INDECONSTRUCTIBLE: THE TRIUMPH OF THE ENVIRONMENTAL "ADMINISTRATIVE STATE"

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INTRODUCTION

Shortly after the 2017 Presidential inauguration, a senior advisor to the President proclaimed that a top priority of the Administration would be the "deconstruction of the administrative state."[1] A primary target of the Administration's deconstruction efforts was the U.S. Environmental Protection Agency ("EPA") and federal environmental regulations.[2] While the Administration has set a lofty goal, it will ultimately fail to accomplish that goal.

While the President can use a variety of tools, including the appointment power, budget power, treaty power, and executive orders, to influence the manner in which the EPA and other agencies interpret and enforce laws,[3] the President has very little power to unilaterally "deconstruct the administrative state." The "administrative state" is a creation of Congress,[4] and the President can only "deconstruct" it with the full cooperation of Congress. While the current Congress appears willing to change some of the procedures that administrative agencies must follow when taking action[5] and to overturn some agency actions with which Congress disagrees,[6] it does not appear willing to eliminate agencies or significantly reduce or eliminate their powers. The

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1. *See* Z. Byron Wolf, *Steve Bannon Outlines His Plan to "Deconstruct" Washington,* CNN, Feb. 24, 2017, http://www.cnn.com/2017/02/23/politics/steve-bannon-world-view/ (last visited June 21, 2017) (discussing remarks made by top White House adviser Steve Bannon at the Conservative Political Action Conference on February 23, 2017).

2. *See* Jeremy Symons, *Trump's War on the EPA: Deconstruction,* THE HUFFINGTON POST, Mar. 2, 2017, http://tiny.cc/7z3yly (last visited June 21, 2017). *See also infra* notes 29-35, and accompanying text.

3. *See infra* notes 29-35, and accompanying text.

4. Agencies are usually created by statutes and statutes outline the limits of agencies' powers. *See, e.g.,* Richard Henry Seamon, ADMINISTRATIVE LAW: A CONTEXT AND PRACTICE CASEBOOK, 12-13 (Carolina Academic Press 2013); Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, Adrian Vermeule, and Michael E. Herz, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 37 (7th ed. Wolters Kluwer Law & Business 2011). *See also Louisiana Public Serv. Commn. v. FCC,* 476 U.S. 355, 374 (1986) (an agency "literally has no power to act . . . unless and until Congress confers power on it.").

5. *See infra* Part III.B. (describing the proposed Regulatory Accountability Act of 2017, Regulatory Integrity Act of 2017, and Regulations From the Executive in Need of Scrutiny Act of 2017).

6. *See infra* Part IV.A.

Constitution, the Administrative Procedures Act,[7] and the statutes that create administrative agencies and give them their power all create a complex system of checks and balances to ensure that the President has very little power to deconstruct the administrative state on his own.[8] The "administrative state" was born in the Progressive era of the 19th century[9] and was considerably expanded during the New Deal era in the middle of the 20th century.[10] After a century and a quarter of fortification, the "administrative state" is not likely to "go gently into that dark night."[11]

President Trump's efforts to "deconstruct" federal environmental regulation present a clear example of how the checks and balances of the Constitution and the statutory structure of the "administrative state" prevent the "deconstruction of the administrative state" unless the President and Congress cooperate to make sweeping changes to the underlying laws.

Beginning in the 1970's, Congress passed a series of environmental laws—frequently in bipartisan fashion—that gave the EPA significant duties and responsibilities for protecting the environment.[12] Those laws provide States and citizens with significant power to force the EPA to carry out those duties and provide States and local governments with power to take more aggressive measures than the federal government to protect the environment, if necessary.[13] Despite the general anti-regulatory rhetoric that has proliferated in political campaigns over the last few decades, Congress has not repealed or significantly amended those laws to reduce the powers of agencies, States, or citizens.[14]

Congress' failure to take such broad action is not surprising in light of the strong public support for environmental protection and environmental regulation. According to several recent polls, a majority

7. 5 U.S.C. § 551, et seq. (2012).

8. *See infra* notes 39-50, and accompanying text.

9. *See* Breyer et al., *supra* note 4, at 17-19; Adam Mossoff, *The Use And Abuse of IP at the Birth of the Administrative State,* 157 U. PA. L. REV. 2001, 2003 (2009).

10. *See* Breyer et al., *supra* note 4, at 19-23; Mark Fenster, *The Birth of a "Logical System": Thurman Arnold and the Making of Modern Administrative Law*, 84 OR. L. REV. 69, 75 (2005); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1243-1253 (1986).

11. The allusion is to the poetry of Dylan Thomas. *See* Dylan Thomas, *Do Not Go Gentle into That Good Night*, THE POEMS OF DYLAN THOMAS 239 (New Directions rev. ed. 2003).

12. *See, e.g.,* 15 U.S.C. §§ 2601 et seq. (2012) (Toxic Substances Control Act ("TSCA")); 33 U.S.C. §§ 1251, et seq. (2012) (Clean Water Act); 42 U.S.C. §§ 300f et seq. (2012) (Safe Drinking Water Act); 42 U.S.C. §§ 6901 et seq. (2012) (Resource Conservation and Recovery Act ("RCRA")); 42 U.S.C. §§ 7401 et seq. (2012) (Clean Air Act).

13. *See infra* notes 44-48, and accompanying text.

14. At the same time, though, the bi-partisan support for *expanding* environmental protection has waned, so that there has only been one major amendment to any of the federal environmental laws in the last quarter century. *See* The Frank R. Lautenberg Chemical Safety for the 21st Century Act, P.L. 114-82, 130 Stat. 448 (2016), https://www.congress.gov/bill/114th-congress/house-bill/2576/text (last visited June 21, 2017) (amending TSCA).

of Americans believe that stricter environmental laws and regulations are worth the cost,[15] that alternative energy development should be given priority over fossil fuel development,[16] and that the EPA's powers should be preserved or expanded, as opposed to being reduced.[17] Public opposition to the President's plan to curtail federal environmental protection was clearly demonstrated by dramatic increases in fund-raising for environmental organizations after the President's election[18] and by the hundreds of thousands of Americans who joined in protest marches in the months immediately following the President's inauguration.[19] During that same time period, when federal agencies

15. *See* Kristen Bialik, *Most Americans Favor Stricter Environmental Laws and Regulations*, Pew Research Center, Dec. 14, 2016, http://www.pewresearch.org/fact-tank/2016/12/14/most-americans-favor-stricter-environmental-laws-and-regulations/ (last visited June 21, 2017) (citing a Pew Research survey conducted between November 30, 2016 and December 5, 2016, in which 59% of respondents indicated that stricter environmental laws and regulations were worth the cost).

16. *See* Brian Kennedy, *Two-thirds of Americans Give Priority to Developing Alternative Energy over Fossil Fuels*, Pew Research Center, Jan. 23, 2017, http://www.pewresearch.org/fact-tank/2017/01/23/two-thirds-of-americans-give-priority-to-developing-alternative-energy-over-fossil-fuels/ (last visited June 21, 2017) (citing a 2017 Pew Research survey in which 65% of respondents supported prioritizing alternative energy production). In a March 2017 Gallup poll, 72% of respondents favored spending more government money on developing solar and wind power. *See* Gallup, *Environment,* http://www.gallup.com/poll/1615/environment.aspx (last visited June 21, 2017).

17. *See* Chris Kahn, *Unlike Trump, Americans Want Strong Environmental Regulator, Reuters/ipsos,* Reuters, Jan. 17, 2017, http://tiny.cc/z23yly (last visited June 21, 2017) (citing a Reuters/Ipsos poll conducted between December 16, 2016 through January 12, 2017, in which more than 60% of respondents indicated that they would like to see the EPA's powers preserved or strengthened under President Trump). In a separate March 2017 Gallup poll, 56% of respondents indicated that protection of the environment should be given priority over protection of the economy, 69% of respondents indicated that they favor "more strongly enforcing federal regulations", 59% said that the government was doing "too little to protect the environment," and 57% said that they thought that the quality of the environment was getting worse. *See* Gallup, *Environment,* http://www.gallup.com/poll/1615/environment.aspx (last visited June 21, 2017).

18. *See* Ben Wolfgang, *Trump Helps Drive Donations to Environmental Groups*, WASH. TIMES, Feb. 9, 2017, http://www.washingtontimes.com/news/2017/feb/9/trump-helps-drive-donations-to-environmental-group/ (last visited June 21, 2017). Between election day and the end of January, 2017, Earthjustice increased fundraising by 160%, the Sierra Club increased fundraising by 700% and added 30,000 new monthly donors, and the League of Conservation Voters increased fundraising by 100%. *See* Brian Dabbs, *Environmentalists Boast Record Fundraising, Membership Levels*, BNA Daily Env't Rept., Feb. 8, 2017, http://tiny.cc/x33yly (last visited June 21, 2017). According to data collected by Charity Navigator, overall contributions to environmental causes during the first 100 days of President Trump's Administration increased by 388% and contributions to the Environmental Defense Fund increased by 388%. *See* Jan Sjostrom, *The Trump Effect? Giving to Civil Rights, Environmental Groups Is up in First 100 Days*, Palm Beach Daily News, April 29, 2017, http://tiny.cc/a43yly (last visited June 21, 2017).

19. On April 22, 2017, a March for Science was held in Washington, D.C., with more than 600 satellite marches being held in every state in the United States, as well as cities on every continent except Antarctica. *See* Ben Guarino, *Every Continent, and One Time Lord, Turned out for the March for Science*, WASH. POST, Apr. 24, 2017, http://tiny.cc/x43yly (last visited June 21, 2017). While the marches were "not partisan" according to organizers, they were motivated, in part, by the attacks that the Trump Administration has leveled on the use of science in regulation. *See* Wynne Davis, *Saturday's*

sought public input on plans to eliminate environmental regulations[20] or abolish national monuments,[21] hundreds of thousands of Americans voiced their strong opposition in public comments.[22] Citizens also voiced their support for the EPA, environmental protection, and environmental regulation at town meetings held by legislators.[23] Since legislators do not want to be viewed as "anti-environment" and anticipate that they may be voted out of office if they act too aggressively,[24] they are unlikely to repeal or significantly amend the federal environmental laws to reduce or eliminate the powers of federal agencies, States, or citizens. Even if a majority of the Senate were to align with the President to support such legislation against the popular will of the people, there is likely a sufficient minority of the Senate that would oppose such legislation and could block it through filibuster.[25] For the time being, therefore, it seems unlikely that Congress and the President will be able to work together to pass legislation to significantly reduces or eliminates federal environmental regulation or federal agencies' powers.

While Congress and the President are not working together to

March Aims To Stand Up For Science, NPR, The Two Way, Apr. 22, 2017, http://tiny.cc/j53yly (last visited June 21, 2017). Only a week after the March for Science, hundreds of thousands of Americans participated in the People's Climate March in Washington, D.C. and more than 375 satellite locations. *See* Chris Mooney, Joe Heim and Brady Dennis, *Climate March Draws Massive Crowd to D.C. in Sweltering Heat*, WASH. POST, Apr. 29, 2017, http://tiny.cc/w53yly (last visited June 21, 2017); Nicholas Fandos, *Climate March Draws Thousands of Protesters Alarmed by Trump's Environmental Agenda*, N.Y. TIMES, Apr. 29, 2017, http://tiny.cc/153yly (last visited June 21, 2017).

20. 82 Fed. Reg. 17,793 (April 13, 2017).

21. 82 Fed. Reg. 22,016 (May 11, 2017).

22. The vast majority of the more than 55,000 comments appearing online by the official close of the comment period urged the EPA to leave existing regulations in place or impose more stringent rules. *See* Brady Dennis, *EPA Asked the Public About Which Regulations to Gut - and Got an Earful About Leaving Them Alone*, WASH. POST, May 16, 2017, http://tiny.cc/353yly (last visited June 21, 2017). As of June 1, 2017, the EPA's docket for the notice indicated that the agency had received over 300,000 comments. *See* U.S. Environmental Protection Agency, *Evaluation of Existing Regulations,* https://www.regulations.gov/docket?D=EPA-HQ-OA-2017-0190 (last visited June 21, 2017).

23. *See* Rachel Leven, *Climate, Environment Raised in GOP Town Halls; Will It Matter?*, BNA Daily Env't. Rept., Apr. 18, 2017, https://www.bna.com/climate-environment-raised-n57982086837/ (last visited June 21, 2017).

24. *Id. See also* Tonya Lewis and Jessica Owley, *Symbolic Politics for Disempowered Communities: State Environmental Justice Policies*, 29 B.Y.U. J. Pub. L. 183, 210 (2014).

25. Because the Senate Rules normally allow for unlimited debate on legislation, a minority of the Senate can prevent the Senate from passing legislation by "filibustering" - continuing to debate the legislation and preventing the Senate from voting on the legislation. *See* U.S. Senate, *Filibuster and Cloture,* https://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm (last visited June 21, 2017). The only way to end a filibuster is to invoke "cloture", which allows the Senate to limit consideration of a pending matter to an additional 30 hours of debate. *See* Sen. Comm. on Rules & Admin, Standing Rules of the Senate, S. Doc. No. 113-18, at R. XXII, P 2 (2013). Sixty votes are required to invoke cloture. *Id.* Consequently, as long as 41 Senators oppose legislation, they have the power, through the filibuster, to prevent the Senate from voting to enact the legislation, even though a majority of the Senate may support the legislation.

fundamentally deconstruct the administrative state, both Congress and the President took steps in the first months of the Trump Administration to weaken federal environmental regulation. For reasons outlined in this article, however, the long-term effect of those measures will be far less significant than the "deconstruction of the administrative state."

Within the first few months of the new administration, Congress took a few steps to overturn environmental regulations and to make it more difficult for agencies to adopt new regulations. In light of the lack of public support for environmental deregulation, however, Congress took these steps in ways designed to limit public involvement and transparency. First, Congress repealed several recently finalized environmental regulations through a streamlined legislative process authorized by the Congressional Review Act of 1996.[26] Then, legislators proposed bills that would change the procedures that agencies are required to use to adopt new rules.[27] While the proposed administrative process changes might appear convoluted and impenetrable to the public, they are designed to significantly complicate the process for adopting new rules.[28]

The deregulatory efforts of Congress were significantly less aggressive than the efforts of the President, who, within his first few months in office, took several bold steps under his appointment power, budget power, treaty power, and other executive powers to attempt to demoralize and weaken EPA and the U.S. Department of Interior ("DOI") and to roll back environmental protections. The President appointed climate change skeptics and anti-regulatory proponents to both agencies, all of whom fundamentally disagreed with many of the policies adopted by the agencies to which they were appointed.[29] The President then proposed to cut the budget of the EPA by one-third;[30] he issued a series of Executive Orders and directives that required the agencies to stop issuing new regulations[31] and to review and revise or repeal many existing regulations;[32] and he required the DOI to review and propose revision or abolition of dozens of national monuments.[33]

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26. Congressional Review Act of 1996, Pub. L. No. 104-121, tit. II, subtit. E, 110 Stat. 868-74 (codified as amended at 5 U.S.C. §§ 801-808 (2012)).

27. *See infra* Part III.B.

28. *Id.* Ironically, if enacted, the additional procedural requirements could complicate the President's deregulatory efforts to eliminate existing rules. *See supra* notes 214-216, 241, and accompanying text.

29. *See infra* Part I.

30. *See infra* Part II.

31. *See infra* Part III.A. (discussing Executive Order 13,771 and the President's January 20, 2017 Memorandum to Heads of Executive Agencies and Departments).

32. *See infra* Part IV.B. (discussing Executive Orders 13,777, 13,778, and 13,783).

33. *See* Exec. Order No. 13,792 of April 26, 2017*, Review of Designations Under the Antiquities Act*, 82 Fed. Reg. 20429 (Apr. 26, 2017),

Armed with significant enforcement discretion, the new EPA Administrator can also "deregulate" by choosing to not aggressively enforce environmental laws or regulations.[34] Finally, the President announced an intention to withdraw from the international agreement to address climate change.[35]

While the long-term prospects for the environment may seem grim in light of the flurry of Executive action, the Constitution, administrative law, and environmental laws impose checks and balances on the President to limit any long-term damage he may cause. Scholars frequently raise concerns about the expansion in Presidential control over agency policymaking.[36] They fear that, without checks and balances, the President could direct agencies to implement policies that conflict with Congressional will, are adopted without the public input and transparency required by federal law, and are based on political, rather than scientific or technical, bases.[37] The checks and balances imposed by the courts, the public, and Congress through the Constitution and federal statutes are designed to ensure that the Executive Branch decisions honor the will of Congress, are made in democratically accountable ways, and are based on expertise, rather than raw politics.[38] For each of the actions that the President has taken or proposed to take to dismantle environmental regulation, there is a corresponding set of checks and balances.

The President's budget and appointment power, for instance, is shared with Congress, which can reject or modify his actions.[39] To the extent that the President acts through Executive Orders, he can only act

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https://www.whitehouse.gov/the-press-office/2017/04/26/presidential-executive-order-review-designations-under-antiquities-act (last visited June 21, 2017).

34. *See infra* Part V.

35. *See* Valerie Volcovici and Jeff Mason, *Trump Dismays, Angers Allies By Abandoning Global Climate Pact*, Reuters, June 2, 2017, http://tiny.cc/963yly (last visited June 21, 2017). The EPA Administrator Scott Pruitt strongly advocated for U.S. exit from the accord, while Rex Tillerson, Secretary of State and former EXXON chief executive, urged the President to remain a party to the agreement. *See* Chris Mooney & Brad Dennis, *Scott Pruitt Calls for an 'Exit' from the Paris Accord, Sharpening the Trump White House's Climate Rift*, WASH. POST, April 14, 2017, http://tiny.cc/q93yly (last visited June 21, 2017).

36. *See, e.g.,* Catherine Y. Kim, *Presidential Control Across Policymaking Tools,* 43 FLA. ST. U. L. REV. 91, 92 (2015); David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095 (2008); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006).

37. *See* Kim, *supra* note 36, at 92. *See also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007).

38. *See* Kim, *supra* note 36, at 92.

39. *See infra* Parts I and II.

within the authority already granted to the Executive branch by the Constitution and Congress, and the next President can unilaterally overturn his actions through an Executive order.[40] To the extent that agencies choose to repeal or revise regulations in response to the directives in the Executive orders, principles of administrative law require the agencies to follow rulemaking procedures of Administrative Procedure Act ("APA"), which provide for ample public participation, and to support their decisions to repeal or revise regulations with reasonable explanations that are not based solely on the change in Administration.[41] The procedures for changing those rules are time-consuming and resource intensive.[42] The environmental laws and the APA provide citizens with the opportunity to challenge the agency's actions in court, which guarantees that the judicial branch provides an additional check on the Executive action.[43]

To the extent that agencies decide that they will not promulgate new rules or will not enforce existing rules, the administrative and environmental laws provide additional checks on such agency inaction. The environmental laws frequently authorize States to administer and enforce the federal laws in place of the EPA.[44] In addition, those laws authorize States and citizens to sue to enforce the laws even when the federal government will not bring an enforcement action.[45] Those same laws frequently require agencies to adopt regulations in some instances, and they allow citizens to sue the agencies if they do not adopt those rules.[46] In addition, even if agencies are not required by law to adopt rules, the APA authorizes citizens to petition agencies to make rules, and it authorizes citizens to challenge the agencies' decision to deny those requests.[47]

The federal environmental laws provide further protection for the environment because they generally provide that states and local governments can establish and enforce their own environmental laws that are at least as stringent as the federal law.[48] Thus, even if the federal

40. *See infra* notes 96, 101, and accompanying text.

41. *See infra* Part IV.B.

42. *See infra* notes 191-216, and accompanying text.

43. *See, e.g.* 5 U.S.C. §§ 702, 704 (2012) (APA presumption of reviewability for final agency actions); 33 U.S.C. § 1369 (2012) (Clean Water Act judicial review provision); 42 U.S.C. § 6976 (2012) (RCRA judicial review provision); 42 U.S.C. § 7607 (2012) (Clean Air Act judicial review provision).

44. *See, e.g.* 33 U.S.C. §§ 1342(b); 1344(g) (2012) (Clean Water Act Section 402 and 404 permitting programs); 42 U.S.C. §6926 (2012) (RCRA hazardous waste permitting program); 42 U.S.C. § 7661a(d) (2012) (Clean Air Act permitting program).

45. *See, e.g.,* 33 U.S.C. § 1365 (2012) (Clean Water Act); 42 U.S.C. §300j-8(a) (2012) (Safe Drinking Water Act); 42 U.S.C. § 6972 (2012) (RCRA); 42 U.S.C. § 7604 (2012) (Clean Air Act).

46. *See infra* notes 97-99, 185-186, and accompanying text.

47. 5 U.S.C. § 553(e) (2012).

48. *See, e.g.,* 33 U.S.C. §1370 (2012) (Clean Water Act); 42 U.S.C. § 6929 (2012) (RCRA); 42 U.S.C. §7416 (2012) (Clean Air Act).

agencies are not enforcing their laws, States and local governments can enforce their own laws to protect the environment.

There is one more vital dynamic that is likely to limit the long-term harm to the environment that could be caused by unilateral Executive action: the response of the regulated community to the Administration's unilateral actions. Regulated entities must engage in long-term planning. They must also recognize that, while the current Administration may adopt guidance documents that relax regulation and may choose to avoid enforcing environmental regulations, everything could change with the next Administration unless there are changes to the underlying regulations, which may be difficult for reasons outlined in this article.[49] In addition, as outlined above, even if the federal government chooses not to enforce the federal environmental laws, States and citizens could enforce those laws or separate state or local laws against the regulated entities.[50] In light of that, regulated entities are unlikely to take significant actions to relax compliance with the existing federal laws and regulations unless it is possible to reverse those actions at a low cost to comply with increased enforcement of the laws and regulations or to comply with more stringent regulations that may be imposed by the next Administration.

To outline the checks and balances that limit the power of Congress and the President to fundamentally "deconstruct the administrative state," this article will explore the actions taken by Congress and the President at the beginning of the Trump Administration, as well as the potential long-term effects of those actions. Part I focuses on the President's power under the Appointments Clause to appoint the EPA Administrator and DOI Secretary. Part II examines the President's authority to deregulate through the Budget Power. Part III explores the authority of the President to limit the adoption of new environmental rules, as well as Congress' efforts to limit the adoption of regulations generally. Part IV examines the power of the President and Congress to repeal or revise existing regulations. Finally, Part V discusses the authority of agencies to deregulate by relaxing enforcement of environmental laws and regulations.

I. THE PRESIDENT'S APPOINTMENT AND REMOVAL POWER

In the context of the deconstruction of the environmental "administrative state," perhaps the most effective weapon in the President's arsenal is the power to appoint and remove the Administrator of the EPA, the Secretary of Interior, and other agency

49. *See infra* Part IV.B.

50. *See supra* notes 44-45, and accompanying text.

"officers."[51] For environmental law, the appointment power is significant because the federal environmental statutes grant very broad discretion to environmental agencies to determine how stringently to set regulatory standards and how to enforce those standards.[52] While the statutes may require an agency to set standards and to consider certain factors when setting standards, there are usually a range of ways that the agency could set the standard to meet the legal requirements, with some of the options being more stringent and costly than others. Similarly, statutes rarely *require* agencies to bring enforcement actions whenever there is a violation of the law. Instead, they *authorize* the agencies to bring enforcement actions and allow the agency to determine how to allocate enforcement resources in the most efficient manner.[53] Consequently, the laws that are currently on the books could be interpreted and applied in widely different ways, depending on who is directing the agency's exercise of discretion. In addition to appointing the EPA Administrator and the DOI Secretary, the President has the power to appoint many other high-level agency officials.[54]

The Constitution *does* impose a check on the President's appointment power in that it provides that the President shall appoint officers "with the advice and consent of the Senate."[55] However, this check is relatively weak when the President is a member of the same political party that controls a majority of seats in the Senate. In 2013, the Senate rules were changed so that a filibuster could not be used to prevent a vote on judges and high-level officers of the United States, including Cabinet nominees.[56] Consequently, a simple majority in the senate can

51. *See* U.S. CONST., art. II, §2, cl. 2. The EPA Administrator is one of the "officers" appointed by the President. *See* Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970), *reprinted in* 5 U.S.C. app. at 643 (2012).

52. *See* J.B. Ruhl & Kyle Robisch, *Agencies Running from Agency Discretion*, 58 WM. & MARY L. REV. 97, 101, 109-110 (2016); Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469 (1986); Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299 (1997); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1983).

53. *See infra* Part V.

54. *See*, Wendy Wagner, William West, Thomas McGarity, and Lisa Peters, *Dynamic Rulemaking* 92 N.Y.U. L. REV. 183, 196 (2017) (noting that the President has authority to appoint almost 700 officials across the Executive Branch); David E. Lewis, *The Contemporary Presidency: The Personnel Process in the Modern Presidency*, 42 PRESIDENTIAL STUD. Q. 577, 578–79 (2012); Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions,* 105 NW. U. L. REV. 471, 484-485 (2011) [hereinafter "O'Connell, *Agency Rulemaking*"]. Over the last several Administrations, the lower level positions are being filled very slowly. *Id.* at 532. Only 64% of the positions requiring Senate confirmation were filled during the first year of President Obama's first Administration. *Id.* While the delay in filling those positions could delay agency actions that might impose burdens on the regulated community, it could also delay important deregulatory policy changes and regulatory repeals.

55. *See* U.S. CONST., art. II, §2, cl. 2.

56. *See* William G. Dauster, *The Senate in Transition or How I Learned to Stop Worrying and Love the Nuclear Option*, 19 N.Y.U. J. Legis. & Pub. Pol'y 631, 632 (2016). The rules were changed by

approve a Cabinet officer. Additionally, since the majority of the public is unlikely to recognize how influential the appointment of an agency secretary or administrator may be, a Senator is not likely to fear the same level of public disapproval when the Senator votes to approve the appointment of the official as they would if they were voting to repeal major portions of the federal environmental laws.

In light of the weak checks on the President's appointment power, therefore, one of the strongest steps that President Trump has taken to deconstruct the environmental "administrative state" has been to appoint the EPA Administrator and the DOI Secretary. In each case, the President appointed anti-regulatory nominees who appeared to fundamentally disagree with the missions of the agencies they would lead. For the EPA Administrator, the President appointed Scott Pruitt, the Oklahoma Attorney General who sued the EPA fourteen times while he was Attorney General, arguing that the federal environmental regulations were too stringent and interfered with states' rights.[57] Environmental advocates were particularly concerned about this nomination since Pruitt rejected the scientific consensus on climate change[58] and was much more heavily influenced by fracking and energy interests than science during his tenure as Attorney General.[59] Hundreds of EPA employees protested the nomination and nearly 450 former

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the "Reid Precedent", advanced by then Majority Leader Harry Reid, as a way to force votes on President Obama's judicial nominees. *Id.*

57. *See* Kahn, *supra* note 17. *See also* John Siciliano, *Senate Confirms Scott Pruitt to Head EPA,* Wash. Exam., Feb. 17, 2017, http://www.washingtonexaminer.com/senate-confirms-scott-pruitt-to-head-epa/article/2615162 (last visited June 21, 2017); Evan Halper, *After Bruising Battle, Climate Change Skeptic Scott Pruitt Confirmed to Lead EPA*, L.A. TIMES, Feb. 17, 2017, http://www.latimes.com/politics/la-na-pol-trump-epa-pruitt-20180217-story.html (last visited June 21, 2017); Brady Dennis, *Scott Pruitt, Longtime Adversary of EPA, Confirmed to Lead the Agency*, WASH. POST, Feb. 17, 2017, http://tiny.cc/pa4yly (last visited June 21, 2017).

58. *See* Siciliano, *supra* note 57; Halper, *supra* note 57. Shortly after his confirmation, in an interview on a morning cable news program, Pruitt indicated that he did not agree that human activity was a primary contributor to global warming and argued that "we need to continue the review and analysis." *See* Robinson Meyer, *Trump's EPA Chief Denies the Basic Science of Climate Change*, The Atlantic, Mar. 9, 2017, https://www.theatlantic.com/science/archive/2017/03/trumps-epa-chief-rejects-that-carbon-dioxide-emissions-cause-climate-change/519054/ (last visited June 21, 2017). Pruitt's statement conflicts with the consensus of the international scientific community and even with the marketing materials of the oil and gas industry. *Id.* In light of those statements, it is not surprising that, after his appointment as Administrator, Pruitt strongly advocated for the U.S. to exit the Paris agreement on climate change. *See* Mooney & Dennis, *supra* note 35.

59. *See* Siciliano, *supra* note 57. Thousands of pages of e-mails released shortly after Pruitt's confirmation revealed the depth of the influence of the energy interests. *See* Coral Davenport & Eric Lipton, *The Pruitt Emails: E.P.A. Chief Was Arm in Arm With Industry*, N.Y. TIMES, Feb. 22, 2017, http://tiny.cc/jb4yly (last visited June 21, 2017). The e-mails revealed secret meetings between the industry and Pruitt and demonstrated that the industry drafted many of the comments that Pruitt submitted to federal agencies on behalf of the State. *Id.*

employees wrote a letter to the Senate opposing the nomination.[60] For the Secretary of the Interior, the President appointed Montana congressman Ryan Zinke, who is also a climate change skeptic and fossil fuel advocate who supports increased resource extraction on federal lands and who consistently voted against endangered species protection while in Congress.[61] Without the filibuster, a minority of Senators resorted to a variety of procedural tactics to stall the confirmation votes, but both nominees were eventually confirmed.[62]

While the EPA Administrator and the Secretary of the Interior can exercise substantial influence in shaping the content of regulations and the level of enforcement of federal laws and regulations, they can have significant influence on the decision making process and public involvement in the decision making process regarding environmental policy in more subtle ways without engaging in rulemaking or adjudication. For instance, both the EPA Administrator Pruitt and the Secretary of the Interior Zinke acted, early in their tenures, to remove scientists from advisory boards and to suspend or eliminate scientific advisory boards, sending a clear message that they planned to de-emphasize science in decision making.[63] The "politicization" of science at the agencies was not surprising in light of reports that the President,

60. *See* Dennis, *supra* note 57. *See also* Tribune News Services, *Hundreds of Current and Former EPA Employees Protest Trump's Nominee in Chicago*, Chi. Trib., Feb. 6, 2017, http://tiny.cc/cc4yly (last visited June 21, 2017).

61. *See* Kahn, *supra* note 17. *See also* Ashley Killough and Ted Barrett, *Senate Approves Trump's Nominee for Interior*, CNN, Mar. 1, 2017, http://www.cnn.com/2017/03/01/politics/ryan-zinke-confirmation-vote-interior-secretary/ (last visited June 21, 2017); Esther Wieldon & Annie Snider, *Senate Confirms Ryan Zinke as Interior Secretary*, Politico, Mar. 1, 2017, http://www.politico.com/story/2017/03/ryan-zinke-confirmed-interior-secretary-235563 (last visited June 21, 2017).

62. *See* Siciliano, *supra* note 57; Halper, *supra* note 57; Dennis, *supra* note 57; Wileldon & Snider, *supra* note 61. When the Environment and Public Works Committee was scheduled to vote on the nomination of Pruitt, all of the Democrats boycotted the meeting, which prevented a vote for lack of a quorum. *See* Jack Fitzpatrick, *Democrats Boycott Pruitt Vote; Barrasso May Suspend Quorum Rules*, The Morning Consult, Feb. 1, 2017, https://morningconsult.com/2017/02/01/democrats-boycott-pruitt-vote-barrasso-may-suspend-quorum-rules/ (last visited June 21, 2017). When the Democrats boycotted the committee meeting on the following day, the Republican majority members of the committee suspended the committee rules to allow a vote and reported Pruitt's nomination to the full Senate. *See* Brady Dennis & Chris Mooney, *Senate Republicans Suspend Committee Rules to Approve Scott Pruitt, Trump's EPA Nominee*, WASH. POST, Feb. 2, 2017, http://tiny.cc/ic4yly (last visited June 21, 2017).

63. *See* Juliet Eilperin and Brady Dennis, *EPA Dismisses Half of Key Board's Scientific Advisers; Interior Suspends More Than 200 Advisory Panels*, WASH. POST, May 8, 2017, http://tiny.cc/5c4yly (last visited June 21, 2017). In early May, the EPA Administrator dismissed half of the scientists who serve on the agency's Board of Scientific Counselors. *Id.* In addition, in the EPA's proposed budget, funding for the agency's Science Advisory Board would be cut by 84%. *Id.* Within days of the Administrator's action, Interior Secretary Zinke announced that he was suspending the work of almost 200 advisory boards for the agency, while the agency reviewed the charter and charge of the boards. *Id.*

during the transition period prior to his inauguration, asked the Department of Energy to provide the names of any scientists who attended conferences addressing climate change.[64]

Transparency for agency decision making has also been under assault at both agencies with the change in Administration. Shortly after the President's inauguration, the EPA and DOI employees were prohibited from issuing press releases and posting messages on social media,[65] and dozens of agency web pages addressing climate change and other important environmental matters were taken down by the agencies.[66]

The EPA Administrator and the Secretary of the Interior also wield considerable power to shape environmental policy in non-transparent ways because they can, like all agencies, adopt important interpretations of laws and regulations through guidance with minimal procedures and minimal public input.[67]

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64. *See* Victoria McGrane, *Trump Cracked down on Environmental Agencies, and the Internet Fought Back*, BOS. GLOBE, Jan. 25, 2017, http://tiny.cc/rd4yly (last visited June 21, 2017). The agency refused to comply and the President's spokesman subsequently indicated that the request was not authorized by the President. *Id.*

65. *See* McGrane, *supra* note 64. *See also* Michael Biesecker and John Flesher, *President Trump Institutes Media Blackout at EPA,* BOS. GLOBE, Jan. 24, 2017, https://www.bostonglobe.com/news/politics/2017/01/24/trump-bans-epa-employees-from-updating-public-via-press-social-media/Anr90pkwhavC2kzK8pwsyK/story.html (last visited June 21, 2017). Despite the orders, a twitter account for the Badlands National Monument (within the Interior Department) posted several tweets about climate change and an "alternative" twitter account claiming to be run by National Park Service employees continued to post tweets about climate change and environmental issues that were at variance with the positions of the new Administration. *See* McGrane, *supra* note 64.

66. *See* McGrane, *supra* note 64. *See also* Juliet Eilperin, *The EPA Just Buried its Climate Change Website for Kids*, WASH. POST, May 6, 2017, http://tiny.cc/se4yly (last visited June 21, 2017); Brian Kahn, *The EPA's Obama-Era Snapshot is Missing Information*, Climate Central, May 5, 2017, http://www.climatecentral.org/news/epa-obama-website-snapshot-missing-information-21420 (last visited June 21, 2017). The White House removed all of the climate change information from its website shortly after President Trump was inaugurated and the EPA removed its website of climate change resources for students in April. *See* Eilpern, *supra*; Kahn, *supra.* The City of Chicago posted the previous EPA material on its website and Chicago Mayor Rahm Emanuel indicated that the city would be "developing tools so that the city and the public as a whole can easily save, archive and preserve open data from public data portals, such as the EPA site." *See* Eilpern, *supra*. Environmental advocates had anticipated that the new Administration would remove significant amounts of environmental information from the web when it took over, so many groups, including the Environmental Data and Governance Initiative, worked to archive agency information and websites during the transition period before President Trump's inauguration. *See* Evan Halper, *At Trump's EPA, Going to Work Can Be an Act of Defiance*, L.A. TIMES, Apr. 4, 2017, http://tiny.cc/jf4yly (last visited June 21, 2017).

67. *See* Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking From 2001-2005*, 38 Envtl. L. 101, 112-113 (2008) [hereinafter "Johnson, *Ossification's Demise*?"]; Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 700-01 (2007) [hereinafter "Johnson, *Good Guidance*"]; Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 283-84 (1998) [hereinafter "Johnson*, Internet*"]; Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 528 (1997) [hereinafter "McGarity, *Response*"]; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 82 (1995) [hereinafter "Pierce, *Seven Ways*"]. In some agencies, interpretive rules and policy statements comprise more than 90% of the agency "rules." *See* Pierce, *supra,* at 82.

Since the EPA Administrator and the Secretary of the Interior can exert so much influence over the policies adopted by the agencies and the manner in which agency employees administer the laws, the President's power to appoint them, with the very limited check imposed by Senate approval, is perhaps the most potent tool available to the President in deconstructing the environmental "administrative state."

The power is ultimately limited, however, in that the actions that the agency leaders take short of adopting new rules can generally be reversed when a new Administration assumes power. Even if the EPA Administrator and the Secretary of the Interior do not aggressively enforce the laws and regulations while they are in power and adopt guidance to soften the requirements of those laws and regulations, subsequent agency leaders can reverse course.[68]

II. THE PRESIDENT'S BUDGET POWER

The President's role in the development of agency budgets provides the White House with another tool to shape the manner in which agencies interpret and enforce the law.[69] A President bent on deconstructing the administrative state can take steps toward that goal by seeking to eliminate or substantially reduce the budgets of agencies. Even if the agency itself is not eliminated, its power and impact on regulated entities will be greatly reduced if the agency is not provided with funding to enforce the regulatory laws it is statutorily charged with administering. The President implements the control over agency budgets through the Office of Management and Budget ("OMB") in the White House.[70] All agency budget requests are submitted to the OMB,

68. Admittedly, though, there may be some long-term harm to the agencies that cannot be easily reversed. For instance, the appointment of Scott Pruitt as the EPA Administrator and the policies that he is pursuing as Administrator, including his rejection of scientific and technical advice from employees, has severely harmed the morale of long-time agency employees. *See* Tribune News Service, *supra* note 60. *See also* Halper, *supra* note 66. To the extent that career employees at the agencies become frustrated and move on before there is a change in Administration, the agencies could lose significant institutional memory and experience. William Ruckleshaus, the EPA Administrator under Presidents Nixon and Reagan, indicated that he had never seen anything like the tumult that the EPA is facing with the appointment of Scott Pruitt as Administrator and that "[i]t is going to set us back in ways we can't even predict." *Id.*

69. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 42-43 (2010); Aziz Z. Huq, *Removal as a Political Question,* 65 STAN. L. REV. 1, 28-29 (2013). The President's control over the budget of agencies derives from the Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 (1921) and was expanded in the Reorganization Act of 1939, Pub. L. No. 76-19, 53 Stat. 561 (1939).

70. *See* Barkow, *supra* note 69, at 42. *See also* Michelle D. Christensen, *The Executive Budget Process*: *An Overview,* Cong. Res. Serv. Rept. No. R42633, July 27, 2012, at 2. OMB is the successor to the Bureau of the Budget, which was created as part of the Treasury Department by the Budget and Accounting Act of 1921, *supra* note 69. The powers of the Bureau were transferred to the President in 1970, who transferred them to OMB. *See* Exec. Order No. 11,541, 3 C.F.R. 10,737 (Supp. 1970).

and the President can exert significant influence over agencies' policies and priorities by drastically reducing or refusing to request funding for various programs.[71] Through the OMB, the President also limits the content of communications that agencies can have with Congress regarding the budget process.[72] The OMB also oversees agencies' expenditure of funds after Congress allocates the funds to agencies.[73] The OMB's reach extends beyond budgeting, however, and agencies must clear all legislative proposals, as well as communications with Congress regarding legislation, through the OMB.[74]

While the President, thus, exerts substantial influence over the contents of the agency budget that is sent to Congress for approval, the budget is ultimately adopted through Congressional legislation, which may have different priorities than the President and may enact a budget that bears very little resemblance to the proposal submitted by the President.[75] While the President could veto the budget passed by Congress and risk a government shutdown when appropriations for government agencies expire under the prior budget legislation, it is unusual for the President to take that step. In light of the fact that

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OMB's mission is "to assist the President in meeting his policy, budget, management and regulatory objectives and to fulfill the agency's statutory responsibilities." *See* Office of Management and Budget, *Office of Management and Budget,* https://www.whitehouse.gov/omb. (last visited June 21, 2017). The agency has responsibilities for five "services" for the White House, including budget development and execution; management; regulatory policy, legislative clearance and coordination; and Executive Orders and Presidential Memoranda. *Id.*

71. *See* Barkow, *supra* note 69, at 42-43; Christiansen, *supra* note 70, at 2-3. The process by which agencies prepare and submit their budget requests to the President is set forth in guidance prepared by OMB for the agencies. *See* Office of Management and Budget, OMB Circular No. A-11, *Preparation Submission and Execution of the Budget,* July 2016, https://obamawhitehouse.archives.gov/omb/circulars_a11_current_year_a11_toc/ (last visited June 21, 2017).

72. *See* Christiansen, *supra* note 70, at 5.

73. *See* Huq, *supra* note 69, at 28.

74. *See* Barkow, *supra* note 69, at 30-31; Office of Management and Budget, *The Mission and Structure of the Office of Management and Budget,* https://obamawhitehouse.archives.gov/omb/organization_mission/ (last visited June 21, 2017). OMB Circular A-19 outlines the requirements and procedures for legislative coordination and clearance through the White House. *See* Office of Management and Budget, Circular No. A-19, *Legislative Coordination and Clearance,* Sept. 20, 1979, https://obamawhitehouse.archives.gov/omb/circulars_a019/ (last visited June 21, 2017). The guidance requires agencies to coordinate with OMB and obtain clearance for all legislative proposals, testimony and letters on pending legislation, and other transmittals to Congress communicating legislative views of recommendations. *Id.* The goals of the clearance process are "to ensure that (1) agencies legislative communications are consistent with the President's policies and objectives; and (2) the Administration 'speaks with one voice' regarding legislation." *See* Memorandum from Mick Mulvaney, OMB Director, to Agency Heads, *Legislative Coordination and Clearance,* M-17-19; Feb. 28, 2017, https://www.whitehouse.gov/the-press-office/2017/02/28/memorandum-heads-departments-and-agencies (last visited June 21, 2017).

75. Congress' role in the budgeting process is outlined in the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (July 12, 1974).

Congress and the President share the budget power, it will only function as an effective tool to deconstruct the administrative state if both the President and Congress agree to reduce the power of agencies by dramatically reducing their budgets. If the will of Congress and the President aligned on that goal, it would be easier to accomplish this incremental step toward deconstruction than it would be to pass laws to eliminate the agencies or agencies' powers (a much more effective means of deconstruction), since a minority of the Senate could not prevent the weakening of the agencies in the budget process, as a filibuster is not available in the Senate for budget legislation.[76] Even though both houses of Congress are currently controlled by the same political party as the President, Congress does not appear to be interested in instituting drastic budget cuts for environmental agencies to deconstruct the administrative state at this time.

President Trump attempted to use his budget power as a means of deconstructing the EPA and environmental regulations when he sent Congress a proposal to reduce the agency's funding by almost one-third and to cut agency staff by one-fifth.[77] The President's proposed budget would have eliminated 50 programs administered by the agency, including its Environmental Justice office.[78] The proposal also included cuts of almost 50% of funding for grant programs for state environmental programs,[79] 30% of funding for Superfund cleanups,[80] and 84% of funding for the agency's Science Advisory Board,[81] as well as deep cuts for enforcement activities,[82] programs for redevelopment of

76. *Id. See also* Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U.C. DAVIS L. REV. 261 (2013).

77. *See* Christine Todd Whitman, *I Ran George W. Bush's EPA—and Trump's Cuts to the Agency Would Endanger Lives*, The Atlantic, Mar. 31, 2017, https://www.theatlantic.com/politics/archive/2017/03/trumps-epa-cuts-budget/521223/ (last visited June 21, 2017) ; Margo Oge & Drew Kodjak, *What Americans Risk Losing if Trump Slashes the EPA's Budget*, Fortune, Apr. 18, 2017, http://fortune.com/2017/04/18/epa-donald-trump-budget-cuts/ (last visited June 21, 2017); Rafi Letzter, *Trump's Epa Cuts Are Great News for Polluters, but Bad News for His Voters*, Business Insider, Mar. 16, 2017, http://www.businessinsider.com/what-trumps-budget-would-really-mean-for-the-epa-2017-3 (last visited June 21, 2017). The proposed cuts would reduce the agency's budget to its lowest level in 40 years. *See* Whitman, *supra*. In anticipation of the cuts, the EPA developed plans to lay off 25% of its employees and eliminate 56 programs, so that it could preserve more money to fund grants for state programs. *See* Juliet Eilperin, Chris Mooney & Steven Mufson, *New EPA Documents Reveal Even Deeper Proposed Cuts to Staff and Programs*, WASH. POST, Mar. 31, 2017, http://tiny.cc/8f4yly (last visited June 21, 2017).

78. *See* Letzter, *supra* note 77.

79. *See* John Siciliano, *Trump's EPA Cuts Risk Fight with State' Environmental Agencies*, Wash. Examiner, Apr. 24, 2017, http://tiny.cc/yg4yly (last visited June 21, 2017).

80. *See* Letzter, *supra* note 77.

81. *See* Eilperin, Mooney & Mufson, *supra* note 77.

82. *See* Letzter, *supra* note 77.

"brownfields" (former waste disposal sites),[83] and programs to restore water quality and the environment in the Great Lakes and the Chesapeake Bay.[84] If Congress had adopted a budget that was similar to that proposed by the President, the EPA could have suffered severe long-term harm due to the loss of thousands of dedicated employees and their expertise and institutional memory. In addition, even if the eliminated programs could have been re-established in a future administration, it would take significant resources to rebuild that framework in the future, and the harm to the environment and public health caused by the elimination of the programs in the interim could be dramatic.

However, many of the programs that the President planned to cut or drastically reduce provide millions of dollars of federal money to states.[85] Consequently, legislators, States, and even the EPA Administrator balked at the cuts.[86] When Congress ultimately adopted stopgap budget legislation to keep the government operating through September, 2017, the EPA's budget was only cut by 1%, with no reduction in workforce.[87] Thus, the President's budget power has so far proved to be a significantly weaker tool than the appointment power for deconstructing the administrative state.

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83. *See* Kevin Lamarque, *Trump Proposes EPA Budget Cuts, Targets Climate, Clean Water Programs*, Newsweek, Mar. 2, 2017, http://www.newsweek.com/donald-trump-epa-environmental-protection-agency-environment-water-climate-563148 (last visited June 21, 2017).

84. *See* Whitman, *supra* note 77. The proposed budget would reduce funding for the Great Lakes Restoration Initiative by 90%, from $300 million to $10 million and would eliminate funding for the Chesapeake Bay Program. *Id.*

85. *See* Siciliano, *supra* note 79; Lamarque, *supra* note 83.

86. *See* Letzter, *supra* note 77; Siciliano, *supra* note 79; Lamarque, *supra* note 83. Pruitt indicated to state and local government leaders that it was important to preserve funding for brownfields, Superfund, drinking water and other state grant programs. *See* Brady Dennis, *Here's One Part of the EPA That the Agency's New Leader Wants to Protect*, WASH. POST, Mar. 2, 2017, http://tiny.cc/dh4yly (last visited June 21, 2017).

87. *See* Joel Achenbach, Ben Guarino, Sarah Kaplan & Darryl Fears, *Science Funding Spared Under Congressional Budget Deal, but More Battles Ahead*, WASH. POST, May 1, 2017, http://tiny.cc/sh4yly (last visited June 21, 2017); Robert Walton, *Last-Minute Congressional Budget Compromise Saves EPA, ARPA-E Funding* , Utility Dive, May 1, 2017, http://www.utilitydive.com/news/last-minute-congressional-budget-compromise-saves-epa-arpa-e-funding/441655/ (last visited June 21, 2017). *See also* U.S. House of Representatives, U.S. House Committee on Appropriations, *FY 2017 Omnibus Summary – Interior and Environment Appropriations*, https://appropriations.house.gov/UploadedFiles/05.01.17_FY_2017_Omnibus_-_Interior_-_Summary.pdf (last visited June 21, 2017).

III. THE POWER OF THE PRESIDENT AND CONGRESS TO LIMIT THE ADOPTION OF NEW RULES

A. The President's Power to Limit the Adoption of New Rules

Even if the President and Congress are not willing to deconstruct the administrative state by enacting legislation to eliminate agencies or reduce their powers, they can take a small step toward deconstruction by preventing the agencies from adopting new rules. Federal agencies generally have broad authority to decide whether and when to adopt rules, so a President can often encourage an agency to exercise its discretion to not adopt new rules.[88] In addition, if an agency has begun a rulemaking process to adopt a rule that the agency was not required by law to adopt, the President can encourage the agency to conclude that process without adopting a final rule.[89] The President might attempt to stop agency rulemaking informally through communications with the agency leaders, reminding the agency of the President's appointment and budgeting powers.[90] The President could also take a more visible action to limit the adoption of agency rules by issuing an Executive

88. *See* O'Connell, *Agency Rulemaking, supra* note 54, at 482-483 (2011). Most federal environmental statutes give the EPA broad authority to adopt rules within a range of discretion that extends as far as "necessary" to carry out the laws. *See, e.g.,* 33 U.S.C. § 1361(a) (authorizing the EPA Administrator to "prescribe such regulations as are necessary to carry out his functions under the Clean Water Act); 42 U.S.C. § 300j-9(a)(1) (similar rulemaking authority for the EPA under the Safe Drinking Water Act); 42 U.S.C. § 6912(a) (similar rulemaking authority for the EPA under RCRA); 42 U.S.C. § 7601(a)(1) (similar authority for the EPA under the Clean Air Act). It is not unusual for a President to ask agencies to halt all rulemaking activities for a short period of time when the President initially takes office, especially if the prior President was a member of an opposing political party. *See, e.g., Memorandum from Reince Priebus, Chief of Staff, for the Heads of Executive Departments and Agencies*, (Jan. 20, 2017), https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies (last visited June 21, 2017) (instructing agencies to send no regulation to the Federal Register until a department or agency head appointed by President Trump reviewed and approved the regulation) [hereinafter "Priebus Transition Memo"]; *Memorandum from Rahm Emanuel, Assistant to the President and Chief of Staff, the White House, to Heads of Executive Departments and Agencies* (Jan. 20, 2009), in 74 Fed. Reg. 4435 (Jan. 26, 2009) (instructing agencies to not start or finish any regulations without approval of the new Administration of President Obama). *See also* O'Connell, *Agency Rulemaking, supra* note 54, at 529. The rulemaking process tends to slow down considerably at the beginning of Presidential administrations, especially for rules for which the rulemaking process began during the prior administration. In a study of rulemakings between 1983 and 2010, Professor Anne O'Connell found that "rulemakings during which a Presidential transition occurred after the [notice of proposed rulemaking] was issued took, on average, nearly three times as long to complete as those . . . that started and ended during a single administration." *See* O'Connell, *Agency Rulemaking, supra* note 54, at 514.

89. *See* O'Connell, *Agency Rulemaking, supra* note 54, at 477-478. The number of rulemakings that are withdrawn tends to increase at the beginning of new Presidential administrations. *Id.* at 509. When Presidents encourage agencies to withdraw rules that have been not finalized, they generally exclude, from that directive, rules that the agencies are required to finalize by law. *Id.* at 529.

90. *See, supra* Parts I and II.

Order that directs the agency to not adopt particular rules or which makes the rulemaking process particularly difficult.[91] President Trump's "two for one" Executive Order is a good example of that tactic. On January 30, 2017, the President issued Executive Order 13,771,[92] which requires agencies to repeal two existing regulations for every new regulation that they propose.[93] In addition, the costs imposed by the new regulation on the economy must be offset by the costs of existing regulations that will be repealed if the new regulation is adopted.[94] Furthermore, the Order requires agencies to provide more advance notice before commencing the rulemaking process.[95] The net effect of the Executive Order will likely be the suppression of most new rulemaking by agencies.

However, the President's power to act by Executive Order is limited, and the President cannot change federal law or require agencies to violate federal law through an Executive Order.[96] Many of the federal

91. While there is no explicit Constitutional or statutory authority for Executive Orders, they are an exercise of the President's Article II Executive power and direct the actions of executive agencies or government officials and set policies for the Executive Branch. *See* John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 334 (2010) . *See also* Vivian S. Chu & Todd Garvey, *Executive Orders: Issuance, Modification and Revocation*, Cong. Res. Serv. Rept. # RS20846, Apr. 16, 2014, at 2, https://fas.org/sgp/crs/misc/RS20846.pdf (last visited June 21, 2017); Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., *Executive Orders and Proclamations: A Study of a Use of Presidential Powers* (Comm. Print 1957). President Trump's focus on the Executive Order as a tool for quick Executive action is not unusual. President Clinton and President George W. Bush issued more Executive Orders during their first years in office than in all of the other years that they were in office. *See* O'Connell, *Agency Rulemaking, supra* note 54, at 496-498.

92. *See* Executive Order 13,771 of January 30, 2017, 82 Fed. Reg. 9339 (Feb. 3, 2017), https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs (last visited June 21, 2017). OMB Guidance suggests that the reach of the Order may be even broader, in that the Guidance defines "regulatory actions" and "deregulatory actions" subject to the Order to include "significant guidance documents." *See* Office of Management and Budget, Office of Information and Regulatory Affairs, *Guidance Implementing Executive Order 13,771, Titled "Reducing Regulation and Controlling Regulatory Costs"*, Apr. 5, 2017, https://www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation (last visited June 21, 2017) [hereinafter "OIRA Guidance on Executive Order 13,771"].

93. *Id.* §2(a). The Order recognizes that agencies will have to utilize notice and comment rulemaking procedures to repeal those rules. *Id.* §2(c).

94. *Id.* §2(c). The Order does not authorize agencies to consider the value of benefits that will be lost when existing regulations are repealed in calculating the costs imposed on the economy. It does not refer to "benefits" of regulations or to "net costs" of regulations, but simply to costs. *Id.*

95. *Id.* § 3. Agencies are not allowed to issue rules that were not previously included in the Unified Regulatory Agenda for the agency. *Id.*

96. *See* Chu & Garvey, *supra* note 91, at 1 (*citing Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332-1339 (D.C. Cir. 1996). Indeed, the Executive Order explicitly limits its reach, indicating in Section 2(a) that agencies must identify two regulations to be repealed when proposing a new regulation "unless prohibited by law" and in Section 2(c) that agencies shall offset the costs of the new regulation "to the extent permitted by law" by the elimination of existing costs associated with at least two prior regulations. *See* Exec. Order No.

environmental laws *require* the EPA to adopt regulations addressing particular issues and to review or revise those regulations on a periodic basis.[97] In addition, the APA authorizes any person to petition an agency to issue, amend, or repeal regulations, and several of the environmental laws explicitly authorize citizens to petition agencies to make, amend, or repeal rules, so agencies may be forced to adopt rules or explain in a rational manner why they are not going to adopt rules in response to citizen petitions.[98] Agencies that do not adopt rules required by law or that fail to respond to citizen petitions for rulemaking in rational ways will likely face lawsuits.[99] Accordingly, the Executive Order will not completely stop the EPA or other agencies from adopting rules. The Executive Order authorizes agencies to adopt rules required by law without *simultaneously* complying with the offset requirements of the Order, but the OMB guidance on the order makes it clear that agencies are expected to offset the costs of the new rule with appropriate repeals of other rules "as soon as practicable thereafter."[100] Thus, the Executive Order could have a longer-term deregulatory impact by forcing an agency to repeal existing rules in order to adopt new rules that are required by law.

Ultimately, however, the President's power to prevent the EPA and other agencies from adopting new rules through intimidation or Executive Order is a weak tool to deconstruct the administrative state

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13,771, *supra* note 92, §§ 2(a) & (c). In addition, the Executive Order provides that "Nothing in this order shall be construed to impair or otherwise affect: (i) the authority granted by law to an executive department or agency, or the head thereof . . . .", *id.* §5(a), and "This order shall be implemented consistent with applicable law . . . ." *Id.* §5(b).

97. *See, e.g.,* 33 U.S.C. § 1314(b) (2012) (requiring the EPA to annually revise effluent guidelines under the Clean Water Act if appropriate); 33 U.S.C. § 1317(b) (2012) (requiring the EPA to revise pretreatment standards under the Clean Water Act from time to time); 33 U.S.C. § 1345(d) (2012) (requiring the EPA to review the Clean Water Act sewage sludge regulations at least every two years for the purpose of identifying additional toxic pollutants to be regulated); 42 U.S.C. § 300g-1(b) (2012) (requiring the EPA to review and, if appropriate, revise national primary drinking water standards under the Safe Drinking Water Act); 42 U.S.C. § 7409(d) (2012) (requiring the EPA to review Clean Air Act national air quality standards every five years and revise them as appropriate); 42 U.S.C. § 7411(b) (2012) (requiring the EPA to review and, if appropriate, revise the Clean Air Act new source performance standards every eight years); 42 U.S.C. § 7412(d) (2012) (requiring the EPA to review and revise, as necessary, the Clean Air Act hazardous air pollutant standards every eight years); 42 U.S.C. § 6921 (2012) (requiring the EPA to revise the RCRA hazardous waste criteria and regulations from time to time as appropriate); 42 U.S.C. § 9605(a) (2012) (requiring the EPA to revise the Superfund National Priority List at least annually).

98. *See* 5 U.S.C. § 553(e) (2012). In addition, the Endangered Species Act authorizes any person to petition the Department of Interior to undertake a rulemaking to list a species as threatened or endangered and requires the agency to make a finding on that petition within 12 months. *See* 16 U.S.C. §1533(b)(3) (2012). RCRA also includes explicit authority for persons to petition the agency for rulemaking. *See* 42 U.S.C. § 6974 (2012).

99. The citizen suit provisions of the federal environmental laws generally authorize persons to sue agencies when they fail to undertake non-discretionary duties. *See supra* note 45.

100. *See OIRA Guidance on Executive Order 13,771, supra* note 92, Part VI, Q 33.

because it will only last as long as the President is in office. A subsequent Administration could easily repeal Executive Orders limiting rulemaking and could encourage agencies to greatly expand their rulemaking efforts.[101]

Another limited power that the President has to restrict agency rulemaking is the power to delay rules that were finalized at the end of a preceding Administration. Much ink has been spilled regarding the "midnight rulemaking" that occurs at the end of a Presidential Administration.[102] Most Presidents act quickly upon inauguration to seek to delay the effective dates of regulations that were finalized by the prior Administration, but have not yet taken effect when the new President has taken office.[103]

President Trump took this action shortly after he took office when he ordered agencies to postpone, by 60 days, the effective date of all regulations that had been published in the Federal Register, but had not yet taken effect. The directive delayed the implementation of at least 30 environmental rules.[104] The purpose of the postponement was to review "questions of fact, law, and policy they raise."[105] The President's memo to executive agencies and departments also indicated that agencies should, where appropriate and as permitted by applicable law, consider proposing for notice and comment a delay of the effective date of regulations beyond the sixty-day period.[106]

Once an agency has adopted a final rule, the agency can only change the rule through a subsequent notice and comment rulemaking.[107] When

101. There are very few procedures that Presidents must follow when issuing or repealing an Executive Order. *See* Chu & Garvey, *supra* note 91, at 7; Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 552-553 (2005). The Administrative Procedures Act does not apply to actions of the President, since the President is not an "agency" under the law. *See* 5 U.S.C. § 551(1)(2012). The only procedural requirements that the President must follow are imposed by the Federal Register Act, which requires that Executive Orders must be published in the Federal Register, *see* 44 U.S.C. § 1505 (2012), and by an Executive Order issued by President Kennedy, *see* Exec. Order No. 11,030, 27 Fed. Reg. 5847 (1962), *codified* 1 C.F.R. Part 19.

102. *See* O'Connell, *Agency Rulemaking, supra* note 54, at 472-473 (discussing the phenomena and noting that the number of rulemakings finalized at the end of a Presidential administration increases even when the new President is a member of the same political party as the outgoing President); *See* Jack M. Beerman, *Presidential Power in Transitions,* 83 B.U. L. REV. 947, 948-954 (2003) (citing a study that noted that regulatory output usually increases by 27.4% in the last three months of an administration).

103. *See* O'Connell, *Agency Rulemaking, supra* note 54, at 471-473 (describing the actions of President Obama and President George W. Bush, among others); Beerman, *supra* note 102, at 949-950 (describing the actions of President George W. Bush). The President cannot, however, suspend rules that have already taken effect without following the normal notice and comment procedures. *See infra* notes 188-190, and accompanying text.

104. *See* Biesecker & Flesher, *supra* note 65.

105. *See Priebus Transition Memo, supra* note 88, § 3.

106. *Id.*

107. *See* Beerman, *supra* note 102, at 982-983 (2003).

an agency delays the effective date of a rule that has been finalized, therefore, it could face legal challenges.[108] A President can probably justify a temporary delay of the effective date of a rule that has been finalized without going through traditional notice and comment rulemaking[109] by relying on the "good cause" exception in the APA, which allows agencies to bypass the notice and comment procedures required for rulemaking when the agency "for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[110] That exception, however, is a very limited exception,[111] and would not likely justify delay of the effective dates of rules for a more substantial period of time.[112] Alternatively, the Executive Branch might argue that the delay is justified by Section 10(d) of the APA, 5 U.S.C. § 705, which authorizes an agency, "when justice so requires," to postpone the effective date of agency actions, pending judicial review.[113] In order to justify delay under Section 705,

108. *See* O'Connell, *Agency Rulemaking, supra* note 54, at 530. As Professor Jack Beerman notes, however, most challenges to such delays in the effective dates of rules would be moot by the time they could be raised in court. *See* Beerman, *supra* note 102, at 983.

109. *See* O'Connell, *Agency Rulemaking, supra* note 54, at 530 (discussing President Obama's limited suspension of the effective dates of rules); Beerman, *supra* note 102, at 983, 988 (discussing President George W. Bush's limited suspension of the effective dates of rules).

110. *See* 5 U.S.C. § 553(b)(3)(B) (2012). Agencies are required to provide a statement that supports their findings that good cause justifies the avoidance of the notice and comment procedures. *Id.* President George W. Bush relied on that exception to justify delaying the effective date of regulations for sixty days when he took office. *See* Beerman, *supra* note 102, at 983. *See also* William M. Jack, *Comment, Taking Care That Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions under the Bush Administration's Card Memorandum,* 54 ADMIN. L. REV. 1479, 1505-1511 (200). Professor Jack Beerman argues that the President's constitutional authority to "take care that the laws be faithfully executed" should justify a brief delay in the effective date of rules to allow a newly appointed President time to review the rules. *See* Beerman, *supra* note 102, at 993-994. He also argues that courts would likely find such a limited delay without notice and comment to review rules within agencies' power at the outset of a new Administration. *Id.*

111. *See* Michael A. Rosenhouse, *Construction and Application of Good Cause Exception to Notice and Comment Rulemaking Under Admnistrative Procedure Act (APA), 5 U.S.C. § 553(b)(B),* 26 A.L.R. Fed. 2d § 2, at 97 (2008). The exception is narrowly construed and the agency has the burden of demonstrating good cause to the court. *Id.* Courts have generally found notice and comment to be "unnecessary" under the exception when changes proposed by the agency are minor or technical. *Id.* While a temporary delay in the effective date for a rule may be minor, more substantial delays are unlikely to be considered by courts to be minor.

112. *See* Beerman, *supra* note 102, at 983. *See also Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 204–06 (2d Cir. 2004) (holding that the Department of Energy's indefinite suspension of the effective date of a rule violated APA notice and comment requirements).

113. *See* 5 U.S.C. § 705 (2012). Section 705 "permits an agency to pospone the effective date of a not yet effective rule, pending judicial review." *Safety-Kleen Corp. v. EPA,* 1996 U.S. App. LEXIS 2324 *2-3 (D.C. Cir. 1996) (per curiam). The Trump Administration attempted to rely on Section 705 to justify postponement of Interior Department rules governing the valuation of oil and gas and coal on federal lands 53 days AFTER the rules took effect. *See* 82 Fed. Reg. 11,823 (Feb. 27, 2017). However, the D.C. Circuit, in the *Safety-Kleen* case, has explicitly held that Section 705 "does not permit [an] agency to suspend without notice and comment a promulgated rule." *See Safety-Kleen, supra,* at *3.

however, an agency must satisfy the four-part test that applies to a request for a preliminary injunction.[114]

Regardless of which approach the Executive Branch relies upon, to the extent that the President asserts that the delay is necessary to review the fact, law, and policy questions raised by rules, the White House should be able to conclude that review within sixty days. If, after that time, agencies feel that they need more time to review the regulations, they should conduct notice and comment rulemaking to delay the effective date.[115] Similarly, if they conclude that the regulations that were finalized by the prior Administration should be repealed or modified, they need to begin the notice and comment process to repeal or modify them.[116]

In light of all of those restrictions, the President's power to temporarily delay the effective date of rules is an even weaker tool to deconstruct the administrative state than the President's power to halt or slow the adoption of new regulations while the President is in office.

B. Congress' Power to Limit the Adoption of New Rules

Congress, like the President, may take steps to slow or stop agency rulemaking as a means of deconstructing the administrative state. While the 115th Congress has not enacted laws to eliminate agencies or significantly reduce their powers, they have introduced several bills that, if enacted, could create serious impediments to agency rulemaking. Unlike the Executive Orders and policies of a President, however, the restrictions would have long lasting impact on agencies, because they would be codified as law and would apply beyond the current Administration.

For instance, the Regulatory Accountability Act of 2017 was introduced in the House and Senate early in the 115th Congress.[117] Although the House and Senate versions were not identical, each

114. *See Sierra Club v. Jackson,* 833 F. Supp. 2d 11, 30 (D.D.C. 2012). Under that test, the proponent of an injunction "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *See Winter v. N.R.D.C.*, 555 U.S. 7, 20 (2008).

115. *See* Beerman, *supra* note 102, at 983, n. 120. During the Bush Administration, the EPA engaged in notice and comment rulemaking when it extended an initial delay in the effective date of rules addressing arsenic levels in drinking water by nine months, to provide the agency more time to review the rule. *Id.* Professor Beerman suggests that courts might view longer delays in the effective dates of regulations to be a "cover for repeal without notice and comment." *See* Beerman, *supra* note 102, at 994.

116. *See infra* notes 188-190, and accompanying text.

117. *See* H.R. 5, 115th Cong., 1st Sess. (2017), https://www.congress.gov/bill/115th-congress/house-bill/5 (last visited June 21, 2017); S. 951, 115th Cong., 1st. Sess. (2017), https://www.congress.gov/bill/115th-congress/senate-bill/951 (last visited June 21, 2017).

version would increase the circumstances in which agencies need to adopt rules through a more formal trial-type hearing process,[118] increase the information that agencies need to collect and consider in developing rules and disclose to the public during the rulemaking process,[119] increase the factors that agencies must consider when adopting rules,[120] and limit the communications that agencies can make during the notice and comment process to solicit input on proposed rules.[121] In addition, both bills would eliminate the deference that courts accord to agencies when agencies interpret their own rules,[122] and the House bill would also eliminate the deference that courts accord to agencies under *Chevron v. N.R.D.C.*[123] when agencies are interpreting statutes that they are charged with administering.[124]

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118. The House bill requires agencies to hold formal hearings for "high impact rules" unless all participants in the rulemaking waive the hearing requirement and requires agencies to hold formal hearings for "major rules" whenever a person petitions the agency to hold formal hearings "unless the agency reasonably determines that a hearing would not advance consideration of the rule or would unreasonably delay completion of the rulemaking." *See* H.R. 5, *supra* note 117, §§ 103, 105. The Senate bill requires agencies to create a docket and follow more formal procedures than are required under the APA for notice and comment rulemaking when issuing "major rules" and "high impact rules", and authorizes any person to petition the agency for a trial type formal hearing before an administrative law judge for "major rules" or "high impact rules". *See* S. 951, *supra* note 117, §3.

119. The House bill requires the agency to consider "any reasonable alternatives to the rule", including a "no rule" alternative, when adopting a rule and requires the agency to include, in a docket for the rule, all information considered by the agency in connection with its adoption of the rule, and requires the agency to identify, in the rule, "an achievable objective for the rule and metrics for measurement." *See* H.R. 5, *supra* note 117, § 103. The Senate bill requires agencies to consider at least three alternatives to a proposed rule in all rulemakings, to explain, for "major rules" and "high impact rules" why they did not propose those alternatives, and "publish all studies, models, scientific literature, and other information developed or relied upon by the agency, and actions taken by the agency to obtain that information." *See* S. 951, *supra* note 117, §3.

120. The House bill requires agencies to consider the costs and benefits of all rules, notwithstanding any other provision of law, and requires agencies to adopt the "least costly rule . . . that meets the relevant statutory objectives." *See* H.R. 5, *supra* note 117, §103. The Senate bill requires agencies to consider the costs and benefits of "high impact rules" and "major rules" and to adopt "the most cost effective rule of the alternatives considered that meets the statutory objectives." *See* S. 951, *supra* note 117, §3.

121. *See* H.R. 5, *supra* note 117, § 103; S. 951, *supra* note 117, §3.

122. *See Auer v. Robbins,* 519 U.S. 452 (1997) (holding that an agency's interpretation of its own regulation is entitled to of controlling weight unless it is plainly erroneous or inconsistent with the regulation).

123. 467 U.S. 837 (1984) (Courts defer to agencies' reasonable interpretations of statutes when the statute is ambiguous).

124. The House bill replaces *Chevron* and *Auer* deference with de novo review by courts of agency interpretations of law and regulations. *See* H.R. 5, *supra* note 117, §202. The Senate bill replaces *Auer* deference for agency interpretations of agency regulations with the deference accorded to agencies under *Skidmore v. Swift*, 323 U.S. 134 (1944), but does not change the level of deference courts accord to agency interpretations of statutes that they are charged with administering. *See* S. 951, *supra* note 117, §4. In *Skidmore,* the Supreme Court held that when determining whether to defer to agency's decisions, courts should consider the thoroughness of the agency's consideration, the formality of procedures used by the agency, the validity of the agency's reasoning, the consistency of the agency's interpretation, whether the interpretation is longstanding or contemporaneous, and the agency's level of

Another bill that passed the House and is pending in the Senate, the Regulatory Integrity Act of 2017,[125] would require agencies to create a docket for regulatory actions (including the issuance of guidance documents, policy statements, directives, and adjudication, as well as rulemaking)[126] and to include, in the docket, every public communication (including written or verbal statements, blog posts, videos, audio recordings, and other social media messages)[127] about the action issued by the agency,[128] within 24 hours after the communication takes place.[129]

Both of those laws would severely slow, or even stop, agency rulemaking by imposing onerous, time-consuming, and resource-intensive requirements on the process.[130] Another legislative proposal, the Regulations from the Executive in Need of Scrutiny Act of 2017 ("REINS Act"), takes a more direct approach to stop agency rulemaking.[131] Under the bill, any "major" rule adopted by an agency would need to be approved by a joint resolution of Congress before it takes effect.[132]

While Congress, therefore, has more power than the President to slow or halt agency rulemaking in the long term, none of the proposed bills have passed both houses thus far.[133] It is likely that the threat of a

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expertise on the issue, among other factors. *See* See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1281 (2007).

125. *See* H.R. 1004, 115th Cong., 1st Sess. (2017), https://www.congress.gov/bill/115th-congress/house-bill/1004 (last visited June 21, 2017).

126. *Id.* § 307(a)(1).

127. *Id.* § 307(a)(2).

128. *Id.* §307(b)(1)(B).

129. *Id.* § 307(b)(2). The bill also includes prohibitions on agency solicitation of public input during rulemaking that are similar to those in the Regulatory Accountability Act. *Id.* §307(c).

130. *See* William Funk, *Requiring Formal Rulemaking Is a Thinly Veiled Attempt to Halt Regulation*, The Regulatory Review, May 18, 2017, https://www.theregreview.org/2017/05/18/funk-formal-rulemaking-halt-regulation/ (last visited June 21, 2017) (arguing that the judicial, trial-like procedures of formal rulemaking are fundamentally at odds with the nature of the legislative decision-making process that epitomizes rulemaking and asserting that the proposal is designed to increase the cost of rulemaking and retard regulatory, but not deregulatory, efforts); Richard J. Pierce, Jr., *A Good Effort, With One Glaring Flaw*, The Regulatory Review, May 8, 2017, https://www.theregreview.org/2017/05/08/pierce-good-effort-glaring-flaw/ (last visited June 21, 2017) (also noting that the judicial type formal hearing procedures included in the proposed legislation are useful for the determination of adjudicative facts, but serve no purpose when agencies are finding legislative facts in rulemaking proceedings). *See also* Daniel E. Walters, *Ditch the Flawed Legislative Proposal to Police Agency Communications*, The Regulatory Review, May 10, 2017, https://www.theregreview.org/2017/05/10/walters-proposal-agency-communications/ (last visited June 21, 2017) (criticizing the communications prohibitions in the Regulatory Accountability Act, which are similar to the prohibitions in the Regulatory Integrity Act).

131. H.R. 26, 115th Cong., 1st Sess. (2017), https://www.congress.gov/bill/115th-congress/house-bill/26 (last visited June 21, 2017).

132. *Id.* §§ 801-802.

133. However, all of the bills passed the House and several were reported out of committee in the Senate. *See* U.S. Senate Committee on Homeland Security and Government Affairs, *Senate Homeland*

filibuster in the Senate, and the corresponding requirement for a supermajority to enact legislation, has prevented Congress from adopting broader provisions to derail environmental and other regulation. Even if Congress succeeds in enacting legislation that imposes additional burdens on agency rulemaking, it will have succeeded because it adopted limits on agency rulemaking that were largely unnoticed by the general public, rather than because it mounted a direct assault on environmental rules and the administrative state.

IV. THE POWER OF THE PRESIDENT AND CONGRESS TO REPEAL OR REVISE EXISTING RULES

A. Congress' Power to Revise or Repeal Existing Rules

Congress and the President can also take steps to deconstruct the administrative state by repealing or weakening existing environmental regulations. At the beginning of the Trump Administration, Congress was able to revoke several environmental rules that were adopted by the EPA at the end of President Obama's Administration; however, Congress was only successful in revoking these rules because it used a streamlined legislative process that limited transparency and debate on the legislative activity.

The Congressional Review Act ("CRA") was enacted in 1996[134] as a tool to provide Congress with more control over administrative agency rulemaking after the Supreme Court invalidated the "legislative veto" process that Congress had routinely included in agency legislation as a check on rulemaking.[135] The CRA requires agencies to notify Congress when they adopt "major rules,"[136] and the Act delays the effective date of those rules for sixty days to allow Congress to review the rules and to decide whether to take action to overturn the rules.[137] If Congress

Security Committee Approves 17 Bills Including, Boots on the Border, Regulatory Reform and the Fair Chance Act, May 17, 2017, https://www.hsgac.senate.gov/media/majority-media/senate-homeland-security-committee-approves-17-bills-including-boots-on-the-border-regulatory-reform-and-the-fair-chance-act (last visited June 21, 2017).

134. Congressional Review Act of 1996, Pub. L. No. 104-121, tit. II, subtit. E, 110 Stat. 868-74 (codified as amended at 5 U.S.C. §§ 801-808 (2012)).

135. *See The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2165 (2009). The "legislative veto" process, which the Supreme Court invalidated in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), allowed one or both chambers of Congress to "veto" agency rules through a resolution of the chamber, without presentment to the President.

136. *See* 5 U.S.C. § 801(a)(1)(A) (2012). A "major rule" is a rule with an annual effect of $100 million or more on the economy, a major impact on prices, or other significant adverse effects on the economy. *Id.* § 804(2).

137. *Id.* §801(a)(3).

objects to a rule adopted by the agency, the CRA creates a streamlined legislative process that Congress can use to revoke the agency's rule through a joint resolution of disapproval.[138] The CRA also includes several features limiting the ability of a Congressional minority to block the resolution of disapproval.[139] Significantly, the Act prohibits the use of filibuster in the Senate,[140] limits the power of any party to keep the resolution in committees,[141] and prohibits amendments and limits debate on the Senate floor.[142] The net effect of those procedures is to reduce the transparency of the process and to reduce deliberation on the legislation. Ultimately, if the joint resolution is passed by both houses of Congress and signed by the President, the agency's rule is revoked *and*, per the legislation, the agency may not adopt a new rule that is substantially similar to the revoked rule unless Congress passes a new law authorizing the agency to do so.[143] The Act is limited, however, in that it only allows Congress to revoke, and not to modify, a rule through the streamlined procedures.[144] Thus, if a majority of Congress supports part of the rule, but oppose other parts, they cannot simply revoke the portion that they do not support.

Between 1996 and 2017, the CRA was only successfully used one time to overturn an agency regulation.[145] In the past, the President's power to veto Congressional resolutions to overturn Executive Branch rules frequently prevented Congress from successfully using the Act.[146] However, with the election of President Trump, the same political party controlled the House and the Senate, and Congress and the new President were united in opposition to several rules adopted by the outgoing Administration.[147] The election, thus, created the perfect storm

138. *Id.*

139. *See The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2176-2177 (2009).

140. *See* 5 U.S.C. §802(d) (2012).

141. If a committee has not reported out a disapproval resolution within 20 days after a "major rule" is submitted to Congress, as few as 30 Senators can bring the resolution to the Senate floor by a petition. *See* 5 U.S.C. §802(c) (2012). In addition, when a disapproval resolution is sent from the House to the Senate or from the Senate to the House, it cannot be referred to a committee in the receiving chamber. *Id.* §802(f)(1).

142. *Id.* §802(d). The law limits debate on the resolution to 10 hours, equally divided between supporters and opponents. *Id.*

143. *Id.* §801(b).

144. *Id.* § 802(a). Since the resolution that passes each chamber will be identical, there is also no conference report for the resolution. *See* 142 Cong. Rec. 8199 (1996) (statement of Sens. Nickles, Reid and Stevens).

145. *See* 122 HARV. L. REV. at 2169.

146. *See* Chelsea Harvey, *Republicans Can Cancel Some Obama Environment Rules. But They'll Have to Choose Carefully*, WASH. POST, Jan. 4., 2017, http://tiny.cc/oi4yly (last visited June 21, 2017).

147. *Id. See also* Michael Grunwald, *Trump's Secret Weapon Against Obama's Legacy,* Politico, Apr. 10, 2017, http://www.politico.com/magazine/story/2017/04/donald-trump-obama-legacy-215009 (last visited June 21, 2017).

for the use of the CRA.[148]

Within the first few months after President Trump's inauguration, Congress successfully passed, and the President signed, 13 joint resolutions revoking rules under the CRA.[149] Several of the resolutions targeted environmental rules, including a "stream protection" rule from the DOI designed to protect water quality from coal mining pollution;[150] a land use planning rule from the DOI designed to increase public involvement in, transparency of, and efficiency of, planning for uses of public lands;[151] and a rule from the DOI that addressed protection of endangered and threatened species on National Wildlife Refuges in Alaska.[152]

Critics of the CRA complain that the law allows Congress to revoke rules that have been developed after years of work by agencies involving significant opportunities for public participation and full consideration of a wide range of input through resolutions that are prompted by affluent corporate donors and are enacted with no hearings and little public debate.[153] During the first few months of 2017, the 13 rules that were targeted for revocation under the Congressional Review Act took an average of three years to complete, while the revocation legislation for the rules that were successfully revoked under the law generally took about 38 days to complete.[154] The Stream Protection Rule that Congress revoked with legislation that passed in 3 days was designed to update rules that had not been amended in thirty years and the rule was adopted after seven years of development by the agency and the consideration of more than 95,000 public comments over a 102-

148. *See* Harvey*, supra* note 146*,* Grunwald*, supra* note 147. *See also* Center for Progressive Reform, *CRA By the Numbers,* http://www.progressivereform.org/CRA_numbers.cfm (last visited June 21, 2017).

149. *See* Center for Progressive Reform, *supra* note 148. By early April, the 11 disapproval resolutions that the President had signed into law were "the only substantive bills" he had signed at that time. *See* Grunwald, *supra* note 147. The only disapproval resolution that did ***not*** pass both chambers of Congress was a resolution that would have repealed a rule limiting methane emissions from drilling operations on public lands. *See* Juliet Eilperin & Chelsea Harvey, *Senate Unexpectedly Rejects Bid to Repeal a Key Obama-era Environmental Regulation*, WASH. POST, May 10, 2017, http://tiny.cc/2i4yly (last visited June 21, 2017). The resolution was rejected in the Senate by a vote of 51-49. *Id.* That environmental victory is likely to be short-lived, though, as the new Administration has identified the rule as a rule that the agency plans to repeal. *Id.*

150. *See* Pub. L. No. 115-5, 115th Cong., 1st Sess. (2017).

151. *See* Pub. L. No. 115-12, 115th Cong., 1st Sess. (2017).

152. *See* Pub. L. No. 115-20, 115th Cong., 1st Sess. (2017).

153. *See* Center for Progressive Reform, *supra* note 148. The Center for Progressive Reform notes that "financial disclosure data reveal that the lead sponsors of [the] CRA resolutions have received significant campaign contributions from the . . . industries that would most directly benefit from the regulatory rollbacks that the resolutions would accomplish." *Id.* Similarly, a January 2017 report by Public Citizen found that industries supporting CRA legislation spent more than $800 million lobbying Congress during 2016. *See* Grunwald, *supra* note 147.

154. *Id.*

day comment period.[155]

Critics also complain that the revoked rules were generally authorized by legislation that was enacted with broad bi-partisan support and that Congress was using "back door" procedures[156] to revoke the rules because it would not be possible to revoke them through a transparent deliberative process where the public was fully aware of what Congress was doing.[157]

Although Congress successfully used the CRA to revoke 13 agency rules adopted in the last few months of 2016, the reach of the law is ultimately limited. As noted above, it only authorizes Congress to use the streamlined process to revoke a rule for a limited period of time after the rule has been adopted.[158] The time period for Congress to act and to revoke rules adopted during the last Presidential Administration expired in May 2017.[159] If Congress passes any more resolutions under the CRA during the next four years, they will be resolutions to overturn rules adopted by the new Administration, so the President will likely be willing to veto the resolutions. Congress is, however, attempting to increase its power under the CRA by proposing legislation, the Midnight Rules Relief Act of 2017,[160] that would allow Congress to reach back further in time to revoke agency rules and to revoke multiple agency

155. *See* 81 Fed. Reg. 93,066 (Dec. 20, 2016). The agency's economic analysis of the rule suggested that it would lead to an *increase* in 156 full time jobs and a decrease in coal production by .08% per year. *Id.* The land use planning rule that Congress revoked with legislation that passed in about two months was also designed to update rules that had not been amended in thirty years and the rule was adopted after two years of development by the agency and the consideration of thousands of public comments over a 100 day comment period. *See* 81 Fed. Reg. 89,580 (Dec. 12, 2016).

156. *See* Grunwald, *supra* note 147.

157. *See* Center for Progressive Reform, *supra* note 148. The Center for Progressive Reform notes that "the margins for passage of the underlying statutes for the rules targeted under the CRA in the House and Senate were 245 and 65, while the margins for passing the CRA resolutions were 49 and 6." *Id.* As Michael Grunwald reported, most of the regulations that were revoked under the CRA "were uncontroversial with the public but bitterly opposed by corporate interests . . . ." *See* Grunwald, *supra* note 147.

158. A disapproval resolution must be submitted in the House or Senate within 60 days after Congress receives the rule for Congress in order for Congress to consider the resolution under the streamlined provisions of the CRA. *See* 5 U.S.C. §802(a) (2012). For rules that are submitted to Congress during the final sixty days of a Congressional session (which also corresponds, occasionally, to the end of a Presidential Administration), disapproval resolutions may be submitted within 75 legislative days after the next session of Congress convenes. *Id.* § 801(d)(1). As long as the process begins within the time provided by the CRA, Congress can pass a joint resolution that revokes a rule that has already taken effect. *See* Richard S. Beth, *Disapproval of Regulations by Congress, Procedure under the Congressional Review Act*, Cong. Res. Serv. No. 7-5700, Oct. 10, 2001, http://www.au.af.mil/au/awc/awcgate/crs/rl31160.pdf (last visited June 21, 2017). If Congress enacts a resolution disapproving a rule that has already taken effect, the rule "shall be treated as though [it] had never taken effect." *See* 5 U.S.C. §801(f) (2012).

159. *See* Stephen Dinan, *GOP Rolled Back 14 of 15 Obama Rules Using Congressional Review Act,* WASH. TIMES, May 15, 2017, http://tiny.cc/ej4yly (last visited June 21, 2017).

160. *See* H.R. 21, 115th Cong., 1st Sess. (2017), https://www.congress.gov/bill/115th-congress/house-bill/21 (last visited June 21, 2017).

rules in a single joint resolution.[161] Under the existing CRA, Congress must pass a separate joint resolution to revoke each rule that it intends to revoke.[162] While the proposed legislation would increase Congressional control over agency rulemaking, it must be adopted through the normal legislative process, which subjects it to filibuster and control through committees and other procedural maneuvers. So far, the Midnight Rules Relief Act remains merely a proposal languishing in the Senate.

B. The President's Power to Revise or Repeal Existing Regulations

While the President does not generally have direct authority to revise or repeal existing regulations, the President can use the Appointment Power, Budget Power, and other Executive authorities to encourage agencies to revise or repeal regulations.[163] The President can do that informally through conversations and communications with agency leaders or more formally through means such as an Executive Order. Since his inauguration, President Trump has issued an Executive Order that very broadly requires agencies to review and potentially revise or repeal existing regulations[164] and additional Executive Orders that target specific regulations or actions that the President would like to see revised or repealed.[165]

1. Executive Order 13,777

About one month after his inauguration, President Trump signed Executive Order 13,777 to "alleviate unnecessary regulatory burdens placed on the American people."[166] The Order requires each agency to

161. *Id.* §2(a).

162. *See* 5 U.S.C. §802(a) (2012).

163. *See* Beerman, *supra* note 102, at 983, 1000-1001.

164. *See* Executive Order 13,777, *Enforcing the Regulatory Reform Agenda,* 82 Fed. Reg. 12,285 (March 1, 2017), https://www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda (last visited June 21, 2017).

165. *See* Executive Order 13,778, *Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule,* 82 Fed. Reg. 12,497 (Feb. 28, 2017), https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic (last visited June 21, 2017); Executive Order 13,783, *Presidential Executive Order on Promoting Energy Independence and Economic Growth*, 82 Fed. Reg. 16,093 (Mar. 31, 2017), https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economi-1 (last visited June 21, 2017); Exec. Order No. 13,792 of April 26, 2017*, Review of Designations Under the Antiquities Act*, 82 Fed. Reg. 20429 (Apr. 26, 2017), https://www.whitehouse.gov/the-press-office/2017/04/26/presidential-executive-order-review-designations-under-antiquities-act (last visited June 21, 2017).

166. *See* Exec. Order 13,777, *supra* note 164, §1.

appoint a Regulatory Reform Officer for the agency[167] and to create a Regulatory Reform Task Force to evaluate existing regulations and to make recommendations regarding the repeal, replacement, or modification of regulations.[168] In particular, the Order requires agencies to identify regulations that "eliminate jobs, or inhibit job creation" or "impose costs that exceed benefits."[169] The Order requires each task force to seek input from entities significantly affected by federal regulations and, within 90 days, to prepare a report for the agency head identifying the regulations for repeal, replacement, or modification.[170]

In concept, the Order issued by the President is not unusual. Every President since President Carter has required agencies to review existing regulations against specific criteria articulated by the President to decide whether to revise or repeal regulations.[171] In addition, the Regulatory Flexibility Act requires agencies to review regulations that have a significant impact on small businesses even ten years.[172] Even without the impetus of those formal review requirements, agencies are constantly re-examining their regulations to determine whether they need to be repealed, replaced, or modified.[173] When not prompted by Executive Orders or formal review requirements, agencies generally revise, repeal, or modify their rules in response to pressure from regulated entities.[174]

While the concept of the Executive Order is not novel, the President and Executive agencies appear to be pursuing the review process much more vigorously than prior Administrations.[175] Within a month after the President Trump issued the Executive Order, EPA Administrator Scott Pruitt appointed the agency's Regulatory Reform Officer and Regulatory Reform Task Force[176] and, on April 13, 2017, posted a

167. *Id.* §2.

168. *Id.* §3.

169. *Id.* The Order also requires agencies to identify regulations that "are outdated, unnecessary, or ineffective" or "create serious inconsistency or otherwise interfere with regulatory reform initiatives and policies." *Id.*

170. *Id.*

171. *See* Wagner, et. al, *supra* note 54, at 186; Beerman, *supra* note 102, at 948, 982.

172. *See* 5 U.S.C. §610(b) (2012).

173. See Wagner, et al., *supra* note 54, at 190. Professors Wagner and her associates reviewed 183 rules across three agencies over a forty year period and found that 73% of the rules were revised at least once and often multiple times over the study period. *Id.* at 201-202. They also found that only about 1% of the rule revisions resulted from formal retrospective review required by an Executive Order or statute. *Id.* at 217.

174. *Id.* at 228. The study conducted by Professors Wagner and her associates found that regulated industries were among the most important motivators for rule adjustments, and that industries prompted revisions through petitions, informal communications with agencies and threats of litigation. *Id.*

175. *See* Dennis, *EPA Asked the Public About Which Regulations to Gut, supra* note 22.

176. *See* Memorandum from E. Scott Pruitt to Acting Deputy Administrator, General Counsel, Assistant Administrators, Inspector General, Chief Financial Officer, Chief of Staff, Associate

notice in the Federal Register seeking public comments regarding "regulations that may be appropriate for repeal, replacement or modification."[177] As noted earlier, the broad public support for environmental protection was demonstrated by the hundreds of thousands of comments that were submitted to the agency, urging the agency to not repeal, replace, or modify *any* of the environmental regulations.[178]

On its face, the charge of the Executive Order seems reasonable and moderate. However, public statements from the President and agency officials suggest that the process, coupled with the deregulatory requirements of Executive Order 13,771, will lead to significant deregulatory activity by agencies.[179] If implementation of the Executive Order leads to significant deregulatory activity in the environmental arena, it should be troubling, since Executive Orders from Presidents of both parties have consistently required agencies, for decades, to conduct cost benefit analyses for proposed rules and to refrain from adopting rules when the benefits do not justify the costs.[180] Consequently, unless the costs of an existing regulation are considerably higher than initially projected or the benefits achieved by the regulation are considerably lower than expected, most rules should not fail a retrospective cost benefit review.[181] Indeed, it is frequently the case that retrospective review demonstrates that cost benefit analyses *overestimated the costs* or *underestimated the benefits* of proposed rules.[182] In addition, any

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Administrators, Regional Administrators, Director, Office of Small and Disadvantaged Business Utilization, Regarding Executive Order 13777: Enforcing the Regulatory Reform Agenda, Mar. 24, 2017, https://www.eenews.net/assets/2017/04/04/document_gw_01.pdf (last visited June 21, 2017).

177. *See* 82 Fed. Reg. 17,793 (Apr. 13, 2017).

178. *See supra* note 22.

179. *See, e.g.,* Robinson Meyer, *How the U.S. Protects the Environment, From Nixon to Trump*, The Atlantic, Mar. 29, 2017, https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/ (last visited June 21, 2017).

180. *See, e.g.,* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (January 21, 2011) (issued by President Obama); Exec. Order No. 13,422, 72 Fed. Reg. 2763 (January 23, 2007) (issued by President George W. Bush); Exec. Order No. 12,866, 58 Fed. Reg. 51735 (October 4, 1993) (issued by President Clinton); Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1981) (issued by President Reagan).

181. In a 2012 report to Congress, OMB retrospectively reviewed the costs and benefits of major regulations between 2001 and 2011 and found that the estimated annual benefits for the rules between $141 billion and $691 billion, compared to annual costs between $42.4 billion and $66.3 billion. *See* GAO, *Report to Congressional Requesters, EPA Should Improve Adherence to Guidance for Selected Elements of Regulatory Impact Analyses* (July 2014), http://www.gao.gov/assets/670/664872.pdf (last visited June 21, 2017). *See also* Office of Management and Budget, *Regulatory Analysis: Circular A–4 to the Heads of Executive Agencies and Establishments*, 68 Fed. Reg. 58366 (2003), https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/ (last visited June 21, 2017). The EPA rules accounted for 60-82% of the benefits and 43-53% of the costs. *See* GAO Report, *supra*.

182. *See, e.g.,* W. Harrington et al., *On the Accuracy of Regulatory Cost Estimates,* http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-99-18.pdf (last visited June 21,

rules that may be repealed pursuant to the Executive Order will likely have been adopted following long processes involving substantial participation by the public and the regulated entities, as well as, in many cases, scientific advisory boards or other advisory boards;[183] the rules will either have survived or avoided legal challenges. Further, the rules will have survived both the past formal and informal review processes.[184] Thus, if there are a significant number of regulations that need to be repealed, replaced, or modified pursuant to the Executive Order, the motivation for the changes will likely be based on political factors, rather than on scientific or technical expertise.

While the Trump Administration may have ambitious goals for repealing and replacing environmental regulations pursuant to the Executive Order, many roadblocks stand in the way of those goals.

First, as noted earlier, many environmental regulations are mandated by federal law.[185] While the agency may have some discretion in the manner in which the regulations are formulated, the agency may not have the discretion to simply repeal those regulations. To the extent that the EPA or any other agency attempts to repeal such regulations, they would likely be sued and the repeal of the rules would be invalidated.[186]

However, many other environmental regulations are not mandated by federal law or, even if the agencies are required to adopt regulations, the environmental statutes provide the agencies with broad discretion regarding the manner in which those regulations are drafted.[187] For those

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2017); Office of Management and Budget, *Regulatory Analysis: Circular A–4 to the Heads of Executive Agencies and Establishments*, 68 Fed. Reg. 58366 (2003), https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/ (last visited June 21, 2017); Pew Charitable Trusts, *Government Regulation: Costs Lower, Benefits Greater Than Industry Estimates* (2015),
http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/05/government-regulation-costs-lower-benefits-greater-than-industry-estimates (last visited June 21, 2017).

183. In addition to requirements in many environmental laws for EPA consultation with advisory boards, *see, e.g.,* 42 U.S.C. § 7409(d)(2) (2012) (requiring EPA consultation with the Clean Air Scientific Advisory Committee when developing rules establishing national air quality standards under the Clean Air Act), OMB guidance requires the EPA and other agencies to subject their influential rules to elaborate peer review. *See* Office of Management and Budget, *Final Information Quality Bulletin for Peer Review,* 70 Fed. Reg. 2664, 2667-2672 (Jan. 14, 2005).

184. *See supra* notes 171-174, and accompanying text. Agencies routinely revise or repeal regulations without the prodding of formal regulatory review processes for a variety of reasons. Occasionally, agencies revise rules to correct mistakes that were made in developing the rule. *See* Wagner, et al, *supra* note 54, at 187-188. At other times, agencies revise rules because scientific, technical and economic knowledge relevant to the rule changes over time "as more and better information becomes available, models improve, and cause-effect relationships become more or less apparent." *Id.* Finally, agencies frequently revise rules to remain current with changing public attitudes and political preferences. *Id.*

185. *See supra* notes 97-99, and accompanying text.

186. *Id.*

187. *See supra* note 52. *See also* O'Connell, *Agency Rulemaking, supra* note 54, at 482-483.

regulations, however, the White House faces substantial obstacles in its deregulatory quest. The biggest obstacle to the President is that the agency must normally use the notice and comment rulemaking process if it wishes to repeal, replace, or modify a regulation that was adopted through notice and comment rulemaking.[188] The President's "two for one" Executive Order explicitly acknowledges that repeals of existing agency regulations must follow the procedures of the APA.[189] While agencies might rely on the "good cause" exception to the notice and comment procedures to justify temporarily delaying the effective date of rules for review by the new Administration, as discussed above, it is unlikely that they could rely on the exception to justify repealing or modifying existing rules without going through the normal notice and comment process.[190]

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188. *See* Beerman, *supra* note 102, at 982-983; Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State,* 94 VA. L. REV. 889, 980 (2008) [hereinafter "O'Connell, *Political Cycles*"]. While agencies may have broad authority to interpret the law they administer through adjudication or rulemaking, including guidance documents, and courts will defer to the agency's choice of one method of policymaking over another, *see S.E.C. v. Chenery Corp.,* 332 U.S. 194, 203 (1947), once the agency has interpreted the law through a legislative rule, it can only change that rule through a subsequent legislative rule. *See Tunik v. Merit Sys. Prot. Bd.,* 407 F.3d 1326 (Fed. Cir. 2005); *Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Labor Relations Auth.,* 777 F.2d 759 (D.C. 1985). If the agency is merely clarifying ambiguous terms in a rule, rather than changing the rule, though, the agency can accomplish that through nonlegislative rules, such as interpretive rules or guidance.

189. *See* Exec. Order. No. 13,771, *supra* note 92, §2(c).

190. While it is impossible to state categorically in the abstract that none of the revisions would be eligible for the "good cause" exception, the exception applies when an agency finds that the notice and comment process would be "impracticable, unnecessary or contrary to the public interest" and the exception is interpreted narrowly. *See supra* note 111. The notice and comment process may be "impracticable" when "due and timely execution of [an agency's] functions would be impeded by" the process. *See* U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 (1947) [hereinafter Attorney General's Manual]. The process may be "unnecessary" when the agency action is "a minor rule or amendment in which the public is not particularly interested," *id.* at 31, or makes changes that are "technical, uncontroversial, and have little or no impact on regulated entities." *See* Rosenhouse, *supra* note 111, §§ 6-9. Finally, the process may be contrary to the public interest when "the interest of the public would be defeated by any requirement of advance notice." See Attorney General's Manual, *supra* at 31. Professors Michael Asimov and Ronald Levin suggest that the "public interest" aspect of the exception is best applied when an agency must act "to meet a serious health or safety problem, or some other risk of irreparable harm…" *See* Michael Asimow & Ronald M. Levin, STATE AND FEDERAL ADMINISTRATIVE LAW 308-09 (3d ed. 2009). In general, the "good cause" exception primarily applies when agencies are dealing with "emergencies and typographical errors, plus the occasional situation in which advance notice would be counterproductive*." See* Kristin E. Hickman*, Coloring Outside the Lines: Examining Treasury's (Lack Of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1782 (2007). In light of the publicity surrounding the Administration's bold statements regarding deconstruction of the administrative state, it is likely that most of the rules targeted for revision would *not* relate to emergencies typographical errors or the occasional situation in which advance notice would be counterproductive. Due to the likelihood of litigation to challenge repeals in accordance with the Executive Order, the Administration will likely avoid relying on the "good cause" exception to dispense with "notice and comment" rulemaking for rule repeals or revisions except in very limited situations.

Notice and comment rulemaking presents several impediments to the President's deregulatory agenda. First and foremost, the process is time consuming and resource intensive.[191] Scholars have repeatedly asserted that the rulemaking process has become ossified[192] and that it could take agencies five years or more to adopt major rules through the process.[193] Several factors are blamed for ossification,[194] including (1) executive branch requirements for OMB review and approval of rules,[195] requirements for agencies to evaluate and report on the costs and benefits of rules[196] and the impacts of rules on takings,[197] federalism,[198] small businesses, children's health,[199] and other topics; (2) legislatively imposed analytical and procedural requirements under the Small Business Regulatory Enforcement Fairness Act,[200] the Information Quality Act,[201] the Paperwork Reduction Act,[202] and other laws;[203] and

191. *See* Aaron Nielsen, *Sticky Regulations,* B.Y.U. Law Res. Paper No. 17-11, (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2950732 (last visited June 21, 2017); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process,* 41 DUKE L.J. 1385, 1385-86 (1992) [hereinafter "McGarity, *Some Thoughts*"].

192. *See* Nielsen, *supra* note 191, at 2, 16-17 (expressing some skepticism about the ossification claim); Johnson, *Ossification's Demise?, supra* note 67, at 101; Johnson, *Good Guidance, supra* note 67, at 700-701; Stephen M. Johnson, *Ruminations on Dissemination: Limits on Administrative and Judicial Review under the Information Quality Act*, 55 CATH.. U. L. REV. 59, 79 (2005); Johnson, *Internet, supra* note 67, at 282-84; McGarity, *Response, supra* note 67, at 528-36; Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking,* 75 TEX.. L. REV. 483, 483-90 (1997); Pierce, *Seven Ways, supra* note 67, at 60-62; McGarity, *Some Thoughts, supra* note 191, at 1385-86; Jerry L. Mashaw & David L. Harfst, THE STRUGGLE FOR AUTO SAFETY 9-25 (1990) (discussing ossification of National Highway Traffic Safety Administration (NHTSA) rulemaking).

193. *See* McGarity, *Some Thoughts, supra* note 191, at 1385 (asserting that OSHA and FTC rulemakings generally took more than five years).

194. Most commentators assert that all three branches of government are responsible for the ossification. *See* Nielsen, *supra* note 191, at 8; Johnson, *Ossification's Demise?, supra* note 67, at 103; McGarity, *Some Thoughts, supra* note 191, at 1385.

195. *See* Exec. Order No. 12,866, *supra* note 180.

196. *Id.* Executive Order 12,866 requires agencies to prepare a cost benefit analysis of "significant" rules and to adopt regulations only upon a "reasoned determination that the benefits of the intended regulation justify its costs." *Id.*

197. *See* Exec. Order No. 12,630, 53 Fed. Reg. 8859, 8859–61 (Mar. 18, 1988).

198. *See* Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999).

199. *See* Exec. Order No. 13,045, 62 Fed. Reg. 19,885 (Apr. 23, 1997).

200. *See,* Small Business Regulatory Enforcement Fairness Act of 1996, 15 U.S.C. § 657, 5 U.S.C. §§ 801–808 (2012). The law requires agencies to provide Congress with cost benefit analyses, regulatory flexibility analyses, and other information that is prepared for major rules that impact small businesses. *Id.* §602-604, 801.

201. *See* 44 U.S.C. § 3516 (2012) (requiring agencies to respond to challenges to the "quality" of information disclosed in, or relied upon in, rulemaking).

202. *See* 44 U.S.C. §§ 3501–1549 (2012) (requiring agencies to submit information collection requests to OMB for rules that require submission of information by 10 or more persons, among other responsibilities).

203. *See, e.g.,* The Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (2012); Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501–1571 (2012) (mandating thorough analysis of rules if they would cause expenditures of more than $100 million by state, local, or tribal governments.) The

(3) judicially imposed requirements.[204] While courts have not imposed additional procedural requirements on agencies, they have interpreted the provisions of the APA broadly[205] to require agencies to provide significant amounts of information in proposed rulemakings,[206] to limit the extent to which final rules deviate from proposed rules,[207] to consider and reply rationally to comments from the public,[208] and to supply detailed explanations for final rules, indicating that they have considered all of the relevant factors and alternatives in crafting the final rule.[209]

Agencies tend to spend a significant amount of time ensuring that they comply with the procedures imposed by Congress and the courts because they recognize that they are likely to be sued when they finalize the rulemaking.[210] Former EPA Administrator William Ruckleshaus asserted that 80% of the agency's rules are challenged,[211] and various

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Regulatory Flexibility Act requires agencies to prepare a "regulatory flexibility analysis" for all "significant" rules, identifying the impact of the rule on small businesses and identifying alternatives to the approach taken in the rules and the impacts of the alternatives. *See* 5 U.S.C. §603(a) (2012). It also requires agencies to publish a regulatory agenda in the Federal Register twice per year, identifying rules that the agencies expect to finalize that are likely to have a significant economic impact on small businesses. *Id.* §605(b).

204. *See* Nielsen, *supra* note 191, at 10; Johnson, *Ossification's Demise?, supra* note 67, at 103.

205. *See* McGarity, *Some Thoughts, supra* note 191, at 108.

206. *See* Nielsen, *supra* note 191, at 10-11 (discussing the *Portland Cement* doctrine, created by the D.C. Circuit to require agencies to disclose data on which a rule is based as part of the notice of proposed rulemaking, in order to ensure that the public has an "opportunity to comment" on the data, per the requirements of the APA, 5 U.S.C. § 553(c).); *Portland Cement Association v. Ruckelshaus,* 486 F.2d 375 (D.C. Cir. 1973).

207. *See* Nielsen, *supra* note 191, at 11-12 (discussing the judicial interpretation of the "notice" and "comment" requirements of the APA, 5 U.S.C. § 553(b) & (c), as mandating that a final rule must be a "logical outgrowth" of the proposed rule).

208. *See, e.g., United States v. Nova Scotia Food Products Corp.,* 588 F.2d 240, 252-253 (2d Cir. 1977). *See also* Nielsen, *supra* note 191, at 11 (discussing the judicial interpretation of the "concise general statement" requirement of the APA, 5 U.S.C. § 553(c), as a requirement that agencies respond to all material or significant comments that they receive); McGarity, *Some Thoughts, supra* note 191, at 108. This requirement is becoming more onerous for agencies in the e-rulemaking era, as some rulemakings have generated hundreds of thousands of comments that must be reviewed. *See, e.g.*, Eric Lipton & Coral Davenport, *Critics Hear E.P.A.'s Voice in 'Public Comments'*, N.Y. TIMES, May 19, 2015, http://www.nytimes.com/2015/05/19/us/critics-hear-epas-voice-in-public-comments.html (last visited June 21, 2017) (noting that the EPA received more than 1 million comments on its 2015 rulemaking to define "waters of the United States" under the Clean Water Act).

209. *See* Nielsen, *supra* note 191, at 12 (discussing the impact of "hard look" judicial review on agency decisionmaking in notice and comment rulemaking).

210. *See supra* note 43 (discussing the avenues for judicial review). *See also* Nielsen, *supra* note 191, at 2-3; Johnson, *Ossification's Demise?, supra* note 67, at 101; Johnson, *Good Guidance, supra* note 67, at 701; Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1296 (1997); McGarity, *Some Thoughts, supra* note 191, at 1412; Philip K. Howard, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA 87 (1994); James Q. Wilson, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 284 (1989).

211. *See* Johnson, *Ossification's Demise?, supra* note 67, at 101-102; William D. Ruckelshaus, *Environmental Negotiation: A New Way of Winning, Address to Conservation Foundation's Second*

studies have found that agency rules are invalidated in 30-50% of the cases in which they are challenged.[212] In order to maximize their chance of success in the inevitable litigation, agencies spend more time preparing rules to ensure compliance with the applicable laws.

In addition to the time that it takes for agencies to finalize a rule after issuing a notice of proposed rulemaking, agencies routinely spend several years developing rulemaking proposals before issuing a notice of proposed rulemaking.[213]

While the current executive, legislative and judicial procedures for rulemaking ensure that the process will be time consuming and resource intensive for agencies, the legislation introduced by Congress in 2017 will only compound the problem for agencies. If the legislation passes, agencies will have to prepare and evaluate even more information to justify a rulemaking proposal, including a proposal to repeal or revise existing rules.[214] In addition, agencies may have to utilize time consuming and expensive trial-type formal hearing processes to promulgate such rule revisions or repeals.[215] Further, they will have to disclose more information in the process, including a comprehensive list of every blog post, tweet, and other communication regarding the rule.[216] If agencies fail to follow any of those procedures, fail to consider factors that the new legislation will require them to consider or engage in communications that will be prohibited by the new legislation, those mis-steps will constitute additional grounds upon which opponents of the rule revision or repeal can challenge the agency's action. The same devices that Congress hopes will prevent agencies from adopting new regulations can be used to prevent agencies from pursuing a

National Conference on Environmental Dispute Resolution (Oct. 1, 1984), *cited in* Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking,* 3 YALE J. ON REG. 133, 134 (1985). More specifically, Ruckleshaus indicated that 80% of the agency's *major* rules were challenged. *Id.* In a study of EPA rules finalized between 2001 and 2005, the author of this article found that 75% of the EPA's "economically significant" rules were challenged. *See* Johnson, *Ossification's Demise?, supra* note 67, at 104.

212. *See* Johnson, *Ossification's Demise?, supra* note 67, at 102; Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation & the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 790 (2008) (analyzing 93 environmental law cases decided between 2003 and 2005 and finding that the courts affirmed the EPA's decisions in 69% of the cases); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825, 849 (2006) (analyzing 183 federal appellate cases reviewing the EPA actions and finding that the courts deferred to the agency 64% of the time). Pierce, *Seven Ways, supra* note 67, at 84.

213. *See* Wagner, et al, *supra* note 54, at 185; Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 143–44 (2011) (finding that the EPA spent, on average, four years developing air toxic standards under the Clean Air Act before issuing notices of proposed rulemaking for those standards).

214. *See supra* note 119.

215. *See supra* note 118.

216. *See supra* note 119, 126-129, and accompanying text.

deregulatory agenda to repeal and revise existing regulations.

The procedures required for notice and comment rulemaking are only *one* impediment to the White House's efforts to aggressively repeal and replace existing regulations. Assuming that the EPA and other agencies ultimately grind their way through the notice and comment rulemaking process and issue final rules to repeal or revise existing regulations, the agency action will have to withstand judicial review. The standards that a reviewing court will apply to an agency's repeal or revision of a rule are the same standards that the court would apply to the initial promulgation of the rule.[217] Consequently, the repeal or revision of the rule will need to withstand "hard look" arbitrary and capricious review, meaning that the agency will need to provide a detailed explanation for its decision and demonstrate that it considered all of the relevant factors and alternatives to the action taken.[218] Courts have long held that agencies interpretations of the law and their regulations are not "carved in stone" and that agencies can change those interpretations and regulations over time.[219] However, when they change them, they must provide a reasonable explanation for the change.[220]

Even though the primary *motivation* for many of the repeals or revisions of regulations that will follow the Executive Branch review under Executive Order 13,777 will be political, it is fairly clear that an agency cannot simply identify a change in Presidential administration as the *reason* for a change in policy or the repeal or revision of a regulation. A change in Administration is a logical and reasonable stimulus for a re-evaluation of priorities and a re-evaluation of the scope of discretion accorded to agencies by law and the manner in which the agencies have exercised that discretion.[221] Ultimately, however, agencies must justify any changes to their legal interpretations or

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217. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 41-44 (1983) ("*State Farm*") (applying the arbitrary and capricious standard to the recission of a rule by the Department of Transportation). *See also* O'Connell, *Political Cycles, supra* note 188, at 906.

218. *See State Farm*, 463 U.S. at 42-43. The other APA standards of judicial review *also* apply. *See* 5 U.S.C. § 706 (2012). Thus, a court could strike down a rule revision or repeal if, for instance, the court finds that the agency action is outside its statutory authority, *id.* §706(2)(C), unconstitutional, *id.* §706(2)(B), or in violation of procedures required by law. *Id.* §706(2)(D).

219. *See National Cable & Telecommunications Association v. Brand X Internet Services,* 545 U.S. 967,981-982 (2005) ("*Brand X*"); *Chevron,* 467 U.S. at 863-864; *State Farm,* 463 U.S. at 41-42.

220. *See State Farm,* 463 U.S. at 42-43.

221. *See Brand X,* 545 U.S. at 981; *State Farm,* 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part); *National Association of Home Builders v. EPA,* 683 F.3d 1032, 1043 (D.C. Cir. 2012). As Justice Rehnquist stated in his concurring and dissenting opinion in *State Farm,* "[a] change in administration . . . is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." *See State Farm,* 463 U.S. at 59.

regulations by explaining how and why the weighing of priorities within their discretion under the law has changed, so that they now are interpreting and applying the law in a different manner, and they must demonstrate that their new interpretation is within the discretionary authority granted to them by law. Although agencies' decisions may be *influenced* by purely political reasons, "hard look" review forces agencies to justify their actions on technocratic, statutory, or scientific bases.[222]

Professor Kathryn Watts and other academics have argued that "hard look" review forces agencies to hide the real reasons for their decisions and that courts should allow agencies to justify their actions on the basis of political influences in appropriate cases.[223] Watts suggests that agencies should be allowed to consider political influences as an appropriate justification for action when the influences seek to further policy considerations or public values, but should not be allowed to consider them as justification when the agency is simply implementing raw or partisan politics.[224]

The courts and many academics, including Professor Mark

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222. *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5-7, 14 (2009).

223. *See* Watts, *supra* note 222, at 23-29, 32-43. Watts espouses a "political accountability" model of agencies, as opposed to an "expertise-based" model. *Id.* at 32. Under that model, she argues that agencies are legitimate because they are politically accountable, so agencies should be able to rely on political influences from the President, other members of the Executive Branch and Congress when acting as "mini-legislatures" through rulemaking. *Id.* at 8. Proceeding from that basis, she argues that while *Chevron* and some other administrative law doctrines have shifted away from a focus on agency expertise and embraced a focus on political accountability, "hard look" review has not yet done so and should be revised to reflect the shift adopted in other doctrines. *Id.* at 12-13. She also argues that allowing courts to consider the influence of political factors on agency decision-making as part of "hard look" review will encourage agencies to disclose the real reasons for their decisionmaking, promoting more transparent agency decisionmaking. *Id.*

Like Professor Watts, Dean Christopher Edley has argued that agencies should "frankly acknowledge the role of political, ideological, or subjective analyses in their reasons and findings," *see* Christopher F. Edley, Jr., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 190 (1990), and that courts, through arbitrary and capricious review, should give "credit [to] politics as an acceptable and even desirable element of decisionmaking." *Id.* at 192. Similarly, in 2001, before she was appointed to the Court, Justice Kagan wrote a law review article suggesting that courts should alter hard look review to look for political factors that demonstrate presidential leadership and accountability. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2380-2383 (2001).

224. *See* Watts, *supra* note 222, at 8-9. She recognizes that distinguishing between acceptable and unacceptable political influences may be difficult, but suggests that it might be appropriate for agencies to rely on political influences when they are designed to advance the public interest and public values, rather than merely caving in to interest group pressure. *Id.* at 8-9, 53. As examples, she suggests that it would be appropriate for an agency to rely on a pro-choice statement by a President to support a regulatory decision that advances that pro-choice agenda, but it would be inappropriate for the agency to make the same decision simply because the President received substantial financial support from pro-choice organizations during the Presidential campaign and directed the agency to make the decision to reward the organizations for their support. *Id.* at 8-9.

Seidenfeld, disagree.[225] Professor Seidenfeld argues that it is normal and appropriate for agencies to be *motivated* to act by political factors, including raw or partisan political factors, but agencies must be able to articulate expert-driven (scientific, technical, or other) rationales for their decision.[226] He suggests that "hard look" review separates value judgments from objective decision making and he asserts that courts appropriately refuse to consider political factors as justifications for agency action under "hard look" review.[227]

If agencies are able to provide rational, expertise-based justifications for their decisions to repeal or revise regulations after reviewing regulations pursuant to Executive Order 13,777, courts will likely uphold the agencies actions. Unlike the recent challenges to President Trump's Executive Orders involving the travel ban and sanctuary cities, where courts examined campaign statements, media appearances, and interviews to determine the President's motivation for those Executive Orders, courts are unlikely to look beyond the reasons articulated by agencies when they decide to repeal or revise rules and strike down the actions because the courts concluded that the real, and inappropriate, reasons for agency action were expressed in various Presidential campaign or press statements.[228] Under "hard look" review, courts will examine the reasons that the agency gave for its decision at the time of

225. *See* Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141 (2012). Justice Stephen Breyer strongly supports judicial review of agency action based on expertise, as opposed to political factors. He has argued, in the past, that "[a] depoliticized regulatory process might produce better results . . . [and] increased confidence," *see* Stephen Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 55-56, 59-60 (1993), and that there are inherent virtues to rationalization, expertise and insulation, which should be separated from politics and public opinion. *Id.* at 60-63. Justice Breyer expressed his sentiments in a dissenting opinion in *F.C.C. v. Fox TV Stations, Inc.*, stating that the law does not permit the FCC to "make policy choices for purely political reasons." 129 S.Ct. 1800, 1829 (2009) (Breyer, J., dissenting).

226. *See* Seidenfeld, *supra* note 225, at 148-151, 160. Seidenfeld notes that "hard-look review does not reject a rule because it is politically motivated, even if that motivation is a self-serving and venal political calculation. Hard-look review accepts politically motivated rules because it concerns itself with justification, not motivation. A policy that is motivated by the President's desire to provide benefits to his political supporters may nonetheless be defensible as good policy." *Id.* at 151.

227. *Id.* at 148. He argues that the current form of hard-look review, eschewing consideration of political factors, is consistent with both an "interest group" model of administrative agencies and a "Presidential control" model of administrative agencies. *Id.* at 148-160. Seidenfeld also criticizes Watts because he believes that her approach allows agencies to "substitute political influence for some of the analysis that courts would otherwise require under hard-look review." *Id.* at 147.

228. *See, e.g., State of Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (court relied on campaign and press statements to find that the purpose of the travel ban in the Executive Order was discriminatory); *County of Santa Clara v. Trump,* No. 17-cv-00574-WHO*,* 2017 U.S. Dist. LEXIS 62871 (N.D. Ca. Apr. 25, 2017) (court relied on statements made by the President to the press to find, for purposes of resolving the standing issue, that the Executive Order would likely be applied in a broader manner than the Executive Branch, in legal arguments to the court, was asserting it would be applied); *Hawai'i v. Trump,* No. 17-00050 DKW-KSC, 2017 U.S. Dist. LEXIS 36935 (D. Haw., Mar. 25, 2017) (court relied on campaign statements and other statements made by the President to the press to find that the purpose of the travel ban in the Executive Order was discriminatory).

the decision and will not, generally, attribute other rationales to the agency's action that are not provided by the agency.[229]

Although the repeal or modification of regulations by agencies will not necessarily be tainted on judicial review because the agencies are *motivated* by political factors, agencies may still have difficulty justifying some of the repeals or modifications under "hard look" review if they are changing long-standing regulations or legal interpretations that have been supported by strong justifications in the past by the Executive Branch. Although the Supreme Court implied, in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, that agencies must provide greater justification when they change rules than when they initially adopt rules,[230] the Court later clarified in *F.C.C. v. Fox TV Stations, Inc.* that agencies are *not* required to provide more substantial justification when they change rules than when they first adopt rules and need not provide that the new rule is better than the old rule.[231] In *Fox*, the Supreme Court made it clear that when an agency is changing a rule, it must "display awareness that it is changing position," and it "must show that there are good reasons for the new policy."[232] Accordingly, when an agency has built a strong record to support an existing rule and repeals or reverses it in a new rulemaking, the agency will need to discuss why the prior justifications for the rule are no longer supportable or why the agency has prioritized other factors within its discretion to justify the new decision than were prioritized in the past. In addition to explaining the reasons for the change in position, the agency will likely receive countless comments during the notice and comment period suggesting that the agency refrain from repealing or modifying the rule, and the agency will need to consider and respond to those comments and consider all of the relevant factors and alternatives raised by those

229. *See State Farm,* 463 U.S. at 43; *SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947) ("Chenery II"); *SEC v. Chenery Corp.,* 318 U.S. 80, 87 (1943) (establishing the bedrock administrative law principle that "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.") A court's analysis of an agency's action under the "hard look" test is quite different from the analysis in the cases challenging the travel ban and sanctuary cities Executive Orders. As the Ninth Circuit Court of Appeals noted, "[i]t is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating establishment and equal protection claims." *See State of Washington v. Trump,* 847 F.3d at 25. There is *not* similar precedent applicable to judicial review under the "hard look" arbitrary and capricious analysis.

230. The *State Farm* Court suggested that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *See State Farm,* 463 U.S. at 41.

231. *See* 556 U.S. 502, 515-516 (2009). The Court indicted, however, that an agency *may* have to provide a more detailed justification for a change in policy in some cases, such as when the new policy rests on factual findings that contradict those behind its earlier policy or when its earlier policy "engendered serious reliance interests that must be taken into account." *Id.*

232. *Id.*

comments.[233]

In repealing and revising rules in response to Executive Order 13,777, agencies must also be vigilant to remain open to public comment on the repeal or revision, as there may be public perceptions that the agencies have entered the rulemaking with marching orders from the White House and are merely going through the procedural motions to repeal or revise the rules of prior Administrations. A series of decisions in the U.S. Court of Appeals for the District of Columbia Circuit has held that an agency does not provide an "opportunity for comment" on proposed rules as required by the APA if the agency does not remain "open-minded" about the issues raised and engage with the comments submitted during the comment period.[234] The "opportunity for comment" must be a meaningful opportunity for comment.[235] At the same time, however, courts have rarely struck down agency rules on the grounds that evidence demonstrated that the agency had an "unalterably closed mind" during the rulemaking.[236]

As with any agency action, the "hard look" standard is not necessarily the *only* judicial review standard that will apply when an agency repeals or revises a rule.[237] Frequently, an agency may interpret a legal term in a statute that it administers when repealing or revising a rule. When an agency interprets a statutory term in the context of its exercise of legislative rulemaking authority, courts generally accord deference to the agency's legal interpretation under the Supreme Court's *Chevron* doctrine.[238] Courts frequently rely on that *Chevron* deference to uphold agency decisions to reverse their legal interpretations and regulations.[239] The Supreme Court has even held that courts should accord *Chevron* deference to an agency when the agency interprets a statute in a way that

233. *See supra* note 218.

234. *See, e.g., Prometheus Radio Project v. F.C.C.,* 652 F.3d 431, 449 (D.C. Cir. 2011); *Rural Cellular Ass'n v. F.C.C.,* 588 F.3d 1095, 1101 (D.C. Cir. 2009); *Advocates for Highway Auto Safety v. Federal Highway Administration,* 28 F.3d 1288, 1292 (D.C. Cir. 1994); *McLouth Steel Prods. Corp. v. Thomas,* 838 F.2d 1317, 1325 (D.C. Cir. 1988).

235. *See Rural Cellular Ass'n v. F.C.C.,* 588 F.3d at 1101. Arguably, if an agency decisionmaker has made up their mind before a rulemaking begins, based on Presidential orders, the decisionmaker is not providing the public with a meaningful opportunity for comment. *See* Beerman, *supra* note 102, at 1001.

236. *See* Beerman, *supra* note 102, at 1001-1002; Stephen M. Johnson, *#Better Rules: The Appropriate Use of Social Media in Rulemaking,* 44 FLA. ST. U. L. REV. 1, 54-58 (2017). Professor Jack Beerman suggests that courts are reluctant to strike down agency action on these grounds because the standard is too vague and conflicts with the realities of the political nature of agency decisionmaking. *See* Beerman, *supra* note 102, at 1002.

237. *See* 5 U.S.C. § 706 (2012) (outlining the standards for review of agency actions under the APA).

238. *See Chevron v. NRDC,* 467 U.S. 837 (1984).

239. *See, e.g., FCC v. Fox Television Stations, Inc.,* 545 U.S. 967 (2005); *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967 (2005); *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735 (1996); *Good Samaritan Hospital v. Shalala,* 508 U.S. 402 (1993).

conflicts with a prior judicial reading of the statute, as long as the court, in the precedent case, indicated that the statute being interpreted was ambiguous.[240] Here again, however, Congressional legislative proposals could make it more difficult for agencies to revise and repeal rules. As noted above, at least one of the bills introduced to "reform" administrative agency decision-making would eliminate *Chevron* deference and allow courts to interpret statutory terms de novo.[241] Consequently, if that legislation is enacted into law, courts will have more freedom to decide that agencies are acting outside of their statutory authority when repealing or revising regulations. Once again, the legislation that is being advanced to halt regulation could be used to entrench existing regulation and halt deconstruction of the administrative state.

2. The WOTUS, Clean Power Plan, and Antiquities Act Executive Order

In addition to issuing an Executive Order that very broadly encourages agencies to repeal, replace, or modify regulations across the board, the President issued several Executive Orders that urged agencies to take very specific deregulatory actions. In the first, Executive Order 13,778, the President ordered the EPA and the U.S. Army Corps of Engineers ("the Corps") to review and rescind or revise the regulation[242] that the agencies adopted in 2015 to identify the "waters of the United States" subject to jurisdiction under the Clean Water Act (the "WOTUS" rule),[243] and to review and rescind or revise all orders, regulations, and guidelines that implement that rule.[244] The Order micro-manages to a degree that is almost unprecedented in Executive Orders, as it includes a provision that directs the agencies, when revising the "waters of the United States" regulatory definition, to "consider interpreting the term . . . in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006)."[245] Finally, the Order requires the agencies to notify the Attorney General that they are reviewing the regulation, so that the Attorney General could "as he deems appropriate, inform any court of such review and take such measures as he deems appropriate"

240. *See National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967 (2005).

241. *See supra* note 124.

242. *See* 80 Fed. Reg. 37,054 (June 29, 2015).

243. *See* Exec. Order No. 13,778, *supra* note 165, §2(a).

244. *Id.* §2(b).

245. *Id.* §3.

concerning litigation relating to the rule.[246] On the same day that the order was signed, the agencies signed a notice of intent to review and rescind or revise the rule.[247] The Attorney General asked the Supreme Court, which was reviewing a jurisdictional question central to the numerous lawsuits that have been filed challenging the rule, to hold the case in abeyance while the agencies review and rescind or revise the rule, but the Court denied the government's request.[248]

The second Executive Order, Executive Order 13,783 (the "Clean Power Plan Executive Order"), required the EPA to review and rescind, suspend, or revise several rules that were proposed or finalized in 2015 to address greenhouse gas pollution from coal-fired electric power plants,[249] and requires the agencies to notify the Attorney General when the agency takes those actions, so that the Attorney General can notify courts with jurisdiction over any challenges to the rule about those actions and "request that the court[s] stay the litigation or otherwise delay further litigation . . . ."[250] The Order also directed the Secretary of the Interior to lift a moratorium on coal leasing on federal lands and directed the EPA and the Secretary of the Interior to review and rescind, suspend, or revise various rules and guidance related to oil and gas development and fracking.[251]

The third Executive Order, Executive Order 13,792, required the Secretary of the Interior to review all designations of national monuments under the Antiquities Act since January 1, 1996, where the designation covers more than 100,000 acres or, for expansions of national monuments, where the designation, after expansion, covers more than 100,000 acres.[252] The order directs the Secretary to determine whether the designations resulted from a lack of public outreach and proper coordination with State, tribal, and local officials or stakeholders and whether they "create barriers to achieving energy independence, restrict public access to and use of Federal lands, burden State, tribal, and local governments, or otherwise curtail economic growth."[253] Based on that review, the Order requires the Secretary to prepare a report for the President to recommend Presidential action, legislative proposals, or other actions.[254] The review was spurred by complaints from Western

246. *Id.* §2(c).

247. *See* 82 Fed. Reg. 12,532 (Mar. 6, 2017).

248. *See* Amanda Reilly, *Supreme Court to Hear WOTUS Litigation*, Greenwire, Apr. 3, 2017, https://www.eenews.net/stories/1060052490 (last visited June 21, 2017).

249. *See* Exec. Order No. 13,783, *supra* note 165, §4.

250. *Id.* §4(d).

251. *Id.* §§ 6-7. The Order also rescinds several Executive actions taken by President Obama and the White House Council on Environmental Quality to address climate change. *Id.* §3.

252. *See* Exec. Order No. 13,792, *supra* note 165, §2.

253. *Id.* §1.

254. *Id.* §§2(d)-(e).

State lawmakers who argued that former Presidents have used the law too aggressively to protect federal lands from development by private interests, and who hoped that the review would lead to the removal of the protections from large portions of those lands.[255] Shortly after the President issued the Order, the Secretary of the Interior released a list of 27 National Monuments that would be reviewed by the Department and posted a notice in the Federal Register seeking public comment on the Monuments included on the list.[256]

Each of the Executive Orders represents a bold assertion of Executive power to advance a deregulatory agenda. At the same time, implementation of each of the Orders will face significant legal challenges, as well as public opposition.

For Executive Order 13,778, the EPA will have a difficult time implementing the directives of the Order. First, the EPA spent many years and resources reviewing and developing a strong scientific and legal record to justify the regulatory definition of "waters of the United States" that the agencies adopted in 2015.[257] The agencies may find it difficult to marshal the necessary scientific and legal justifications to rationally reverse course so quickly after adopting the 2015 rule. Neither the science nor the law has changed since 2015; only the President has changed. The process to adopt a new rule to replace the 2015 rule and to attempt to provide legally sufficient support for the new rule to counter the record built by the agency for the prior rule and to respond to the inevitable comments that will oppose the new rule will take years.[258] Even if the agencies manage to complete the rulemaking

255. *See* Dan Mercia & Kevin Liptak, *Trump Order Could Roll Back Public Lands Protections from 3 Presidents*, CNN, Apr. 26, 2017, http://www.cnn.com/2017/04/25/politics/donald-trump-federal-lands-antiquities/index.html (last visited June 21, 2017).

256. *See* 82 Fed. Reg. 22,016 (May 11, 2017). The docket for the agency action, including the public comments on the notice, is available at https://www.regulations.gov/docket?D=DOI-2017-0002 (last visited June 21, 2017).

257. *See* Stephen M. Johnson, WETLANDS LAW: A COURSE SOURCE 143-146 (eLANGDELL PRESS, 2016). *See also* 80 Fed. Reg. 37054-37073 (June 29, 2015) (discussing the scientific and legal justifications for the rule). At the centerpiece of the scientific justification for the rule was the "Connectivity Study", a review or more than 1,200 peer reviewed scientific publications. *See* U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report)*, EPA/600/R-14/475F, (Washington, DC: U.S. Environmental Protection Agency, (2015)), http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf (last visited June 21, 2017).

258. It took the agencies eight years and two guidance documents to issue final rules amending the definition of "waters of the United States" after the Supreme Court's *Rapanos* decision. *See* Johnson, WETLANDS LAW, *supra* note 257, at 139-146. The agencies received over one million public comments on the 2015 rule. *See* U.S. Environmental Protection Agency, *Docket for "Definition of 'Waters of the United States' Under the Clean Water Act,*" https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880 (last visited June 21, 2017).

process to adopt a new definition of "waters of the United States" within the four years of the President's Administration, the new rules will be challenged and likely stayed for years pending the resolution of those challenges.[259] The Supreme Court has thrice reviewed the agencies' regulatory definition of "waters of the United States" and challenges to any amendment of the rule in response to the Executive Order are inevitable.[260] The 2015 regulations were stayed pursuant to litigation shortly after they were adopted and have never been enforced.[261]

In addition, the agencies wrote their 2015 rule to comply with an interpretation of the Clean Water Act that was articulated by Justice Kennedy in *Rapanos v. United States* and has been adopted by most of the appellate courts in response to the Supreme Court's divided opinion in that case.[262] The President's Executive Order directs the agencies to revise the rule to comply with an interpretation of the Clean Water Act outlined by Justice Scalia in a plurality opinion in that case,[263] which has not been adopted by any of the appellate courts as the primary test for Clean Water Act jurisdiction.[264] If the agencies adopt a rule that follows that directive, it would appear to be inconsistent with the interpretation of the law that has been adopted in all of the appellate courts.[265] The rule would not necessarily conflict with those interpretations; however, the agency would need to rationally explain why it is choosing to adopt a much narrower interpretation of the term "waters of the United States" than courts have suggested is authorized and than the agency has previously suggested is necessary to protect traditional navigable waters under the Clean Water Act. This could be legally difficult for the agencies.

The unusual manner in which the Executive Order is drafted raises

259. The 2015 rule was challenged by environmental groups, 27 states, 14 agriculture and industry groups in separate lawsuits. *See* Johnson, WETLANDS LAW, *supra* note 257, at 146. Lawsuits were filed in 18 different federal district courts and 8 appellate courts. *See* Richard Lazarus, *Who's On First? District, Appeals Courts Grapple with Jurisdiction*, Env. L. Forum 13, Sept./Oct. 2016, http://environment.law.harvard.edu/wp-content/uploads/2016/08/ELI-Sept-Oct-2016-1.pdf (last visited June 21, 2017).

260. *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

261. *See* Johnson, WETLANDS LAW, *supra* note 257, at 146.

262. *Id.* at 142. Justice Kennedy wrote that agencies had jurisdiction over waters that had a "significant nexus" to traditional navigable waters. *See Rapanos,* 547 U.S. at 759.

263. *See Rapanos,* 547 at 719.

264. *See* Johnson, WETLANDS LAW, *supra* note 257, at 142.

265. Executive Orders cannot change existing law, *see, e.g. Chamber of Commerce v. Reich,* 74 F.3d 1322, 1332-1339 (D.C. Cir. 1996), so the fact that President Trump's Executive Order directs the agencies to adopt an interpretation of the law that may be at variance with the Supreme Court's reading of the law would not save the agency regulation. Indeed, the WOTUS Executive Order explicitly recognize that the agencies may only act, pursuant to the Executive Order, "to the extent authorized by law." *See* Exec. Order No. 13,778, *supra* note 165, §4.

the potential for additional legal challenges to a rule by the EPA and the Corps that adopts the Scalia test to define "waters of the United States." The Clean Water Act authorizes the agencies, and not the President, to adopt regulations to carry out the Clean Water Act.[266] To the extent that the agencies adhere to the President's micro-management of agency decision making and adopt a definition consistent with the Scalia test, challengers may argue that the rule is invalid because the President exercised the discretion that was delegated to the agencies by Congress, and that the President has no authority to make rules under the Clean Water Act.[267] Even if that argument is unsuccessful, challengers may argue that the agencies adopted the revised definition of "waters of the United States" without providing the public a meaningful opportunity for comment, as the agencies entered the comment period with an unalterably closed mind regarding the form of the final rule in light of the fact that they were adopting a rule to meet the test mandated by the President's Executive Order.[268]

Since Executive Order 13,783 (the "Clean Power Plan Executive Order") does not interfere as directly with the EPA's exercise of discretion as Executive Order 13,778, it will probably not face the challenges regarding Presidential exercise of rulemaking authority or agency rulemaking with an unalterably closed mind. Nevertheless, like the WOTUS rule, the EPA built a very strong technical and legal foundation to support the rules addressed in the Clean Power Plan Executive Order and completed two of the rules within the last two years.[269] Like the WOTUS rule, the EPA may find it difficult to build a technical record and craft legal arguments to support a decision to repeal the rules so quickly after they were adopted, and to respond rationally to the inevitable flood of comments opposing the repeal of the rules.[270] As

266. *See* 33 U.S.C. § 1361(a)(2012).

267. *See* Beerman, *supra* note 102, at 1000-1001, 1003-1004 (discussing the contours and limits of such a challenge in the abstract, as opposed to applied to the WOTUS rule).

268. *See supra* notes 234-236, and accompanying text. *See also* Beerman, *supra* note 102, at 1001.

269. *See* "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,661 (October 23, 2015) ("Clean Power Pln"); "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,509 (October 23, 2015).

270. Both rules were challenged shortly after they were initially adopted and the Supreme Court took the unusual step of issuing a stay of the Clean Power Plan rule pending resolution of the challenges to the rule in the D.C. Circuit. *See West Virginia v. EPA*, 136 S.Ct. 1000 (U.S. 2016). After the President issued Executive Order 13,783, the Attorney General asked the D.C. Circuit to stay the challenges to the rules addressed in the order, and the court granted the government's request, but only agreed to hold the challenge to the Clean Power Plan in abeyance for 60 days. *See West Virginia v. Environmental Protection Agency,* No. 15-1363 (D.C. Cir. Apr. 28, 2017), http://www.environmentallawandpolicy.com/wp-content/uploads/sites/186/2017/04/CPP-Abeyance.pdf (last visited June 21, 2017). The Court ordered the EPA to file status reports every 30 days and required the parties to file supplemental briefs to address whether the case should be remanded to the EPA

with the WOTUS rule, the process to repeal or revise the rules targeted by Executive Order 13,778 could take the entire length of the President's Administration to complete and will likely be tied up in litigation for years after they are completed. In some respects, this is a win for the Administration because the rules targeted in both Executive Orders will not be enforced in the interim. In other respects, however, if the Administration is ultimately successful in making such drastic changes to the rules so quickly after adopting the rules in 2015 and courts uphold those changes, the agencies may be able to make an equally extreme course correction when a new Administration takes office. In that case, the deregulatory success of the Administration could be as ephemeral as the streams that will be left unprotected by the Administration's amendment of the WOTUS rule.[271]

The Administration could face more fundamental legal challenges in the implementation of Executive Order 13,792 regarding the Antiquities Act. Supporters of the Order anticipate that it will lead to actions by the President to abolish or reduce the size of national monuments.[272] However, while the Antiquities Act authorizes the President to *create* national monuments,[273] it does not provide the President with any express authority to *abolish* or *revoke* national monument designations.[274] Congress has the power, under the Property Clause of the Constitution, "to dispose of and make all needful rules and regulations" respecting federal lands.[275] While Congress, in the Antiquities Act, delegated to the President the power to impose limits on land use to protect federal lands by designating them as national monuments,[276] only Congress can abolish or revoke national monument

instead of held in abeyance. *Id.* If the case is remanded to the EPA, the challenge in the D.C. Circuit would be resolved, so the Supreme Court's stay would be lifted and the rules would take effect.

271. The regulatory definition of "waters of the United States" adopted by the EPA and the Corps included various intermittent and ephemeral waters, which sparked a debate among the Justices regarding the scope of the agencies' jurisdiction over such waters. *See Rapanos,* 547 at 725-738 (Scalia, J., plurality) (rejecting jurisdiction); 547 at 769-770 (Kennedy, J. concurring) (acknowledging that some ephemeral waters may be regulated); 547 at 801-807 (Stevens, J, dissenting) (deferring to the agencies' interpretation).

272. *See supra* note 255.

273. *See* 54 U.S.C. § 320301(a) (2012).

274. *See* Mark Squillace, Eric Biber, Nicholas S. Bryner, and Sean B. Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments,* 103 VA. L. REV. ONLINE (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967807 (last visited June 21, 2017); Alexandra M. Wyatt, *Antiquities Act: Scope of Authority for Modification of National Monuments*, Cong. Res. Serv. Rep. No. R44687, Nov. 14, 2016, http://www.law.indiana.edu/publicland/files/national_monuments_modifications_CRS.pdf (last visited June 21, 2017).

275. *See* U.S. Const., Art. IV, §3, cl.2.

276. Congress can delegate power to the President as long as it establishes an intelligible principle to guide the Executive's exercise of discretion. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

designations.[277] The President might have authority to reduce the size of national monuments, but the extent of that authority has never been tested in court.[278] If the President decides to abolish or reduce the size of national monuments after the review required by the Executive Order, the Administration will surely face legal challenges, as there appears to be very little public support for the elimination or reduction of

277. *See* Squillace, et al, *supra* note 274, at 2; Arnold Porter Kaye Scholer, *The President Has No Power Unilaterally to Abolish a National Monument Under the Antiquities Act of 1906*, http://democrats-naturalresources.house.gov/imo/media/doc/Arnold%20&%20Porter%20Legal%20Memo%20on%20Revocation%20of%20National%20Monuments.pdf (last visited June 21, 2017). A 1938 Attorney General Opinion, provided to President Coolidge by his Attorney General when the President was considering rescinding the designation of the Castle Pinckney National Monument, concluded that the President does not have the power to revoke the designation of a national monument. *See* Proposed Abolishment of Castle Pinckney Nat'l Monument, 39 Op. Atty. Gen. 185, 185 (1938).

Professor Squillace and his co-authors argue that there is additional support for the limitation of the President's power in that the text, structure and legislative history of the Federal Land Policy and Management Act ("FLPMA") , adopted after the Antiquities Act, clearly demonstrate that Congress did not intend to authorize the President to abolish national monuments. *See* Squillace, et al, *supra note* 274, at 3. John Yoo and Todd Gaziano argue, to the contrary, that the President has implied powers to revoke national monument designation, based on the President's constitutional Executive Power. *See* John Yoo and Todd Gaziano, American Enterprise Institute, *Presidential Authority to Revoke or Reduce National Monument Designations*, 1,3, Mar. 2017, https://www.aei.org/wp-content/uploads/2017/03/Presidential-Authority-to-Revoke-or-Reduce-National-Monument-Designations.pdf (last visited June 21, 2017).

278. *See* Yoo and Gaziano, *supra* note 277, at 1. The Antiquities Act provides the monuments "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." *See* 54 U.S.C. §320301(a)-(b) (2006 & Supp. 2015). Yoo and Gaziano argue, therefore, that the President, at a minimum, has the authority to reduce the size of national monuments when they are not limited in size to the "smallest area comparable with proper care and management of the objects to be protected." *See* Yoo & Gaziano, *supra* note 277, at 1. They note that several Presidents have, in the past through Executive action, reduced the size of national monuments. *Id.* at 15. In addition, the 1938 Attorney General Opinion did not state that the President lacked the power to reduce the size of national monuments. *See* Wyatt, *Antiquities Act, supra* note 274, at 5.

Professors Squillace and his co-authors admit that Presidents reduced the size of national monuments at various times since the enactment of the Antiquities Act, but they argue that no President has reduced the size of a monument since the enactment of the FLPMA, in which, they argue, Congress made it clear that Presidents lack that authority. *See* Squillace, et al, *supra* note 274, at 6-7. Further, they note that the President's authority to reduce the size of national monuments has never been tested in court. *Id.*

Critics of recent National Monument designations argue that the Antiquities Act was never intended to authorize the President to protect such large amounts of federal land from development. *See* Sean Hecht, *Politicians and Commentators who Criticize Recent national Monuments are Making Up Their Own Version of History*, Legal Planet, May 8, 2017, http://legal-planet.org/2017/05/08/politicians-and-commentators-who-criticize-recent-national-monuments-are-making-up-their-own-version-of-history/ (last visited June 21, 2017). However, many of the first monuments designated by Presidents under the Antiquities Act, covered more than a million acres, including the Glacier Bay National Monument (more than 1 million acres), designated by President Coolidge in 1925 and the Death Valley National Monument (1.6 million acres), designated by President Hoover in 1933. *Id.* The Supreme Court upheld the President's authority to designate the 800,000 acre Grand Canyon National Monument in *Cameron v. United States*, 252 U.S. 450 (1920).

protection for those lands.[279] The DOI received more than 100,000 comments in response to its request for public input on the review of the national monuments and 96% of the submissions expressed support for the current designations, with only 3% expressing opposition.[280]

V. THE POWER OF THE EXECUTIVE BRANCH TO NOT ENFORCE THE LAW

In addition to the tools outlined above, the Executive Branch can weaken, but not necessarily deconstruct, the administrative state by refusing to enforce the environmental laws or regulations or by interpreting those laws and regulations in ways that benefit the regulated entities.[281] As noted above, the federal environmental laws generally provide the EPA and other agencies with a wide variety of administrative, civil, and criminal enforcement tools but provide the agencies with substantial discretion to decide how to use those tools.[282] The laws generally do not *require* agencies to bring enforcement actions whenever someone violates the laws or regulations, and the Supreme Court has held that an agency's decision to not bring an enforcement action is generally unreviewable because agencies are in the best position to determine how to allocate scarce enforcement resources.[283] Courts will review an agency's failure to bring an enforcement action when a statute provide standards to regulate the agency's exercise of discretion, but most environmental statutes do not include such standards.[284] Courts might also review an agency's exercise of enforcement discretion when a challenger can demonstrate that the agency is making decisions in a manner that is discriminatory, but that is a very limited exception.[285] Just as courts rarely review agencies' decisions to not enforce the law, Congress spends little time on oversight of agency enforcement strategy.[286]

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279. *See* Jennifer Yachnin, *Comments on Interior Review Heavily Favor Status Quo - Group,* GREENWIRE, May 26, 2017, https://www.eenews.net/greenwire/stories/1060055234 (last visited June 21, 2017).

280. *Id.*

281. *See* Kim, *supra* note 36, at 97 (finding that the Department of Education's Office of Civil Rights relied on the strategic use of discretion to implement policies to prohibit discrimination in the nation's primary, secondary and post-secondary schools); Tom Campbell, *Executive Action and Nonaction*, 95 N.C.L. REV. 553, 570 (2017).

282. *See supra* note 53. *See also* Ruhl & Robisch, *supra* note 52, at 101; Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1130-1131 (2016).

283. *See* Heckler v. Chaney, 470 U.S. 821 (1985). *See also* Kim, *supra* note 36, at 103; Campbell, *supra* note 281, at 581; Barkow, *supra* note 282, at 1131-1132.

284. *See Heckler,* 470 U.S. at 834-835. *See also* Campbell, *supra* note 281, at 570.

285. *See Heckler,* 470 U.S. at 838. *See also* Campbell, *supra* note 281, at 574-575.

286. *See* Kim, *supra* note 36, at 103-104; Barkow, *supra* note 282, at 1133-1134. Congress does, however, occasionally oversee agency enforcement discretion by limiting the discretion through riders to prohibit the use of funding to enforce various policies. *See* Campbell, *supra* note 281, at 576.

Accordingly, the Executive Branch can effectively deregulate by simply refusing to bring enforcement actions against persons who violate the environmental laws or specific provisions of the environmental laws or by imposing very minor sanctions on persons who violate the environmental laws. While the Executive Branch might articulate this strategy in a directive to enforcement staff,[287] it can avoid most external oversight by courts, Congress, and the public if it avoids memorializing the strategy in written documents and opts to provide oral directives or to require approval of enforcement activity by a limited group of decision-makers who are aware of the strategy.[288]

The Executive Branch can also take steps to deregulate by refusing to defend challenges to regulations or actions that were taken by prior Administrations or agree to settle those cases on terms that are favorable to the regulated entities,[289] although the government's power is limited to some extent, in that non-parties—such as environmental groups—frequently intervene in the legal challenges, and those groups may defend the government's action when the government declines to do so, and may object to the terms of sweetheart settlements.[290]

Although the Executive Branch may attempt to deregulate through the strategic exercise (on non-exercise) of its enforcement powers, the federal environmental laws impose several impediments to that strategy. First, the environmental laws generally include provisions that authorize States to administer and to enforce most of the permitting programs in those laws, in conjunction with the federal government, and most States have taken over many of those programs.[291] Under the statutes, the

287. *See* Kim, supra note 36, at 93-94. Agencies frequently issue guidance documents or policies to provide direction to regional and local enforcement staff when implementing an enforcement strategy. *Id.* While such guidance provides notice (and reassurance) to regulated entities, it increases oversight by the public and Congress. *Id.* at 107.

288. *Id.* at 93-94, 100, 105-106. If an enforcement decision does not result in a final adjudication, and most don't, it will not be reviewed by courts and is unlikely to be scrutinized by Congress or the public, who are likely unaware of it. *Id.* at 102-103, 105-106. Of the tools available to agencies to make policy (legislative rulemaking, adoption of guidance documents, exercise of enforcement discretion), the strategic use of discretion is subject to the least external controls and oversight. *Id.* at 95, 102.

289. *See* O'Connell, *Agency Rulemaking, supra* note 54, at 530-531. The Trump Administration has asked federal appellate courts to delay review of several rules, which it does not plan to defend as written, including the Clean Power Plan, *supra* note 270, ozone standards under the Clean Air Act, *see Murray Energy Corp. v. EPA,* No. 15-1385, (D.C. Cir., Apr. 11, 2017) (Order), http://www.environmentallawandpolicy.com/wp-content/uploads/sites/186/2017/04/epa2017_0722.pdf (last visited June 21, 2017), and limits on fracking on federal lands. *See* Juliet Eilperin, *Interior Department to Withdraw Obama-Era Fracking Rule, Filings Reveal,* WASH. POST, Mar. 15, 2017, http://tiny.cc/3k4yly (last visited June 21, 2017).

290. *See* Fed. R. Civ. P. 24.

291. *See supra* note 44. For instance, forty seven States have taken over authority to administer the Clean Water Act Section 402 permitting program. *See* U.S. Environmental Protection Agency, *NPDES State Program Information: State Program Authority,* https://www.epa.gov/npdes/npdes-state-program-information (last visited June 21, 2017). One of the

States that have taken over the permitting programs generally have primary enforcement authority.[292] As a result, even if the federal government wanted to deregulate by choosing to not enforce the laws or regulations, it would be limited, to some degree, because States with delegated programs might choose to enforce the law anyway.

In addition, the federal environmental laws generally include citizen suit provisions that allow any person, including environmental groups or concerned citizens, to sue any person who is violating those laws.[293] The laws preclude suit if the federal government or a State is enforcing the law, but allow citizens to sue when the government is not.[294] They also allow citizens to intervene in government enforcement actions and to oversee the process through which the government and regulated entities settle those cases.[295] Thus, the citizen suit provisions limit the extent to which the federal government can protect regulated entities by choosing to not enforce the law against them.

The federal environmental laws provide a further check on federal environmental deregulation because they generally include explicit non-preemption provisions. Most of the laws provide that States can administer their own environmental laws that are at least as stringent (if not more so) than the federal laws.[296] Accordingly, even if the federal government, state government, and citizens do not enforce the federal environmental laws, states private parties will be able to use state and local laws to protect the environment. When the Trump Administration expressed its intentions to repeal and revise the Clean Power Plan and exit the Paris agreement on climate change, for instance, States and local governments announced their intentions to continue to take steps under their separate authorities to impose restrictions on greenhouse gas emissions in order to address global climate change.[297]

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ways that Congress traditionally designs administrative regulatory structures to avoid under-enforcement is by allowing states to share enforcement authority with the federal government. *See* Barkow, *supra* note 282, at 1142.

292. *See supra* note 44.

293. *See supra* note 45. This is another tool that Congress traditionally uses to prevent under-enforcement by agencies. *See* Barkow, *supra* note 282, at 1143.

294. *See, e.g.,* 33 U.S.C. § 1365(b) (2012) (Clean Water Act); 42 U.S.C. §300j-8(a) (2012) (Safe Drinking Water Act); 42 U.S.C. § 6972(b) (2012) (RCRA); 42 U.S.C. § 7604(b) (2012) (Clean Air Act).

295. *Id.*

296. *See, e.g.,* 33 U.S.C. §1370 (2012) (Clean Water Act); 42 U.S.C. §6929 (2012) (RCRA); 42 U.S.C. §7416 (2012) (Clean Air Act); 42 U.S.C. §9614(a) (2012) (Superfund).

297. *See* Steven Mufson, *These Titans of Industry Just Broke with Trump's Decision to Exit the Paris Accords*, WASH. POST, June 1, 2017, https://www.washingtonpost.com/news/energy-environment/wp/2017/06/01/these-titans-of-industry-just-broke-with-trumps-decision-to-exit-the-paris-accords/?utm_term=.77746e870de3 (last visited June 21, 2017). Thirty states joined a statement condemning the decision to withdraw from the Paris agreement and expressed their intention to continue to take steps to reduce greenhouse gas emissions in the state beyond those required by federal law. *Id.*

Even if the Executive Branch takes steps to deregulate through non-enforcement of environmental laws, those steps are ultimately temporary and can be reversed when there is a change in Administration. Regulated entities recognize that simple fact, which is why they are another impediment to the Executive Branch's attempts to deregulate through non-enforcement of the law. While regulated entities frequently favor deregulation, they also favor stable regulation.[298] When rules are adopted through notice and comment rulemaking, they are generally stable because the process to repeal and revise is time-consuming and resource intensive.[299] Although ossification of the rulemaking process is frequently criticized, it benefits regulated entities by providing assurance that they can make longer-term plans against that stable regulatory structure.[300] Thus, if an Administration chooses to not enforce regulations, but does not act to repeal those regulations, regulated entities likely understand that the regulations could be enforced again as soon as a new Administration takes office. Accordingly, regulated entities are unlikely to make changes to their operations or business plans to avoid complying with existing, but unenforced, regulations, unless it is possible to reverse those changes without significant cost in the future when a new Administration chooses to enforce them. Just as States pledged to continue efforts to address climate change despite President Trump's deregulatory actions, billionaire philanthropist Michael Bloomberg pledged to donate $15 million to cover the United States' commitments under the Paris agreement, and businesses have committed to go beyond compliance

298. *See* Kai Ryssdal, *Weekly Wrap: What Business Is Saying about Trump's Paris Agreement Withdrawal*, Marketplace, Jun. 1, 2017, https://www.marketplace.org/2017/06/02/economy/weekly-wrap/weekly-wrap-what-business-saying-about-trumps-paris-agreement (last visited June 21, 2017).

299. *See supra* notes 191-213.

300. *See* Nielsen, *supra* note 191, at 4-6, 24-29. As Professor Aaron Nielsen explains, "Agencies not only seek to regulate today's three-dimensional world, but they also often act to encourage the emergence of a preferred future that does not yet exist . . . . Agencies . . . often require investment by private parties to meet long-term regulatory goals – investment that can only be recouped if the regulatory scheme does not materially change for years. If regulated parties are not confident that the scheme will remain unchanged, then they will invest less in agency-favored priorities . . . To effectively regulate into the future, agencies thus need a 'commitment mechanism' – some way to credibly convince regulated parties that administrative policy will not change too quickly . . . . [O]ssification can act as an agency commitment mechanism . . . . To the extent that regulated parties know that regulators cannot quickly change regulatory schemes, they can proceed with greater confidence to do what an agency . . . would like them to do." *Id.* at 4-6. Nielsen notes that, without ossification, regulated entities would be concerned that agencies could change the rules that apply to them at any time, in light of the Supreme Court's *Fox* and *Brand X* decisions. *Id.* at 24-26. Professor Wendy Wagner and her associates similarly noted that regulated entities will have difficulty engaging in long-term planning when agencies can frequently, and easily, change the rules that apply to their businesses. *See* Wagner, et al, *supra* note 54, at 244.

with existing rules to reduce greenhouse gas emissions.[301] They recognize that more stringent enforcement of greenhouse gas emissions is inevitable in the future and makes economic sense, so they are planning for the long-term and ignoring the short-term deregulatory actions of the current Administration.[302]

VI. CONCLUSION

Deconstructing the administrative state is a Sisyphean task, which requires a commitment from Congress and the Executive Branch to work together to enact laws that eliminate agencies or greatly reduce their powers. In the absence of such joint action, a President's efforts to drastically reduce federal regulation will only yield transitory results. This is evidenced by the efforts of the current Administration to reduce federal environmental regulation. Although the Executive Branch and many members of Congress have vilified the Environmental Protection Agency and federal environmental safeguards, a majority of the public still supports the environmental protection efforts of the federal

301. *See* Leanna Garfield, *Billionaire Michael Bloomberg Is Launching a Coalition to Defy Trump and Uphold the Paris Agreement*, Bus. Insider, Jun. 2, 2017, http://www.businessinsider.com/michael-bloomberg-paris-agreement-coalition-2017-6 (last visited June 21, 2017) (noting that 30 cities, 3 states, more than 80 university presidents, and more than 100 companies are pledging to uphold the Paris agreement, regardless of whether the United States withdraws from the agreement); Venessa Wong, Cora Lewis, Leticia Miranda & Matthew Zeitlin, *Big Companies Defy Trump on Climate Change,* CNBC, Mar. 30, 2017, http://www.cnbc.com/2017/03/30/big-companies-defy-trump-on-climate-change.html (last visited June 21, 2017); Jennifer Rubin, *Trump's Climate-Change Denial Rattles U.S. Businesses*, WASH. POST, May 9, 2017, http://tiny.cc/jl4yly (last visited June 21, 2017) (noting that more than 300 companies, including 72 with annual revenues exceeding $100 million, sent President Trump a letter, urging him to not abandon the Paris agreement).

302. *See* Rubin, *supra* note 301; Devin Henry, *Oil, Tech Giants Tell Trump to Stay in Paris Deal*, The Hill, Apr. 26, 2017, http://thehill.com/policy/energy-environment/330621-oil-tech-giants-tell-trump-to-stay-in-paris-deal (last visited June 21, 2017) (noting that BP, Shell, Google, Microsoft, Walmart and many other companies sent a letter to the President, urging the President to stay in the Paris agreement because the agreement creates jobs for American businesses, puts them on a level playing field with international competitors, and minimizes the risks that climate change poses to the companies). The nation's largest coal fired utilities, American Electric Power, Southern Company, and Duke Energy, are all retiring their older coal plants and switching to natural gas and renewables, despite the Trump Administration's efforts to repeal or relax environmental regulation of coal extraction and use. *See* Ken Silverstein, *Will Undoing The Stream Protection Rule Really Help Coal?*, Forbes, Feb. 3, 2017, https://www.forbes.com/sites/kensilverstein/2017/02/03/will-undoing-the-stream-protection-rule-really-help-coal/#40bb8a8a40bb (last visited June 21, 2017). In a recent Wall Street Journal interview, the CEO of Duke Energy stated, "Because of the competitive price of natural gas and the declining price of renewables, continuing to drive carbon out makes sense for us . . . . Administrations will change during the life of our business, and we'll continue to move forward in a way that makes sense for our investors and our customers." *See* Wong, et al, *supra* note 301 (also quoting representatives of Nestle, General Mills and the Gap, explaining the economic benefits for those companies of pursuing sustainable business practices, regardless of government deregulatory efforts).

government, so Congress will not eliminate the EPA or repeal the major federal environmental laws that give the agency its powers.

As long as those laws remain in place and provide the EPA with the authority to interpret and enforce the laws, the power of the President or Congress to act unilaterally to deconstruct the administrative state is limited. As demonstrated above, the Constitution, the Administrative Procedures Act, and the federal environmental laws create a complex system of checks and balances to limit the power of any of the branches to deconstruct the administrative state in the environmental arena. While Congress was able to revoke a few environmental regulations adopted at the end of the last Presidential Administration that certainly does not constitute the deconstruction of the administrative state.

Similarly, while the President appointed a deregulatory EPA Administrator who will likely relax environmental enforcement and the President is taking actions to reduce the EPA's budget, revise existing regulations, and halt adoption of new regulations, Congress, courts, States, and the public can use the checks outlined above that are available through the Constitution and federal laws to limit those deregulatory efforts. To the extent that the Executive branch can overcome all of those obstacles to deconstruct the administrative state, its efforts will only be transitory, as a subsequent Administration can reverse the Administration's actions unless the Administration can work with Congress to codify its deregulatory efforts as laws. This is unlikely to happen in light of the strong public support for environmental protection. Consequently, while the future of federal environmental regulation may seem momentarily dim as a result of the Administration's broad pronouncements regarding the evils of environmental regulation and as a result of the flurry of Executive activity accompanying the rhetoric, the prospects for reinvigoration of federal environmental regulation remain strong over the long term. The environmental administrative state will not be deconstructed in the foreseeable future.