

Deconstruction of the Administrative State

Speaking at the Conservative Political Action Conference, White House Chief Strategist Steve Bannon explained that the Trump Administration intends to achieve a “deconstruction of the administrative state.” Four deregulation executive orders later, all within the first fifty days of President Trump’s term in office, we can see that President Trump is driven to achieve substantial and lasting deregulation with an unwavering commitment; he is taking unprecedented action to cut back regulation and reduce the size and scope of the federal bureaucracy. No President since Ronald Reagan has proceeded with such determination, and no President has proceeded so astutely to that end, relying on multiple simultaneous angles of attack against the bureaucracy, thus maximizing the chance of success.

The approach taken by the Administration is exceedingly clever. In prior administrations, much lip service has been paid to deregulation, but the Presidents have often relegated the initiative to Vice Presidents who have maintained a somewhat half-hearted effort that has failed to stop the massive growth of the administrative state. The problem with relying exclusively on the agencies themselves to recommend rules for elimination is that the agencies have an inherent conflict of interest. When agency heads advocate elimination of regulation and reduction in the size and scope of their agencies, they are recommending a diminution in their own power and influence. It should come as no surprise, then, that the only times when agencies have been deregulated significantly is when both the President and the President’s pick to be agency head were of one mind, to deregulate, and with a clear understanding from the start that the agency head’s actions may well alienate the bureaucracy, the

regulated class, Congress, and the very professional community into which the agency head would ordinarily go after government employment.

Among the best examples of an agency head who remained true to his deregulatory mission even at the expense of extreme contrary pressure from a hostile Congress, hostile regulatory community, and hostile press was former FCC Commissioner Mark Fowler. He did more to deregulate the broadcast media and bring about true competition than any other person to hold that position. He did so at considerable personal expense, bravely ignoring repeated threats made to him that by pursuing a policy of sweeping deregulation he would become persona non grata with industry leaders and their lawyers and consultants who depended on the regulations to maintain those leaders' market dominance. He, and his successor, Dennis Patrick, deregulated with zeal, based on constitutional principles that revived First Amendment protection for independent editorial control of the broadcast media, and rebuked with wit, wisdom, and grace often vehement and caustic attacks from enemies of the First Amendment, such as then Congressman, now Senator, Ed Markey.

President Trump has astutely created engines of persistent deregulation within his executive branch agencies. Not only has he ordered that no new agency regulation be adopted unless two existing agency regulations are eliminated, he has also ordered the agencies to identify and eliminate all costly impediments to free market operation. Although he has ordered the agencies to deregulate, he is not depending on the agency heads alone to achieve his deregulatory objectives. Rather, he has created within each agency a deregulation task force that will also identify regulations to be placed on the chopping block. But that is not all, stacking the deck further against the forces for regulation, he is actively soliciting input from outside government critics of regulation and from industry stakeholders adversely affected by

regulations, aiming to leave no stone unturned.

His freeze order not only prevents new regulations from being implemented but also applies to guidance documents. During the Obama years, the administrative agencies flouted the legal strictures of the Administrative Procedure Act by adopting what were legislative rules as “guidance documents” without going through the legally required notice and comment rulemakings. On the one hand, the Obama agencies disingenuously declared the rules presented as mere ‘guidance’ for industry, not to be considered legislative rules, but on the other they enforced those guidances as rules against the regulated industries. The effect was to create authoritarian rules, i.e., rules adopted by the unelected agency heads and imposed without any sure way for industry to challenge them in the courts.

When parties would challenge the “guidances” in the courts, the courts would often reject the challenges as not stating a true case or controversy in light of agency statements to the courts that the positions were but “guidance” and not rules. Bannon and Trump are very much on to the deceptive and costly game of legerdemain performed by the agencies and are routing out those instances where agencies have created rules through guidance documents.

The steps taken by the President and his senior advisors to ensure substantial and meaningful deregulation are extraordinary. They hold out great promise for an increase in freedom and free enterprise. There can be no significant economic recovery unless American enterprise is unleashed from the costly and freedom killing shackles imposed upon them by zealous federal regulators over the last sixty years. President Trump knows this, and he is doing everything in his power to deconstruct the administrative state.