Regulation, Kavanaugh, Trump & the Indexing of Capital Gains

By Eugene Steuerle *Thu, Sep 27, 2018*

'Presidents and political parties favor regulation mainly when it when it advances their own agenda, regardless of the number of pages it adds to the Federal Register,' writes our guest columnist.

The issue of government regulation promulgated by unelected officials is central to many of today's political and policy debates. It has surfaced in the confirmation battle over Supreme Court nominee Brett Kavanaugh, a strong critic of regulatory actions that are unsupported by legislative or constitutional authority. And we see it in the Trump administration's contradictory regulatory initiatives: Aggressive deregulation when it comes to environmental law paired with enthusiastic administrative efforts to reduce taxes on capital—absent clear legislative authority.

While the nation's regulatory wave crested four decades ago, long before President Trump, the pattern has always been inconsistent. President Jimmy Carter jump-started the modern deregulatory push by cutting red tape for everything from airlines to home-brewed beer. Every president since has laid claim to at least part of the antiregulatory mantle. Yet, every recent president, including Trump, has also attempted to achieve policy goals through administrative power.

The current administration has been especially enthusiastic about using regulations to achieve tax policy ends. Senior White House advisers have asserted that Treasury and IRS can issue regulations to provide for the indexing of capital gains. The president himself has asked Treasury to liberalize the treatment of required distributions from retirement plans. Both share a common goal: to cut taxes on returns to wealthholders without enacting a statute.

In truth, presidents and political parties favor regulation mainly when it when it advances their own agenda, regardless of the number of pages it adds to the Federal Register. Interestingly, both presidents Trump and Obama have turned to administrative and regulatory initiatives in frustration when

they felt they could not achieve their policy goals with Congress. And, when it comes to the sausage they do seek and get from Congress, their anti-regulatory fervor falls by the wayside; witness all the regulation that IRS still struggles to issue around the Tax Cut and Jobs Act of 2017.

But what are the criteria by which an affirmative decision to regulate should be made? In theory, they are two-fold: benefits should exceed costs and the actions should be constitutionally and legislatively allowed.

Using regulation to interpret the law can simplify life for taxpayers by providing rules surrounding the large number of possible transactions and arrangements into which they may enter. Such a requirement is often implicitly, if not explicitly, allowed by the legislation itself. While the law may not pass the benefit-cost test, regulations to taxpayers on how to be law-abiding usually does. Though the line between interpretation and exercising authority ceded in legislation is never perfectly clean, the Treasury and IRS have always viewed their guidance as mainly interpretative.

Yet, most administrations, not just the current one, often are tempted to wade into technical tax issues about which they have limited knowledge. A strong Treasury Secretary or Assistant Secretary can constrain such efforts, sometimes by making clear that meddling is unnecessary and potentially politically dangerous.

Extending to administrative agencies non-interpretative, legislative-type authority raises more complicated benefit-cost and statutory authority questions.

The Constitution explicitly requires that the President, not the Congress, “take care that the laws be faithfully executed.” Even if it didn’t, Congress has neither the time nor the expertise to execute laws, and implementation inevitably requires discretion. Anyone who has ever sat at a congressional drafting session knows how much Congress leaves unspecified in legislative language. Long before a tax bill becomes law, congressional staff have begun consulting with Treasury and other agencies over how to fill in the

inevitable gaps in the statute.

Bottom line: Think twice before generalizing about the costs or benefits of regulation or even its constitutional basis. And remember that the political and ideological arguments for or against regulation, particularly as something good or bad in and of itself, tend to be selective and supported by weak legal and economic reasoning. Mostly, though, remember that the best way to avoid bad regulation or rule making is to avoid bad law making.