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# The Impossibility of Legislative Regulatory Reform and the Futility of Executive Regulatory Reform

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# The Impossibility of Legislative Regulatory Reform and the Futility of Executive Regulatory Reform

Stuart Shapiro

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## INTRODUCTION

Notice and comment rulemaking came into existence in 1946<sup>1</sup> but came of age in the 1970s. With the passage of a wide variety of statutes delegating regulatory decisions to the agencies of the executive branch, rulemaking exploded. So did the reaction to rulemaking.<sup>2</sup> In both the executive branch where presidents Ford through Reagan imposed new requirements on agencies writing regulations,<sup>3</sup> and in Congress where statutes such as the Regulatory Flexibility Act<sup>4</sup> and the Paperwork Reduction Act<sup>5</sup> were passed, political leaders sought to influence the regulatory output of executive agencies.

Since then, discussions of regulatory reform have rarely been absent in either the executive or legislative branches of the federal government. A predictable pattern has emerged in both branches. With one notable exception explained later, the 104th Congress, dozens of regulatory reform bills are introduced each session and rarely even make it to the stage of being voted on by either house. Permanent significant changes to the rulemaking process seem to be nearly impossible to pass in Congress. Meanwhile, presidents from Bush Sr. through Obama introduced changes to the regulatory review process initiated by President Reagan. But, excluding the changes by President Clinton, few have had a long term impact on the pace or nature of regulation. Many have been repealed or significantly altered when a member of the opposing party ascended to the presidency.

Some of the most significant attempts at bold change to the regulatory process in decades have come from the Trump Administration. Executive Order 13771<sup>6</sup> created both a regulatory budget and a policy of repealing two regulations for every one that is enacted. At the same time,

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<sup>1</sup> Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–59).

<sup>2</sup> Eisner, Marc Allen. *Regulatory politics in transition*. JHU Press, 2000.

<sup>3</sup> Tozzi, Jim. "OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding." *Administrative Law Review* (2011): 37-69.

<sup>4</sup> Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified as amended at 5 U.S.C. §§ 601–12 (1996)).

<sup>5</sup> Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified at 44 U.S.C. §§ 3501–21).

<sup>6</sup> Executive Order 13771 *Federal Register* February 3, 2017 82 FR 9339

regulatory output has fallen to historic lows.<sup>7</sup> It is therefore tempting to credit (or blame depending on your preferences) the regulatory reforms in EO 13771 with having an impact that few reforms over the past several decades have had. However, an equally plausible explanation for the lack of regulation from the Trump Administration is a set of cabinet appointees who are more devoted to non-interference in the market than any of their predecessors, and the constant desire of the president to announce low regulatory numbers.

The ascendancy of the Democrats to the presidency in 2021 or 2025 (or later) will not answer this question. Any Democratic president is likely both to repeal EO 13771<sup>8</sup> and to put in place appointees at the agencies who value regulation. Both of these actions underscore the short-lasting nature of executive branch regulatory reform. This may be one of the most normal aspects of the Trump presidency.

If regulatory reform from the legislature has become impossible and regulatory reform from the executive is at best fleeting, what are the implications for the future of regulatory reform? This article lays out a brief history of changes to the regulatory process. The next section focuses on Congressional changes highlighting the conditions that were present for the various waves of regulatory reform and why seemingly favorable conditions for reform have not produced meaningful reform since the turn of the century. In the following section, the article focuses on the executive branch and notes how, since Executive Order 12866, the regulatory process has endured numerous temporary changes that were soon reversed. The article then turns to a review of a few recent examples of regulatory reform at the state level that are likely to be more lasting than anything at the federal level. Finally there are conclusions regarding regulatory reform in Washington.

## I. LEGISLATIVE REGULATORY REFORM

The first key step in the evolution of the current rulemaking process is obviously its creation. The Administrative Procedure Act (APA)<sup>9</sup> was passed in 1946. Containing far more than just rulemaking, the APA was largely a response to the growth of the administrative state during The New Deal.<sup>10</sup> The APA was passed by a Democratic Congress and signed by a Democratic president. It was a “fierce compromise”<sup>11</sup> that allowed closer judicial review of administrative adjudications, while enshrining a process whereby executive branch agencies

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<sup>7</sup> See <https://thehill.com/opinion/white-house/404249-trump-hit-the-regulatory-brakes-but-hasnt-found-reverse-gear> (last viewed September 11, 2020)

<sup>8</sup> See <https://www.theregreview.org/2019/04/25/which-trump-regulatory-reforms-likely-last/> (last viewed September 11, 2020).

<sup>9</sup> cite

<sup>10</sup> Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 219 (1986).

<sup>11</sup> George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. L. REV. 1557, 1559 (1996)

could make broader policies via notice and comment rulemaking.<sup>12</sup> Particularly critical to the passage was the fear within the Democratic Congress that after construction of the New Deal, they would lose the presidency in 1948, and a greater sense of security with a judicial branch largely populated by Democratic appointees.<sup>13</sup>

The next wave of legislative changes to the regulatory process occurred in the late 1970s. Although there were changes to the APA in the late 1960s and early 1970s, including the Privacy Act,<sup>14</sup> the Freedom of Information Act (FOIA),<sup>15</sup> and the Government in the Sunshine Act,<sup>16</sup> none of these acts made fundamental changes in how the executive branch regulated. In 1980 however, Congress passed the Regulatory Flexibility Act (RFA) which required agencies issuing regulations expected to have a significant effect on a substantial number of small businesses to analyze that effect and evaluate alternative policies.<sup>17</sup> This was followed by the Paperwork Reduction Act (PRA). The PRA placed requirements on agency attempts to collect information from the public including through regulatory efforts.<sup>18</sup>

Congress passed both the RFA and the PRA in response to the growing perception that the burden imposed by regulation on the US economy was stifling economic growth. Like the APA, a Democratic Congress passed and a vulnerable first-term Democratic president signed both the RFA and PRA. The statutes, however, also each reaffirmed the statutory obligations of regulatory agencies and contained a number of provisions designed to ensure that these new steps in the regulatory process did not excessively impinge upon the independence of these agencies. Including these provisions was crucial to the bipartisan support these statutes needed to pass.<sup>19</sup>

The most recent wave of legislative changes to the regulatory process occurred in 1995. Congress passed and the president signed both the Unfunded Mandates Reform Act (UMRA)<sup>20</sup> and the Small Business Regulatory Enforcement Fairness Act (SBREFA) (which included the Congressional Review Act).<sup>21</sup> Unlike the previous two waves of regulatory reform, this one occurred with a Republican Congress. The 104th Congress led by Speaker Newt Gingrich had

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<sup>12</sup> Martin Shapiro, *The APA: Past, Present, and Future*, 71 VA. L REV. 447, 448 (1986).

<sup>13</sup> *Id.* at 452.

<sup>14</sup> Pub.L. 93-579, 88 Stat. 1896, enacted December 31, 1974, 5 U.S.C. § 552a

<sup>15</sup> Pub L. 89-487, 80 Stat 250, 5 U.S.C. § 552

<sup>16</sup> Pub.L. 94-409, 90 Stat. 1241, enacted September 13, 1976, 5 U.S.C. § 552b

<sup>17</sup> Pub L. 96-354 94 Stat 1164 5 USC §601 et seq

<sup>18</sup> Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified at 44 U.S.C. §§ 3501-21).

<sup>19</sup> Shapiro, Stuart, and Deanna Moran. "The checkered history of regulatory reform since the APA." *NYUJ Legis. & Pub. Pol'y* 19 (2016): 141.

<sup>20</sup> Unfunded Mandates Reform Act, Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. §§ 1501-03).

<sup>21</sup> Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified at 5 U.S.C. §§ 601, 631, 648(c)(3), 657).

been elected on a platform (the “Contract with America”) that included deregulation as a central component.<sup>22</sup>

But there were also similarities to the previous waves of regulatory reform. Once again the legislation was signed by a Democratic president, who after his party suffered significant losses in the 1994 midterms, feared for his re-election chances. And once again, as with the RFA and the PRA, UMRA and SBREFA contained numerous provisions that ensured regulatory agencies controlled key parts of their process and retained their autonomy. In order to secure passage and President Clinton’s signature, key terms were left undefined maintaining bureaucratic discretion for regulatory agencies.<sup>23</sup>

And then the story of changes to the regulatory process passed by Congress ends. There have been no major regulatory reform statutes passed by Congress since UMRA and SBREFA in 1995. In a sense, this is mysterious. For at least two periods between 1995 and 2020, Republicans, who championed deregulation and changing the regulatory process to achieve this goal, controlled both houses of Congress and the presidency. To understand the lack of regulatory reform statutes at the federal level over the past 25 years, it is worth discussing these two periods (2003–2007 and 2017–2019) in detail.

Republicans had full control of Congress from 2003 until 2007 while George W. Bush was president. There were bills introduced in this period that would have reformed the regulatory process. However, none of these bills passed either house of Congress. Probably the most notable was the “Major Regulation Cost Review Act of 2005.”<sup>24</sup> Introduced by Rep. Barrett Gresham and co-sponsored by 36 other Republicans, the bill would have mandated consideration of a variety of factors when an agency issued a regulation and strengthened cost-benefit analysis requirements. Like other regulatory reform bills in this period, it did not receive a hearing or a committee vote.<sup>25</sup>

It is possible that during this period, the passage of SBREFA and UMRA were still recent enough that regulatory reform did not have a prominent place on the Congressional agenda. A strong economy in this period also may have reduced political incentives for curtailing the issuance of regulations.<sup>26</sup> Finally, perhaps the Republican Congress did not want to hamstring President Bush with new requirements.

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<sup>22</sup> Glicksman, Robert L., and Stephen B. Chapman. "Regulatory reform and (breach of) the Contract with America: improving environmental policy or destroying environmental protection." *Kan. JL & Pub. Pol'y* 5 (1995): 9.

<sup>23</sup> *Supra* Note 19.

<sup>24</sup> GovTrack.us. (2020). H.R. 3143 — 109th Congress: Major Regulation Cost Review Act of 2005. Retrieved from <https://www.govtrack.us/congress/bills/109/hr3143>

<sup>25</sup> *Id.*

<sup>26</sup> Shapiro, Stuart, and Debra Borie-Holtz. *The politics of regulatory reform*. Routledge, 2014.

The absence of statutory regulatory reform in the 2017–19 period when Donald Trump was President and Republicans controlled both houses of Congress is even more curious. Deregulation was regularly hailed by both Trump and Senate Majority Leader Mitch McConnell as a central achievement of the Republicans in this period.<sup>27</sup> Congress repealed fourteen regulations promulgated in the last six months of the Obama Administration using the Congressional Review Act which, until that point, Congress had used only once in the preceding twenty years since its passage.<sup>28</sup> With this prominent place in Republican rhetoric, one would expect that regulatory reform would be a legislative priority.

Indeed, regulatory reform bills were discussed in the 117<sup>th</sup> Congress. But the results were remarkably similar to attempts at regulatory reform when the Republicans controlled Congress but the President was Barack Obama. Two bills were most prominent both in Congress and in academic discussions of regulatory reform.<sup>29</sup> The first was the Regulations from the Executive in Need of Scrutiny (REINS) Act. This act would have required Congressional approval before any executive branch regulation took effect. This change to the regulatory process would have been a major shift, and critics argued that it would have significantly reduced the issuance of regulations.<sup>30</sup>

The REINS Act was not new in the 115<sup>th</sup> Congress. In fact, it had been introduced in each of the previous three Congresses.<sup>31</sup> But advocates of REINS couldn't be faulted for feeling that the fate of the bill in the 115<sup>th</sup> Congress would be different.<sup>32</sup> Unlike the three previous instances, there was now a Republican president who would likely sign the bill if Congress passed it.

But in fact, little was different. As in each of the previous three sessions the bill was introduced in the House, referred to the House Judiciary Committee, and eventually passed the

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<sup>27</sup> See e.g. <https://www.whitehouse.gov/briefings-statements/president-trumps-historic-deregulation-benefitting-americans/> (last viewed September 11, 2020).

<sup>28</sup> See <https://regulatorystudies.columbian.gwu.edu/congressional-review-act> (last viewed September 11, 2020).

<sup>29</sup> Levin, Ronald M. "The REINS Act: Unbridled Impediment to Regulation." *Geo. Wash. L. Rev.* 83 (2014): 1446. Adler, Jonathan H. "Placing Reins on Regulations: Assessing the Proposed Reins Act." *NYUJ Legis. & Pub. Pol'y* 16 (2013): 1. Levin, Ronald M. "The regulatory accountability act and the future of APA revision." *Chi.-Kent L. Rev.* 94 (2019): 487. Shapiro, Sidney. "The Regulatory Accountability Act of 2011: Way Too Much of a Good Thing." *Admin. & Reg. L. News* 37 (2011): 10.

<sup>30</sup> *Id.* Levin.

<sup>31</sup> Bill. H.R. 427 (114AD).

Bill. H.R. 367 (113AD).

Bill. H.R. 10 (112AD).

<sup>32</sup> Bill. H.R. 26 (115AD).

full House along largely partisan lines.<sup>33</sup> Then the bill was referred to the Senate where it was introduced by Senator Rand Paul of Kentucky.<sup>34</sup> All co-sponsors were Republican. In the Senate, the bill was referred to the Homeland Security and Government Affairs Committee. No hearings were held in the Senate and the bill did not advance to a committee vote, much less a floor vote in any of the sessions of Congress.

The other significant regulatory reform initiative of the past decade was the Regulatory Accountability Act. For proposed major or high-impact rules that have a specified significant economic impact or adverse effect on the public health or safety, the bill would have required agencies to:

- “publish notice of such rulemaking to invite interested parties to propose alternatives and ideas to accomplish the agency's objectives;
- allow persons interested in high-impact or certain major rules to petition for a public hearing with oral presentation, cross-examination, and the burden of proof on the proponent of the rule;
- adopt the rule that maximizes net benefits within the scope of the statutory provision authorizing the rule, unless the agency explains the costs and benefits that justify adopting an alternative rule and such rule is approved by the Office of Information and Regulatory Affairs (OIRA); and
- publish a framework and metrics for measuring the ongoing effectiveness of the rule.”<sup>35</sup>

The bill would have required Agencies to notify OIRA with certain information about a proposed rulemaking, including specified discussion and preliminary explanations concerning a major or high-impact rule. Further, RAA would have required OIRA to establish certain rulemaking guidelines. Additionally, the bill (1) revises the scope of judicial review of agency actions, and (2) establishes requirements for agencies issuing guidance.<sup>36</sup>

Despite being perceived as less extreme than REINS, the Regulatory Accountability Act (which primarily affected “high-impact” rulemakings) had a similar history to REINS. It was introduced in both houses in every Congress from the 112th through the 116th.<sup>37</sup> It passed the

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<sup>33</sup> In the 112<sup>th</sup> and 113<sup>th</sup> Congress the REINS Act was co-sponsored by a Democrat, Rep. Dan Boren of Oklahoma. Boren did have the lowest percentage in these Congresses of voting with his party ([https://ballotpedia.org/Dan\\_Boren#cite\\_note-16](https://ballotpedia.org/Dan_Boren#cite_note-16)) last viewed June 30, 2020.

<sup>34</sup> Similarly, in the 112<sup>th</sup> and 113<sup>th</sup> Congress, Senator Joe Manchin of West Virginia co-sponsored the bill in the Senate but dropped his support by the 114<sup>th</sup> Congress.

<sup>35</sup> See summary of Regulatory Accountability Act of 2017 (S951). <https://www.congress.gov/bill/115th-congress/senate-bill/951>

<sup>36</sup> Bill. H.R. 5 (115AD).

<sup>37</sup> Bill. H.R. 185 (114AD).  
Bill. H.R. 5 (115AD).

House in every Congress from the 112th until the 115th by margins that were slightly larger than REINS. It was introduced in the Senate in every Congress from the 112th until the 116th and had Democratic co-sponsors in each Congress from the 112th until the 115th. It was referred to the Senate Homeland Security Committee, then the Senate took no further actions.<sup>38</sup>

Why did regulatory reform bills fail to move forward both under Presidents Bush and Trump? The easiest explanation is that the filibuster in the Senate means that in order to pass a bill through the Senate, significant bipartisan support is necessary. While the Regulatory Accountability Act had some Democratic support it was limited and diminished over time. Previous successful regulatory reform efforts in 1979–80 and 1995–96 were supported by Democrats, but only because these bills preserved agency autonomy.<sup>39</sup> REINS, the RAA, and the efforts at regulatory reform from 2003–2007 did not contain sufficient protections for agencies to garner support from Democrats.

Another possible explanation is that both periods of Republican control took place during strong economic conditions. Regulations are often a scapegoat when the economy suffers.<sup>40</sup> Both Congress and the president want to be seen as doing something about poor economic conditions. Historically, regulatory reform has had the virtue of allowing political actors to claim action on the economy even if these efforts accomplished very little in alleviating large scale economic malaise.<sup>41</sup> The lack of a need for such credit claiming in 2003–07 and 2017–19 may also have played a role in the failure of Republican Congresses to pass regulatory reform bills.

Finally, it is possible that unified party control of government is an actual disincentive to regulatory reform. Most regulatory reform measures, particularly REINS, curb executive discretion. When the executive is a member of your party the perceived need for congressional control may seem less urgent than when the president is from the opposition party. Indeed, the president may object to being restricted in his ability to use regulation as a policy tool.

Is regulatory reform in Congress impossible? The accomplishments have certainly not measured up to the rhetoric surrounding this issue. There have been no meaningful changes to the regulatory process since 1996 and even those changes in 1996 and in 1979 did little to restrain the growth of regulations, a constant feature of US policymaking for 50 years. On the one hand, bipartisanship seems to be a requirement for meaningful regulatory reform in Congress. The APA, PRA, and RFA were all passed by Democratic Congresses and UMRA and SBREFA were

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Bill. H.R. 2122 (113AD).

Bill. H.R. 3010 (112AD).

Bill. S. 3208 (116AD).

<sup>38</sup> Id.

<sup>39</sup> *Supra* Note 19.

<sup>40</sup> Institute for Policy Integrity *Regulatory Red Herring: The Role of Job Impact Analysis in Environmental Policy Debates* <https://policyintegrity.org/publications/detail/regulatory-red-herring/>

<sup>41</sup> *Supra* Note 26.

all signed by a Democratic president (and got bipartisan support in Congress). However bipartisan support requires concessions to those who support regulatory policy as an instrument for protecting public health and safety. This renders regulatory reform less far-reaching<sup>42</sup> than the proposals contained in REINS or even the RAA.<sup>43</sup>

## II. EXECUTIVE REGULATORY REFORM

If the legislature has made few changes to the regulatory process in recent years, the same is certainly not true of the executive branch. Beginning in the Ford Administration, presidents have regularly attempted to assert control over the regulations written by executive branch agencies.<sup>44</sup> President Reagan broke new ground in 1981, issuing Executive Order 12291.<sup>45</sup> This Executive Order gave the OIRA, an office created by the PRA,<sup>46</sup> the authority to review regulations and the economic analyses behind them. While initially the role of OIRA was extremely controversial,<sup>47</sup> it continues to review executive branch regulations many years later.

Executive Order 12291 had been described as (along with the APA) one of the two most important changes in the regulatory process.<sup>48</sup> The Order has gone through one major change since it was issued. President Clinton repealed the order and replaced it with Executive Order 12866.<sup>49</sup> E.O. 12866 preserved much of what was in E.O. 12291 while making a few major changes.<sup>50</sup> These changes included limiting OIRA review of regulations to “significant” regulations (while giving OIRA authority to determine significance) and modifying the economic standard of review to ensuring a regulation’s benefits “justify” its costs rather than “exceed” its costs.<sup>51</sup>

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<sup>42</sup> This ignores the argument made by those who say that continuous regulatory reform has “ossified the regulatory process” McGarity, Thomas O. "Some thoughts on deossifying the rulemaking process." *Duke Lj* 41 (1991): 1385. There is countervailing evidence that rulemaking pace has not been affected dramatically by many of these reforms (Yackee, Jason Webb, and Susan Webb Yackee. "Administrative procedures and bureaucratic performance: Is federal rule-making “ossified”?.” *Journal of Public Administration Research and Theory* 20, no. 2 (2010): 261-282.) and in any case judicial review provisions and cost-benefit analysis requirements are more often cited as causes of ossification than any of the statutes mentioned in this paragraph.

<sup>43</sup> The author is proud to have set a record for acronyms in one paragraph.

<sup>44</sup> *Supra* Note 3.

<sup>45</sup> *Executive Order 12291* Federal Register Feb. 17, 1981, 46 FR 13193

<sup>46</sup> *Supra* Note 5.

<sup>47</sup> Morrison, Alan B. "OMB interference with agency rulemaking: the wrong way to write a regulation." *Harv. L. Rev.* 99 (1985): 1059. P. 1064.

<sup>48</sup> Tozzi, Jim. "The Iconic Executive Order 12291: The Precedent for the Preservation of Critical Executive Orders." *Available at SSRN 3240195* (2018).

<sup>49</sup> EO 12866 Federal Register 58 Fed. Reg. 51735 (Sept. 30, 1993).

<sup>50</sup> See <https://regulatorystudies.columbian.gwu.edu/tracing-executive-order-12866%E2%80%99s-longevity-its-roots> (last viewed September 11, 2020)

<sup>51</sup> *Supra* 12866

Unlike in Congress, regulatory reform is a constant theme of executive branch policy-making over the past several decades. While E.O. 12866 has remained the basis of presidential oversight of regulation, the three presidents since Clinton have all issued other executive orders to supplement it. President George W. Bush brought guidance documents into OIRA's purview and required agencies to document a "market failure" when issuing a significant regulation.<sup>52</sup> President Obama scaled back some of these changes<sup>53</sup> but, at least on paper, maintained the guidance document changes.<sup>54</sup> He also emphasized the retrospective review of regulations<sup>55</sup> more thoroughly than his predecessors and encouraged agencies to use behavioral approaches to regulation.<sup>56</sup>

President Trump has made the most pronounced changes to the regulatory process since President Clinton issued Executive Order 12866. He created a regulatory budget and mandated that agencies repeal two regulations for every one that they put in place.<sup>57</sup> While these changes have received the most attention from supporters and critics alike, the Trump Administration also brought regulations from the Internal Revenue Service under OIRA review<sup>58</sup> and reasserted the power of OIRA over agency guidance documents.<sup>59</sup>

On the surface, the Trump Administration executive orders seem to have had a profound effect. The issuance of new regulations by executive branch agencies has slowed to a crawl under the Trump Administration and some credit/blame E.O. 13771.<sup>60</sup> Repeal of existing regulations has also been very slow however (contrary to the rhetoric of the president) and in fact by 2019, the issuance of significant regulations (while small) had outpaced deregulatory efforts.<sup>61</sup> And it is hard to separate the effect of the executive orders from the behavior of Trump appointees at regulatory agencies. Many of these appointees are devoted to deregulation, and it is hard to imagine them issuing significant regulations with or without an executive order deterring them from doing so.

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<sup>52</sup> Eo 13422; Federal Register December 11, 2007 72 FR 70477

<sup>53</sup> EO 13497: <https://obamawhitehouse.archives.gov/the-press-office/revocation-certain-executive-orders-concerning-regulatory-planning-and-review>

<sup>54</sup> See <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2009/m09-13.pdf> (last viewed September 11, 2020)

<sup>55</sup> EO 13563 Federal Register January 18, 2011 76 FR 3821

<sup>56</sup> See <https://obamawhitehouse.archives.gov/the-press-office/2015/09/15/executive-order-using-behavioral-science-insights-better-serve-american> (last viewed September 11, 2020).

<sup>57</sup> *Supra* EO 13771

<sup>58</sup> See <https://fas.org/sgp/crs/misc/IN10883.pdf> (last viewed September 11, 2020).

<sup>59</sup> EO 13891 Federal Register October 9, 2019 84 FR 55235

<sup>60</sup> See <https://www.brookings.edu/research/accounting-for-regulatory-reform-under-executive-order-13771/> (last viewed September 11, 2020).

<sup>61</sup> <https://www.thereview.org/2020/01/14/shapiro-making-sense-trump-administration-regulatory-numbers/> (last viewed September 11, 2020).

To really test the effectiveness of Executive Order 13771, one would need to see it in place in an administration staffed with agency appointees dedicated to regulating. We are very unlikely to ever get that chance. A Democratic Administration is likely to both staff agencies with regulatory advocates and to repeal most of the Trump Administration executive orders on regulation.<sup>62</sup> The net effect of these changes is likely to be a reinstatement of the regime where Executive Order 12866 governs the regulatory process within the executive branch.

Much as SBREFA and UMRA in 1996 marked the last successful legislative efforts to change the regulatory process,<sup>63</sup> the last significant lasting executive change to the regulatory process was President Clinton's issuance of Executive Order 12866. Since then presidents have issued a series of changes that may or may not have led to changes while they were in office but had little impact on their successors. President Trump's executive orders have been more dramatic and have represented more significant temporary changes than those of Presidents Bush and Obama, but with one or two exceptions they too are unlikely to outlive his presidency.<sup>64</sup>

### III. WHAT ABOUT THE STATES?

Of course, the federal government is not the only governmental entity that issues regulations. All fifty states have regulatory processes, and they have been regular sources of experimentation in regulatory reform.<sup>tk</sup> Unlike at the federal level, the number of changes to the regulatory process at the state level have been myriad.<sup>tk</sup> In 2013, my co-author and I examined the regulatory processes at the state level and found that the nature of the process had little relationship to the level of regulation in the state.<sup>65</sup> We found that state officials tended to turn to regulatory reform as a way of appearing to combat economic downturns that they had few ways of otherwise dealing with. The symbolic value of being able to say they were changing the regulatory process in order to improve the economy was the primary driver behind regulatory reform.<sup>66</sup>

In the years since that study, there have been some further efforts at regulatory reform in the states. Most of these initiatives have come from the executive branch of government. States like Nevada and Florida had governor-driven efforts to prune unnecessary regulations from the

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<sup>62</sup> I've written elsewhere that I expect some of the less high-profile Trump Executive Orders to be kept by a new administration because they expand presidential authority:

<https://www.theregreview.org/2019/04/25/which-trump-regulatory-reforms-likely-last/>

<sup>63</sup> Although their impact may have actually been minimal *supra* Note 19.

<sup>64</sup> *Supra* Note 61

<sup>65</sup> *Supra* Note 13.

<sup>66</sup> *id*

state books.<sup>67</sup> Kentucky,<sup>68</sup> Oklahoma,<sup>69</sup> and Missouri<sup>70</sup> also had very recent red tape reduction efforts. These all represent efforts to remove regulations rather than permanent changes to the regulatory process. Such efforts can be significant. But they are also generally one time efforts that leave in place regulatory processes for future regulatory efforts.

There have been a few laws enacted at the state level that represent potentially significant changes to the regulatory process. The discussion of these laws that follows does not represent a sampling of all fifty states. Rather, it is the result of consultation with experts on state regulatory reform and google searches in an attempt to find legislative successes in regulatory reform that may be used to help understanding of when such efforts are successful. Two particular efforts stood out.

Wisconsin passed its own version of the REINS Act in 2017.<sup>71</sup> The act passed along partisan lines as Republicans controlled both houses of the legislature and the Wisconsin Senate does not have a filibuster provision. Republican Governor Scott Walker signed the legislation. The Wisconsin REINS Act provides for more public input during an agency's administrative rule writing process, requires legislation authorizing any administrative rule with compliance and implementation costs of \$10 million or more over a two-year period, and allows the Joint Committee for the Review of Administrative Rules (JCRAR) to indefinitely suspend promulgation of a proposed rule for reasons specified in statute.<sup>72</sup>

In 2019, the Ohio state legislature passed a 2 for 1 requirement that effectively legislated Executive Order 13771.<sup>73</sup> The requirement was part of the bill enacting the state budget. The budget passed with bipartisan support. Like EO 13771, the bill requires agencies to cut two regulations for every new regulation that they implement.<sup>74</sup> The Ohio and Wisconsin bills are two of the most notable legislative changes to state regulatory processes in recent years.

The passage of regulatory reforms in Wisconsin and Ohio are a contrast with the failure to pass such reforms at the federal level. Both states passed the legislation under unified Republican control of the state government and both states do not have the filibuster.<sup>75</sup> At the

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<sup>67</sup> Shapiro, Stuart, Debra Borie-Holtz, and Ian Markey. "Retrospective Review in Four States." *Regulation* 39 (2016): 32.

<sup>68</sup> See <https://www.mercatus.org/publications/regulation/tracking-progress-kentucky%E2%80%99s-red-tape-reduction-initiative> (last viewed September 11, 2020).

<sup>69</sup> See <https://www.usnews.com/news/best-states/oklahoma/articles/2020-02-04/oklahoma-governor-orders-agencies-to-reduce-regulations> (last viewed September 11, 2020).

<sup>70</sup> See <https://www.newstribune.com/news/local/story/2019/jan/14/state-agencies-still-considering-rules-cutbacks/760979/> (last viewed September 11, 2020).

<sup>71</sup> 2017 Wisconsin Act 57.

<sup>72</sup> *Id.*

<sup>73</sup> Ohio HB 166

<sup>74</sup> *Id.*

<sup>75</sup> See [https://en.wikipedia.org/wiki/Comparison\\_of\\_U.S.\\_state\\_governments](https://en.wikipedia.org/wiki/Comparison_of_U.S._state_governments) (last viewed July 21, 2020).

federal level however removal of the filibuster would likely make such process reforms as fleeting as they are in the executive branch. Reform laws would likely be put in place and removed depending on which party controlled Congress and the presidency, although complete control of House, Senate, and the presidency would be required to implement these laws—each of the last four presidents has enjoyed at least two years when his party had control of both houses of Congress. As soon as the opposite party gained control of the congress, however, that party would be likely to repeal or replace the previous party’s reforms, just as we see now in the executive branch.

#### IV. PROSPECTS FOR REGULATORY REFORM IN WASHINGTON

The regulatory process seems to continually grow in prominence. As major legislation passed by Congress becomes rarer and rarer, presidents understandably turn to the regulatory process to embellish their list of accomplishments. During the Obama administration, regulatory actions to combat climate change and implement the Affordable Care Act were front page news. In the Trump Administration, deregulatory action (while vastly exaggerated)<sup>76</sup> are second only to the tax bill passed in 2018<sup>77</sup> when the president touts his accomplishments.

As regulation gains attention so too does the process by which regulations are promulgated. A google search for “Executive Order 13771” gets more than 36,000 results<sup>78</sup> and this omits any results from searches for “two for one order” or “regulatory budgets” that omit the name of the Executive Order (but also return many irrelevant results). As detailed above, regulatory reform bills are introduced in every session of Congress and every president has issued executive orders that modify the regulatory process.

What does it all add up to though? In two decades the regulatory process has gone largely unchanged. Two decades may seem like a short span in American history but it does represent 40% of the age in which notice and comment rulemaking has been a prominent tool for federal policy-making. In that time Congress has repeatedly (or allegedly) tried and failed to amend the regulatory process and presidential changes have proven fleeting, largely vanishing with the change in party of the president. The same is likely to be true of the Trump Administration reforms.<sup>79</sup>

The history of the APA and subsequent changes to the regulatory process in the 1970s and the 1990s indicate that changes occur when three conditions are present. First, a Democratic president is near the conclusion of his first term. Second, Congress is under unified control. And third, the majority party in Congress is willing to make concessions that leave agencies discretion

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<sup>76</sup> See <https://www.theregreview.org/2020/01/14/shapiro-making-sense-trump-administration-regulatory-numbers/> (last viewed September 11, 2020).

<sup>77</sup> [Pub.L. 115–97](#)

<sup>78</sup> Conducted on July 22, 2020.

<sup>79</sup> *Supra* Note 8.

in order to secure support from the minority party (and likely the Democratic president). It is possible to over generalize from three instances of legislative action but it is worth noting that at no point in the past two decades have all three of these conditions been present simultaneously.<sup>80</sup>

It is also possible that the much remarked upon polarization in Congress has made regulatory reform impossible. This polarization also likely ensures that presidents will quickly reverse direction on the regulatory priorities of their predecessor.<sup>81</sup> With the two political branches of government locked in to the current regulatory process, the only source of change may be the courts. Indeed some have argued that in strengthening the role of cost-benefit analysis<sup>82</sup> and questioning the role of Chevron deference<sup>83</sup> the courts have taken on the role abdicated by Congress. Judicial policy-making in the realm of regulation would seem to be a second best solution.<sup>84</sup> But at the present it seems like the only one that is even vaguely operational.

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<sup>80</sup> Another possible way for regulatory reform to pass as showed by Ohio and Wisconsin is the elimination of the filibuster. As noted above that may lead to a regulatory process that changes with changes in control of the elected branches.

<sup>81</sup> Creating what one commenter has called “regulatory whiplash.”

<https://www.lawandenvironment.com/2020/08/19/epa-rolls-back-obama-methane-rules-i-coin-a-phrase-regulatory-whiplash/> (last viewed September 4, 2020).

<sup>82</sup> Noe, Paul R., and John D. Graham. "The Ascendancy of the Cost-Benefit State." *Admin. L. Rev. Accord* 5 (2019): 85.

<sup>83</sup> Walker, Christopher J. "Attacking Auer and Chevron Deference: A Literature Review." *Geo. J.L. & Pub. Pol'y* 16 (2018): 103.

<sup>84</sup> But see Bremer, Emily S. "The Unwritten Administrative Constitution." *Fla. L. Rev.* 66 (2014): 1215. “judicially created rules in this context both inform and are informed by the political branches’ complementary legal instruments including core administrative statutes and executive policy directives. These nonjudicial components of the unwritten constitutions legally and institutionally tether administrative common law to extrinsic policies and principles.” (p. 1267) and “The REINS Act may be too big a step to take at once, however because it would likely have far-reaching effects on other components of the administrative state’s unwritten constitution.” P. 1270.