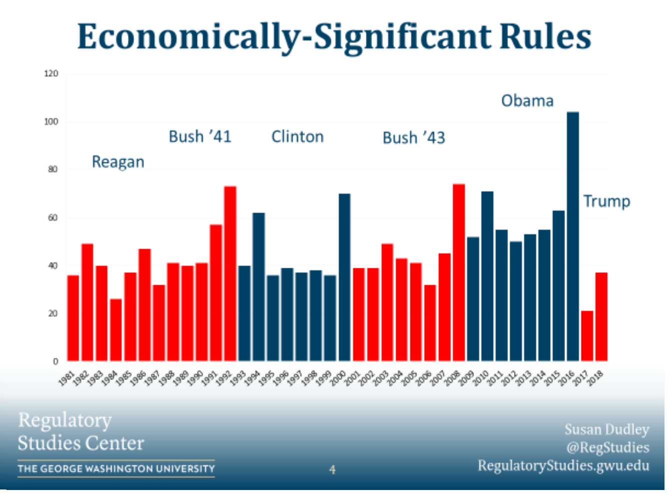
> Susan Dudley and her co-panelists discuss the effect of Trump's Executive Order 13771, repeated losses for the administration in court, the administration's view of benefit-cost analysis, and more at an ABA AdLaw Regulatory Policy Committee meeting.

How is the Trump administration's deregulatory program going? That was the topic of a panel discussion hosted by the Regulatory Policy Committee of the American Bar Association's Section on Administrative Law and Rulemaking last week. I spoke on the panel and enjoyed a lively discussion with my GW Law colleague Richard Pierce, Karyn Schmidt of the American Chemistry Council, Keith Holman of the Administrative Conference of the United States, Tom Sullivan of the U.S. Chamber of Commerce, and Gerron Levi of the National Community Reinvestment Coalition.

The speakers reviewed the Trump administration's initiatives and agreed his policies had slowed the pace of new regulations. Trump's Executive Order 13771 directed agencies to remove two regulations for every new one issued, and to offset the costs of new regulations by modifying or eliminating existing regulatory requirements. This policy appears to have deterred agencies from issuing regulations, as two of my slides illustrated:





Sullivan shared data indicating that the slower pace of regulation has contributed to an increase in small businesses optimism over the last two years. In surveys, small businesses no longer list regulation as the first or second most important concern. Levi, however, raised concerns that the administration's actions were harming consumers, citing fair lending and housing rules.

Whether the administration's policies have led to deregulation—reducing the stock of regulations — as the president has claimed, is another matter. During its first two years, the administration classified more of its major regulatory actions as deregulatory than regulatory and claimed significant cost savings. However, as Holman noted, those estimates necessarily involve assumptions, and the accounting behind them may be open to debate. To date, few of the deregulatory activities, other than the rescission of 15 regulations through Congress's aggressive use of the Congressional Review Act, removed or replaced existing regulations.

For the more significant deregulatory actions, Pierce observed, "This administration, at least initially, has shown unparalleled ineptitude at figuring out what the hell the law is and how to comply with it." Citing data collected by the Brookings Institution and the NYU Institute for Policy Integrity, Pierce said the administration had won less than 10% of the cases challenging their regulatory changes. In contrast, he said most administrations win about 70% of cases in court. My slide on this subject notes both the deregulatory actions taken and the poor showing in the courts.

All panelists agreed that deregulating takes at least as much time as regulating. Agencies must develop a new record to support any changes and seek interagency review and public comment before issuing a final action. As a result, Pierce said the average length of rulemaking is 5 years, making it difficult to achieve large changes in one presidential term. He predicted that "Trump will not be able to use notice and comment to rescind or change any major rule that was final and upheld by a court."

Pierce also warned that the president's approach to regulation may "destroy Reagan's legacy by persuading the courts and the public that [benefit-cost analysis] is far too unreliable to use as a regulatory tool."

Sullivan and I were more optimistic about the future of benefit-cost analysis, and remarked on the surprising continuity of President Clinton's Executive Order 12866 that required agencies to conduct regulatory impact analysis before issuing new regulations and to choose regulatory approaches that maximize net benefits. Sullivan also found recent bipartisan legislative proposals promising, including bills to strengthen the Small Business Administration Office of Advocacy and encourage Early Participation in Regulations.

Discussion among panelists and with the audience revealed different perspectives on the Trump administration's deregulatory efforts, yet there was general agreement that to date they had slowed the pace of new regulations. How durable those initiatives will be depends both on how well the administration defends them in court, and the outcome of the next election.

To view slides from the event, click here.