

## Trump vs. Biden: Who Got More Done on Regulation?

Rob Wolfe

April 7, 2024

When it comes to federal regulations, Democratic and Republican presidents are judged by different standards. The former are expected to use federal regulations vigorously to advance liberal goals such as protecting the environment and the rights of workers. The latter are supposed to take an ax to federal regulations, especially those that burden large corporations. Neither task is especially easy. Moving a federal regulation through the complicated rulemaking process is time-consuming, and the same is true for getting rid of one. But both Donald Trump and Joe Biden played their assigned roles in their first terms, at least rhetorically. So it's fair to assess their actual records by those partisan metrics: Was Biden an effective regulator, and Trump a successful deregulator?

All in all, the Trump administration's inexperience and sloppiness in rulemaking led an overwhelming number of its actions to be overturned in court. Biden, meanwhile, has had far more success promoting his agenda through regulations.

But Biden's accomplishments will be in jeopardy if he loses this fall, thanks to one lasting victory that Trump did achieve: appointing three justices to the Supreme Court. Since then, in a series of precedent-breaking decisions, the Court's conservative supermajority has begun an assault on the foundations of the administrative state. Regardless of who wins the election, we can expect to see the next president pursue a similar agenda with a similar level of competence. This time, however, the playing field will be tilted to the right—unless he and his fellow Democrats in Congress take aggressive steps to curb judicial interference with regulation.

A year into his presidency, Trump proclaimed with typical bombast that he had launched the “most far-reaching regulatory reform” in U.S. history. “We have decades of excess regulation to remove,” he said in the Roosevelt Room of the White House, just before using an oversize pair of scissors to cut through red tape. “To help launch the next phase of growth, prosperity, and freedom, I am challenging my cabinet to find and remove every single outdated, unlawful, and excessive regulation currently on the books.”

Soon after taking office, Trump directed executive branch agencies to remove two regulations from the books for every one added. At the end of his term, he claimed to have zapped eight for every one. There are many ways to evaluate those benchmarks, but by any fair measure he did not reach his two-to-one goal, let alone the grandiose figure of eight.

Many of the regulations that Trump claimed to have revoked he was merely refusing to enforce, including numerous consumer protection standards. Among his administration's attempts to actually remove regulations from the books, or add them, a staggering number—77.5 percent—

were overturned in court. For comparison, other administrations lose these cases only about 30 percent of the time.

This winter, the libertarian Cato Institute attempted to measure Trump's impact in several ways, all of which indicated that his deregulatory campaign at best kept the number of new rules level, and more likely saw a slight increase. One long-used, but imprecise, method is to count the number of pages in the *Code of Federal Regulations*, an annual register of all executive branch rules. Under Trump, the number of pages increased by 0.8 percent to 186,645—less than it increased in the Obama years, but far from the promised reduction. But tallying up pages in a book doesn't tell you how many actual regulations were added or removed, nor how much of an effect, positive or negative, they had on the economy. A more sophisticated way of measuring regulatory burden is to count the number of restrictions implied by words such as *must*, *required*, *may not*, and *prohibited* that appear in the *CFR*. Trump's first term also produced a marginal increase in that metric.

Trump's attempts to cut red tape were significantly hindered by his administration's unfamiliarity with the ponderous bureaucratic processes that govern regulations. Federal rulemaking is a lengthy process that involves public comment, congressional and administrative review, and ultimately oversight from courts. To get rid of a regulation is similarly onerous, unless it happens within the 60-day time window that the Congressional Review Act gives lawmakers to block a new rule. The Trump administration often glided over steps in that process and used faulty reasoning to nix Obama-era regulations (or enact its own), which led courts to overturn a stunning 200 of 258 regulatory actions in the first Trump term.

As the journalist Olga Khazan wrote in *The Atlantic* in 2021, Trump's political appointees had little knowledge of the regulatory process, which led them to look to radical outside groups to guide their policies. Emails obtained by Khazan show that Trump officials consulted the anti-welfare think tank Foundation for Government Accountability as they crafted changes to SNAP eligibility that would have kicked 3.7 million people off food stamps during the pandemic. The administration offered little justification for the changes, other than that they would save money, and declined to weigh any potential negative consequences, as the rulemaking process usually demands. A federal judge blocked one part of that proposal in a scathing decision in late 2020, and Biden withdrew the rest the following spring.

*The Trump administration's inexperience and sloppiness in rule making led an overwhelming number of its actions to be overturned in court. Biden, meanwhile, has had far more success promoting his agenda through regulations.*

Many of the regulatory actions Trump did undertake were openly slanted in favor of Big Business. Just to give a few examples: Trump substantially weakened Obama-era fuel economy regulations; presided over the congressional scaling back of the Dodd-Frank financial regulation law; and revoked federal standards to prevent discriminatory housing practices (which the administration viewed as a mandate to subsidize low-income housing over single-family homes).

Although these regulatory moves doubtlessly saved large companies billions of dollars, they have the potential to impose costs on others, including taxpayers who might, for instance, be on the hook for bank bailouts down the road.

Some of the biggest losers of Trump-era regulation were women. The Trump administration worked against women's interests in many ways—by undermining private abortion care coverage, reducing access to birth control, blocking data collection on the gender pay gap, weakening Title IX gender protections and the Title X family planning network, taking away nondiscrimination protections in health care, and lowering the overtime pay threshold for working mothers.

When he assumed the presidency in January 2021, Biden quickly went to work undoing several Trump-era regulations. That included withdrawing the aforementioned proposal to kick millions off food stamps and, with Congress's help, repealing rules that had relaxed restrictions on predatory payday lenders.

He then began wielding regulatory tools to implement some of his boldest policies. To shore up U.S. manufacturing and decrease the nation's dependence on international adversaries for critical supply chain materials, Biden's Commerce Department slapped strict controls on microchip exports to China. The rules have required updates to plug loopholes, but have proved far more effective in their potential to strangle Chinese industry than any of Trump's bluster about trade wars. At home, Biden in summer 2021 issued his "Executive Order on Promoting Competition in the American Economy," a sweeping initiative that directed more than a dozen agencies to take steps like limiting noncompete clauses, allowing for over-the-counter sales of hearing aids, bringing back net neutrality (banished under Trump), and making it easier for farmers to bring claims against the monopolized meatpacking industry. As the *Monthly* editor Will Norris recounts, rulemaking efforts by federal agencies to promote competition have dovetailed with increased antitrust enforcement in the courts—and have already begun to weaken the grip of monopoly power over the economy.

By almost any measure, Biden has been a vigorous regulator. The number of "significant rules"—regulations impactful enough to be overseen by the Office of Management and Budget—increased by 451 in Biden's first 18 months, as opposed to 270 in the same period for Trump. Biden also created 142 "major rules," which have economy-wide effects, to Trump's 81. In terms of instituting major rules, early-term Trump and Biden were comparable to their co-partisan predecessors, George W. Bush and Barack Obama. (Although, because of COVID-19, Trump actually enacted a record number of economic regulations in his last year in office.)

Biden has also made notable changes to a little-known but key chokepoint in the federal government's regulatory machinery: the Office of Information and Regulatory Affairs. A subsidiary of the White House's Office of Management and Budget, OIRA vets the cost-benefit analyses of regulations proposed by executive branch agencies. For years, regulation scholars and progressive advocates have complained that OIRA puts too much weight on the supposed cost versus the potential benefits of proposed regulations, listens too much to industry lobbyists and not enough to the public, and increasingly slows the regulatory process down. Last spring,

Biden issued an executive order overhauling OIRA's procedures on all these fronts. In a second Biden term, these institutional reforms could make the promulgation of regulations much smoother. Trump, however, could withdraw the changes if he takes back the White House.

Moreover, Biden's institutional changes pale in comparison to one Trump achieved in his first term. By appointing three justices to the Supreme Court, Trump created a conservative supermajority that, during the Biden years, has transformed the bench's jurisprudence in administrative law. On their own initiative, the conservative justices have launched an assault on the administrative state and the delegation of power from Congress that underpins it—potentially doing much more to deregulate than Trump himself could in his first term.

In their 2022 ruling in *West Virginia v. EPA*, the conservative justices expanded a legal framework called the “major questions doctrine” that significantly narrowed what kinds of regulatory power Congress can delegate to executive branch agencies. After oral arguments this year in *Loper Bright Enterprises v. Raimondo*, Trump's supermajority appears ready to continue its campaign against regulations, this time by undoing the so-called *Chevron* doctrine—long-standing precedent that gives agencies leeway in interpreting the federal laws that enable government rulemaking. Both cases threaten not just individual regulations but also the legal foundations on which all regulations are built.

If Trump wins this fall, he'll likely be able to overturn much of what Biden accomplished in his last months. The conservative Court supermajority he appointed might also make quick work of other signature Biden regulatory reforms that would otherwise be harder for Trump to dislodge.

But would Trump improve on his abysmal record of losing regulatory cases in lower courts? Possibly not. Many of his first-term failures stemmed from the sloppiness and inexperience of his staff. This time around, Trump seems not to have learned his lesson. He has announced plans to bring the federal bureaucracy even more under his direct control, and with the help of right-wing think tanks is compiling lists of loyalists to replace career civil servants. The likelihood of a second-term Trump regulatory agenda being advanced by sober, effective professionals is looking ever slimmer.

And at the same time, Trump may find a total dismantlement of the administrative state at odds with his stated intention to use the federal government to punish his adversaries at home and abroad. A second term would more likely see him reduce regulatory burden on selected corporations and political allies, while heaping it onto those he distrusts.

What if Biden is the victor in November? Undoubtedly, he'll continue to aggressively use regulations to implement new legislation, or to make policy directly in case he can't get those bills through Congress. And thanks to his OIRA reforms, Biden will have an easier time getting new regulations through the slow-moving rulemaking process.

Looming over all of this, however, will be a Supreme Court increasingly intent on making itself the decider on regulatory authority questions. In his second term, when the Court inevitably torpedoes one of his regulations, Biden will need to find ways around its decision, just as he has in his first term. For instance, when the Court last June overturned Biden's forgiveness of \$430

billion in student loans, his Department of Education responded by expanding debt relief through the “SAVE” program, on firmer statutory ground.

At some point, however, Biden may have to challenge the Court’s power directly. If a Court vacancy opens, he could nominate a jurist with knowledge of administrative law who firmly supports the *Chevron* doctrine and opposes the major questions doctrine. He would also be wise to nominate judges to lower courts who have backgrounds in economics, labor, and other subjects that would help them go toe-to-toe with their conservative anti-regulatory brethren (see [Caroline Fredrickson’s essay](#)). And if Democrats take control of both houses of Congress, they could pass, and Biden could sign, a “Congressional Review Act” for Supreme Court decisions, giving legislators a fast track through the filibuster to respond. As it stands, Congress is too sclerotic to issue clarifying legislation for each major regulatory decision, which effectively leaves the last word to the Court.

In either president’s second term, altering the course of the slow-moving ship of state will remain a cumbersome process. For Biden, however, it’ll likely be even more so, with a hostile Supreme Court looking over his shoulder. With Trump, the same self-sabotaging patterns will probably arise. Either way, expect to see long-running tensions come to a head as both men work to finish what they started.