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From Regulatory Review to Social Engineering: Biden's Misguided Approach

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KEY TAKEAWAYS

President Biden has unveiled a radical regulatory agenda that will undermine fundamental constitutional principles and decades of rulemaking precedent.

The President has instructed OMB to ensure that the review process does not result in deregulation, in contrast to the Trump Administration's deregulatory agenda.

Congress must avert a flood of new regulation by codifying rigorous rulemaking standards and reclaiming its lawmaking authority.

Within hours of pledging to "preserve, protect, and defend the Constitution," President Joe Biden unveiled a radical regulatory agenda that will undermine fundamental constitutional principles and decades of rulemaking precedent. The run of memoranda and executive orders also dismantles a host of much-needed restraints on the regulatory state instituted by the Trump Administration.

Of particular concern is President Biden's memorandum on Modernizing Regulatory Review,[1] which loosens standards of cost–benefit analysis in rulemaking. The President boasted that the actions provide regulators with the "flexibility" to undertake "robust regulatory action."[2] That is the worst course possible at any time—but particularly now, when regulatory escalation will inhibit the nation's economic recovery from the COVID-19 lockdown.

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Citizens must demand that Congress codify rigorous rulemaking standards and reclaim its lawmaking authority. Otherwise, the Biden Administration's flood of new regulation will extinguish America's entrepreneurial spirit and doom countless livelihoods and lives.

The Regulatory Review Process

The regulatory review process administered by the Office of Management and Budget (OMB) determines whether agencies have complied with rulemaking requirements, including the integrity of risk assessments and cost–benefit analyses, and controls if and when regulations are finalized. The process is intended to ensure that regulation is lawfully authorized, necessary, and effective.

Regulatory review originated under President Richard Nixon in 1971, and every President since has customized review policies.[3] The Biden memorandum of January 20, 2021, "reaffirms the basic principles" of executive orders on regulatory review issued by Presidents Bill Clinton[4] and Barack Obama,[5] both of whom directed agencies to "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[6]

However, President Biden's reaffirmation is rendered meaningless by his other directives that violate basic principles of evidence-based rulemaking and objective regulatory assessment.

Biden's Misguided Approach

President Biden has instructed the OMB director (in consultation with executive departments and agencies) to recommend improvements to regulatory review for the purposes of "promoting public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations."[7]

Alas, such delusions of regulatory grandeur reflect the Progressive conceit that government is somehow equipped to remedy all economic hardship and cultural conflict, along with correcting all manner of human fallibility.

The memorandum also requires that the review process "fully accounts for regulatory benefits that are difficult or impossible to quantify, and does not have harmful anti-regulatory or deregulatory effects."[8] Accounting for benefits is the function of cost–benefit analysis, which is a method of quantification to enable comparisons between various actions and anticipated outcomes. It is also necessary to demonstrate that regulation is not "arbitrary or capricious," a legal standard in assessing the reasonableness of agencies' regulatory actions.

Other presidents have allowed agencies to "consider" qualitative benefits.[9] But to insist, as President Biden has now done, on "fully accounting" for unquantifiable benefits is as inappropriate as it is oxymoronic. The President is attempting to masquerade abstract political values as regulatory benefits, such as "human dignity, equity, and the interests of future generations." Doing so will circumvent empirical analysis in rulemaking, thereby allowing the Administration to justify virtually any regulation. As recently noted by former OMB Director Mick Mulvaney, "The applications are almost limitless. It will usher in an era of rapid and dramatic reregulation, often on the flimsiest basis and regardless of the costs."[10]

Regulatory policy is not *solely* a function of cost–benefit analysis. A variety of political considerations and cultural values also shape every regulatory agenda. But the regulatory review process is specifically designed to ensure that rules yield benefits commensurate with the costs. Evading the process of quantification turns regulatory review into an instrument of social engineering.

Forgoing the integrity of regulatory review also conflicts with the Administration's January 27 memorandum, Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking.[11] There is no way to reconcile arbitrary rulemaking with President Biden's purported commitment to policy decisions "guided by the best available science and data."

Barring Deregulation

The President has also instructed the OMB to ensure that the regulatory review process "does not have harmful anti-regulatory or deregulatory effects."[12] This is in sharp contrast to the Trump Administration's commitment to deregulation. Indeed, compared to rulemaking during the Obama/Biden and Bush Administrations, the volume of new regulations dramatically slowed during the past four years, with the Trump Administration issuing 74.9 percent fewer "significant"[13] regulations than did the Obama Administration (within the same period), and 66.6 percent fewer than the Bush Administration.[14] Experts credit this regulatory restraint, in part, for robust growth in gross domestic product (GDP), record-low unemployment, and a long-running stock market surge during President Trump's term. But the cumulative costs of legacy regulation—an estimated $2 trillion annually—still constitute a crushing tax on the economy.[15]

The direct effects of this legacy regulation include higher energy rates from nonsensical global warming schemes; increased food prices (for people and pets) as a result of excessively prescriptive food production standards; restricted access to credit for consumers and small businesses under Dodd–Frank dictates; fewer health care choices and higher medical costs under the Affordable Care Act; and reduced Internet investment and innovation under network-neutrality rules favored by the Biden Administration.

The actual costs are far greater, both because the impacts have not been fully quantified for a significant number of rules, and because many of the worst effects—the loss of freedom and opportunity—are incalculable. It is ludicrous for President Biden to effectively prohibit deregulation.

Evading Accountability

The new Administration is also attempting to concoct a moral imperative for abandoning quantitative analyses of regulatory effects. In his memorandum on regulatory review, the President instructs the OMB to "propose procedures that take into account the distributional consequences of regulations…to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, marginalized communities."[16]

A thorough cost–benefit analysis would typically identify regulatory targets and beneficiaries; costs and benefits could not otherwise be accurately calculated. The analyses largely focus on "direct" costs, which is insufficient for gauging the rippling effects of regulation across the economy. But President Biden's demand for regulatory "equity" is not a methodological technique. It is a political calculation.

If President Biden really is intent on reducing the "distributional consequences of regulations," he would prioritize deregulation over red tape. The burden of regulation inexorably falls heaviest on low-income families and fixed-income seniors because the costs translate to higher consumer prices that exhaust a relatively larger share of their household budgets. Moreover, the excessive spending on fashionable causes and hypothetical threats consumes resources that could be better spent remedying the actual environmental risks in low-income communities, such as contaminated drinking water and toxic soils.

Indeed, the benefits of regulatory reform are numerous and well documented. The White House Council of Economic Advisers, for example, conservatively estimated that excessive regulation has stunted GDP growth by 0.8 percent annually (on average) since 1980.[17]

An abundance of scholarship also documents a direct correlation between income and health.[18] Simply put, squandering resources on regulatory overkill and strangling investment and innovation through unnecessary restraints endangers the very disadvantaged, vulnerable, marginalized communities that President Biden claims to protect.

As a whole, the Biden directives animate the form of "despotism" to which American democracy is subject, as Alexis de Tocqueville warned in 1835:[19]

> [T]he supreme power…covers the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate, to rise above the crowd. The will of man is not shattered, but softened, bent, and guided; men are seldom forced by it to act, but they are constantly restrained from acting. Such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd.

Reversing the Trump Reforms

The reform agenda of the past four years largely focused on reversing the regulatory excesses of previous Administrations, as well as instituting constraints on rulemaking.

To reset agencies' regulatory orientation, President Trump directed regulators to identify for elimination at least two prior regulations for every one new regulation issued,[20] and to control regulatory costs through a budgeting process.[21] But President Biden, on Day One, revoked these and a variety of other regulatory reforms—including a requirement that agencies provide Web-based access to "guidance" documents and employ public notice and comment procedures before issuing "significant" guidance documents.[22]

Also dispatched was Mr. Trump's Executive Order 13777, which established a regulatory reform task force to evaluate regulations and recommend those appropriate for repeal, replacement, or modification.[23]

Opportunities for Reform

Although the election of President Biden threatens to reverse the progress instituted by the Trump Administration, that should not inhibit Members of Congress, the business community, civic organizations, and individuals from continuing to press for reforms.

Specifically, policymakers should:

- **Codify regulatory impact-analysis requirements.** Agency calculations of regulatory costs are notoriously inaccurate and imprecise. Codifying stringent methodological requirements would ensure that analytic standards cannot be rolled back without congressional action and would provide the basis for judicial review of agency compliance.

- **Subject independent agencies to executive branch regulatory review.** Rulemaking is increasingly being conducted by independent agencies outside the direct control of the White House. Regulations issued by agencies such as the Federal Communications Commission, the Securities and Exchange Commission, and the Consumer Financial Protection Bureau are not subject to OIRA review—or even required to undergo a cost–benefit analysis. This is a gaping loophole in the rulemaking process. These agencies should be fully subject to the same regulatory review requirements as those to which executive branch agencies are subject.

- **Require agencies to base rulemaking decisions on factual data and to disclose any such data for public review.** Federal agencies routinely mask politically driven regulations as scientifically based imperatives. The supposed science underlying these rules is often hidden from the public and unavailable for vetting by experts. Credible science and transparency are necessary elements of sound policy.

Conclusion

Reform need not become tangled in the hyper-partisanship that sidelines most congressional action these days. The goal is not to arbitrarily reduce the number of rules, but to ensure that each regulation is necessary and effective—and that policymakers are held accountable for the impacts. Unless constrained, the regulatory state will crush the freedoms on which this nation was founded.

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Endnotes

1. White House, "Memorandum for the Heads of Executive Departments and Agencies: Modernizing Regulatory Review," January 20, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/ (accessed February 19, 2021).
2. White House, "Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation," January 20, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-revocation-of-certain-executive-orders-concerning-federal-regulation/ (accessed February 19, 2021).
3. Congress established the Office of Information and Regulatory Affairs (OIRA) in 1980 to administer regulatory review. The OIRA is a division of the Office of Management and Budget, which is ensconced within the Executive Office of the President.
4. President Clinton's Executive Order 12866 asserts the following objectives: "[T]o enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public." *Federal Register*, Vol. 58, No. 190 (October 4, 2003), pp. 51735–51744.
5. President Obama's Executive Order 13563 calls for regulation to be based on the best available science; allow for public participation; promote predictability and reduce uncertainty; use the best, most innovative, and least burdensome tools for achieving regulatory ends; take into account benefits and costs (both quantitative and qualitative); ensure that regulations are easy to understand; and measure and seek to improve the actual results of regulatory requirements. *Federal Register*, Vol. 76, No. 14 (January 21, 2011), pp. 3821–3823.
6. This wording is from President Clinton's Executive Order 12866. The wording in President Obama's Executive Order 13563 varies slightly, stating, "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs." *Federal Register*, Vol. 58, No. 190.
7. White House, "Memorandum for the Heads of Executive Departments and Agencies."
8. Ibid.
9. President Obama's Executive Order 13563 states: "Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify." *Federal Register*, Vol. 76, No. 14.
10. Mick Mulvaney and Joe Grogan, "Biden Gives Regulators a Free and Heavy Hand," *Wall Street Journal*, January 26, 2021, https://www.wsj.com/articles/biden-gives-regulators-a-free-and-heavy-hand-11611703468?mod=searchresults_pos1&page=1 (accessed February 19, 2021).
11. *Federal Register*, Vol. 86, No. 26 (February 10, 2021), pp. 8845–8851.
12. White House, "Memorandum for the Heads of Executive Departments and Agencies."
13. Roughly defined as rules costing the economy at least $100 million per year.
14. Author's calculations based on data from *Federal Register*, "Document Search," https://www.federalregister.gov/documents/search#advanced (accessed February 19, 2021).
15. The paperwork burden alone now totals 11.6 billion hours annually, at a cost to the private sector of $159 billion. Office of Information and Regulatory Affairs, "Inventory of Currently Approved Information Collections," February 10, 2021, https://www.reginfo.gov/public/do/PRAReport?operation=11 (accessed February 19, 2021).
16. White House, "Memorandum for the Heads of Executive Departments and Agencies."
17. Executive Office of the President, "The Growth Potential of Deregulation," Council of Economic Advisers, October 2, 2017, http://www.eifr.eu/document/file/download/1936/the-growth-potential-of-deregulation-1-pdf (accessed February 19, 2021).
18. According to Evelyn Kitagawa and Philip Hauser, for example, "[t]he evidence indicates that further reductions in death rates in the United States may be achieved more readily through programs designed to improve the socioeconomic conditions of the disadvantaged elements of the population than through further advances in biomedical knowledge." See Evelyn M. Kitagawa and Philip M. Hauser, *Differential Mortality in the United States* (Cambridge, MA: Harvard University Press, 1973).
19. Alexis de Tocqueville, *Democracy in America*, Gerald Bevan, trans. (New York, NY: Penguin Random House, 2003).
20. *Federal Register*, Vol. 82, No. 22 (February 3, 2017), pp. 9339–9341.
21. Being compelled to restrict the costs imposed on the public, the agencies were forced to establish regulatory priorities and engage in a rolling review of the vast accumulation of rules.
22. *Federal Register*, Vol. 84, No. 199 (October 15, 2019), pp. 55235–55238.
23. *Federal Register*, Vol. 82, No. 39 (March 1, 2017), pp. 12285–12287.