Article

Regulation in Transition

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INTRODUCTION

Like many prior presidents,[1] Donald Trump came into office promising to roll back his predecessor's regulations.[2] But unlike earlier presidents, President Trump did not stick with just the usual strategy of using "stop-work" orders to attack very late-

1. *See, e.g.*, James Carney & John F. Dickerson, *How Bush Plans to Roll Back Clinton*, TIME (Jan. 21, 2001), http://content.time.com/time/nation/article/0,8599,96140,00.html [https://perma.cc/4F9Z-EGRN] (detailing plans to reverse guidance and make regulatory changes); Ceci Connolly & R. Jeffrey Smith, *Obama Positioned to Quickly Reverse Bush Acti*ons, WASH. POST (Nov. 9, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/11/08/AR2008110801856.html?nav=E8 [https://perma.cc/2MJL-JVH2] (same).

2. Gregory Korte, *Trump Promises to Reduce Federal Regulations to Pre-1960 Level*, USA TODAY (Dec. 14, 2017), https://www.usatoday.com/story/news/politics/2017/12/14/trump-promises-reduce-federal-regulations-pre-1960-level/953072001/ [https://perma.cc/YUG4-2MR5]; *see also Remarks by President Trump in Joint Address to Congress*, WHITEHOUSE.GOV (Feb. 28, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-address-congress/ [https://perma.cc/8357/-8GKB] (claiming to have "undertaken a historic effort to massively reduce job-crushing regulations").

term regulations[3] or going through notice-and-comment rule-making to repeal regulations.[4] Instead, he also made aggressive use of several relatively low-profile tools—disapprovals under the Congressional Review Act,[5] abeyances in pending litigation,[6] and suspensions of final regulations[7]—to target more of the prior administration's regulations than had been the case in previous transitions. These tools had been used before, but the Trump administration used them far more aggressively than previous administrations had, targeting many significant regulations from as far back as 2015 in areas such as the environment and financial regulation, among others.[8]

In recent decades, as presidents have been less able to obtain legislative wins due to congressional gridlock,[9] they have aggressively used regulatory measures to make policy,[10] a process that has come to be known as "presidential administration."[11] But the new prominence of the rollback tools is likely to change those presidential strategies to a significant extent. The ability of future presidents to continue the aggressive use of

3. Traditionally, after an inter-party transition, a new president instructs agencies to stop work on any pending regulations and to withdraw any that were not officially published in time. *See infra* note 14.

4. The Administrative Procedure Act (APA), 5 U.S.C. § 555 (2012), governs such repeals. *See infra* notes 19–24 and accompanying text.

5. The Congressional Review Act allows Congress to disapprove of a regulation within a certain amount of time after it is finalized. *See infra* notes 51–68 and accompanying text.

6. An abeyance is a court order placing a pending challenge to a regulation on hold. *See infra* notes 107–12 and accompanying text.

7. Suspensions put a regulation on hold. *See infra* note 38 and accompanying text.

8. *See, e.g.*, Extension of Deadline for Promulgating Designations for the 2015 Ozone National Ambient Air Quality Standards, 82 Fed. Reg. 29,246 (June 28, 2017) (to be codified at 48 C.F.R. pt. 81) (suspending the 2015 ozone rule); Definition of the Term "Fiduciary," 82 Fed. Reg. 16,902 (Apr. 7, 2017) (to be codified at 29 C.F.R. pt. 2510) (suspending the 2016 rule regulating investment advice); Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017) (to be codified at 40 C.F.R. pt. 423) (suspending the 2015 rule setting wastewater limits).

9. *See* Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1518–25 (2018) (discussing Congressional gridlock in the tax system).

10. *See* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 559–61 (2003) (describing presidents' desires to make policy decisions through regulations).

11. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2264 (2001).

these rollback tools means that a far larger proportion of regulations promulgated during a president's last term will be at risk following an inter-party transition. As long as legislative victories remain difficult to obtain, we are likely to see presidents make important changes to adjust to the new threats in order to continue to preserve the output of their regulatory policy. The new pressures will affect how presidents transition into their jobs, weigh the decision of whether to wait until a second term to promulgate controversial regulations, and make the decision about whether to get involved in electoral campaigns for Congress and for their successor. Administrative agencies are also likely to change the manner in which they conduct their rulemaking. The impact of these tools will lead to a new conception of the president's regulatory power, in which two terms, rather than just one, are necessary to promulgate significant and lasting regulatory policy.

Because this shift in regulatory policy has been undertaken with low-visibility strategies, its broader impact has gone largely overlooked, not just by the public, but also by legal scholars. Academic work to date has generally taken the traditional regulatory rollback tools as a given, implicitly seeing the world as one in which presidents must use stop-work orders or notice-and-comment rulemaking to repeal regulations.[12] As this Article shows, that is no longer the case. And the prior work has not grappled with how this transformation in the rollback process will substantially change rulemaking and electoral strategies. Neither has any attention been paid to how the obscure rollback tools used aggressively by the Trump administration are changing our understanding of presidential power.

This Article is the first to identify and analyze this trend in aggressive regulatory rollbacks by the Trump administration.[13]

12. *See, e.g.*, Jody Freeman, *The Limits of Executive Power: The Obama-Trump Transition*, 96 NEB. L. REV. 545, 551 (2018) (discussing actions to withdraw or rescind rules); Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 HARV. L. & POL'Y REV. 13, 30, 30 n.100 (2018) (discussing the APA's notice-and-comment rulemaking requirement); Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515 (2018) (discussing rulemaking procedures under the APA).

13. Gillian Metzger has addressed the Trump administration's deregulatory efforts while analyzing a broader effort to deconstruct the administrative state, *see* Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 9 (2017), but this Article takes a different perspective by looking at the impact of the Trump administration's deregulatory

It argues that the new rollback tools are likely to cause an enduring transformation in presidential strategies and to prompt a reconceptualization of Executive Branch power. Future presidents, including for these purposes Trump himself, will need to face the possibility that their regulatory output could be undone. And this will have ripple effects across the regulatory and electoral spheres.

Part I begins by describing the Trump administration's novel approach to regulatory rollbacks. The administration focused on three previously low-profile strategies: disapprovals under the Congressional Review Act, abeyances in pending litigation, and suspensions of final regulations. In contrast, prior presidents exercised their powers to dismantle part of a previous president's legacy by making use of stop-work orders issued by the White House Chief of Staff on Inauguration Day and using regulatory repeals or replacements. Stop-work orders allow a president to instruct agencies to discontinue all work on rules that have not yet been finalized and to withdraw final rules that have not yet been published in the *Federal Register*.[14] Repeal and replacements allow a president to change the requirements of a prior finalized rule.[15]

The strategy of stop-work orders has proved effective for discarding proposed rules.[16] But while the stop-work orders have at

efforts on presidential incentives both inside and outside of the administrative sphere.

14. *See* Memorandum for the Heads of Executive Departments and Agencies, 82 Fed. Reg. 8346 (Jan. 24, 2017) (instructing agencies not to submit any proposed or final regulations to the Office of the Federal Register and to withdraw any rules that had already been submitted to the Office but not yet published); Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435 (Jan. 26, 2009) (same); Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001) (same); Regulatory Review, 58 Fed. Reg. 6074 (Jan. 25, 1993) (instructing agencies not to send any proposed or final regulation to the Federal Register for publication until it has been approved by a presidential-appointee); Postponement of Pending Regulations, 46 Fed. Reg. 11,227, 11,227 (Feb. 6, 1981) (instructing agencies to "refrain, for 60 days following the date of this memorandum, from promulgating any final rule").

15. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514–15 (2009) (discussing the standard of review for agencies to make a policy change).

16. With some exceptions, it is relatively easy to withdraw proposals, see *In re* Murray Energy Corp., 788 F.3d 330, 334 (D.C. Cir. 2015); Oklahoma Pruitt v. McCarthy, No. 15-0369, 2015 WL 4414384, at *5 (N.D. Okla. 2015), and final rules that have not yet been published, see Kennecott Utah Copper Corp. v. U.S. Dep't of Interior, 88 F.3d 1191, 1206 (D.C. Cir. 1996). *But see* Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in*

times also sought to require or encourage agencies to go further and suspend recently finalized rules without notice and comment,[17] the courts have generally not approved of those types of suspensions.[18] As a result, the effort had limited scope and covered only a small fraction of the prior administration's regulatory output.

Repeals and replacements do not have any temporal limitation, but three factors make this tool of limited use as well. First, the Administrative Procedure Act's (APA) "arbitrary and capricious" standard and notice and comment requirements both apply to agencies attempting to repeal or replace rules.[19] Agencies must provide a "reasoned explanation" for changing course, show awareness of a changed position, and give "good reasons for the new policy."[20] In addition, when the prior regulation is supported by facts or a well-conducted cost-benefit analysis, an agency faces a significant hurdle in the requirement to explain its reasons for "disregarding facts and circumstances that underlay or were engendered by the prior policy."[21] As a result of all these

the Administrative State, 76 U. CHI. L. REV. 1157, 1188 (2009) (describing limited circumstances where withdrawals may be challenged).

17. Several stop-work orders (issued by Reagan, Bush, Obama, and Trump) have instructed agencies to delay the effective dates of finalized rules. *See* Postponement of Pending Regulations, 46 Fed. Reg. at 11,227 (instructing agencies "[t]o the extent permitted by law" to postpone the effective dates of final but-not-yet-effective regulations by sixty days); Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. at 7702 (instructing agencies to postpone the effective date of final regulations by sixty days, subject to an exception for emergency or other urgent situations related to health or safety); Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. at 4435 (instructing agencies to "[c]onsider extending for sixty days the effective date" of regulations that have been published, but not yet taken effect); Memorandum for the Heads of Executive Departments and Agencies, 82 Fed. Reg. at 8346 (instructing agencies "as permitted by applicable law" to postpone the effective dates of regulations that had been published in the Federal Register "but have not taken effect").

18. *See* Envtl. Def. Fund, Inc. v. Gorsuch, 713 F.2d 802, 818 (D.C. Cir. 1983); Nat. Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 762 (3d Cir. 1982).

19. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

20. Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); *accord* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) (holding that where the agency's prior rule had engendered "significant reliance interests" a "summary discussion" explaining a changed position was insufficient).

21. *Fox Television Stations, Inc.*, 556 U.S. at 516.

procedural requirements, regulations can be "sticky" and difficult to change.[22]

Second, because the APA requirements make changing a regulation extremely resource intensive for an agency, the agency may be limited in the number it can undertake at one time.[23] Third, the difficulty of changing a regulation through regulatory procedures is compounded when a regulation has already gone into effect and the regulated industry has purchased durable equipment to comply with the regulation or modified its production processes, as typically happens with environmental, health, and safety regulations. A repeal under these circumstances will forgo benefits but will not save the costs that have already been sunk. Thus, such a repeal will look unattractive as a matter of policy and will be vulnerable to judicial review.[24]

In its zeal to set aside its predecessor's regulatory accomplishments, the Trump administration sought to reach a broader set of regulations than those covered by the traditional stop-work orders through the use of disapprovals under the Congressional Review Act, abeyances in pending litigation, and suspensions of final regulations. More than two years into the Trump administration, it is possible to assess the success of these tactics and their impact on the Executive Branch's ability to engage in regulatory policymaking.

The first of these tools—disapprovals under the Congressional Review Act—allowed the Trump administration to directly repeal rules without regard to the APA's requirements.[25] Prior to the Trump administration, Congress had disapproved of only one regulation through the Congressional Review Act: an ergonomics rule promulgated by the Department of Labor under

22. Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 90, 123 (2018); *see also* Bethany A. Davis Noll & Denise A. Grab, *Deregulation: Process and Procedures that Govern Agency Decisionmaking in an Era of Rollbacks*, 38 ENERGY L.J. 269 (2017) (describing procedures that make it difficult to reverse course); Kagan, *supra* note 11, at 2264 (describing research on the rigidity and ossification of agency rulemaking); Mendelson, *supra* note 10, at 592–93 (same).

23. *See* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1423–25, 1439–40 (2012) (discussing the ossification of agency regulation).

24. *See Fox Television Stations, Inc.*, 556 U.S. at 515–16 (requiring an agency to provide "a more detailed justification" for a change in the regulation "when its prior policy has engendered serious reliance interests").

25. *See* 5 U.S.C. §§ 801–08 (2012).

President Bill Clinton.[26] In contrast, early in the Trump administration, fourteen regulations suffered this fate.[27] Congressional Review Act disapprovals are particularly valuable because they put an immediate end to the rule in question. In fact, they are more effective than a regulatory repeal because under the terms of the Act, regulations that are "substantially the same" as the disapproved rule cannot be promulgated in the future without congressional authorization[28]—a very high bar in our current era of congressional gridlock.[29] As a result, of the three rollback strategies, Congressional Review Act disapprovals have been the most effective.

In contrast to disapprovals under the Congressional Review Act, the other two rollback tools that the Trump administration has used in an uncharacteristically aggressive manner—abeyances in pending litigation and suspensions—require control of only the presidency and thus they may be wielded in inter-party transitions where the president's party does not control Congress. In addition, the use of these tools is not limited by the strict timing rules in the Congressional Review Act[30] or by the fact that using Senate debate time to disapprove of a regulation early in a new administration requires a difficult tradeoff between confirming senior Executive Branch officials, including cabinet members, and voting on disapprovals.[31]

Under the second tool, abeyances in pending litigation, courts place a hold on any further briefing, argument, or decision in a challenge to a pending rule while the administration considers whether to change that rule.[32] Many administrations have

26. Joint Resolution Providing for Congressional Disapproval of the Rule Submitted by the Department of Labor Under Chapter 8 of Title 5, United States Code, Relating to Ergonomics, Pub. L. No. 107-5, 115 Stat. 7 (2001).

27. *See Congressional Review Act Resolutions in the 115th Congress*, COALITION FOR SENSIBLE SAFEGUARDS, https://sensiblesafeguards.org/cra [https://perma.cc/T6JQ-B69S] (providing a full list of rules that have been disapproved). In November 2017 and May 2018, the Trump administration also disapproved a guidance and regulation issued by the Consumer Financial Protection Bureau. *Id.*; *see also infra* note 89.

28. 5 U.S.C. § 801(b)(2).

29. *See* Revesz, *supra* note 9, at 1518–25 (discussing gridlock).

30. *See* 5 U.S.C. § 801(d) (listing the timing rules for Congressional Review Act disapprovals); *see also infra* Part I.A.1 (discussing impact of timing rules).

31. *See* 5 U.S.C. § 802(d) (listing rules for Senate debate and the vote).

32. *See, e.g.*, Am. Petrol. Inst. v. EPA, 683 F.3d 382, 389 (D.C. Cir. 2012) ("[W]e can hold the case in abeyance pending resolution of the proposed rulemaking."); Order, West Virginia v. EPA, No. 15-1363 (D.C. Cir. June 26, 2016).

used abeyances, though prior to the Trump administration, abeyances were requested only in cases that were still in the early stages, prior to the completion of briefing.[33] In contrast, the Trump administration has sought abeyances in a significant number of cases in which briefing was complete and where oral argument had already taken place months earlier, such as in the challenge to the Clean Power Plan, the Obama-era regulation designed to cut carbon dioxide emissions from existing power plants.[34] Placing cases in abeyance can be helpful to a new administration in a number of ways. If a court previously stayed the rule pending the completion of the litigation, as was the case for the Clean Power Plan,[35] an abeyance extends the life of that litigation and hence the duration of the court stay.[36] Even where the abeyance does not keep a regulation from going into effect, it can avoid a decision upholding the challenged rule, which could otherwise complicate the agency's efforts to repeal that rule.[37]

The third tool that the Trump administration used to an unprecedented extent in the effort to dismantle Obama-era regulations involved suspending (or postponing, delaying, and staying) regulations while the agencies work on plans to repeal or amend the targeted rules.[38] With suspensions, agencies can use the lack of implementation to make a subsequent repeal seem less signif-

33. *See* Freeman, *supra* note 12, at 551 (describing practice); *infra* Part I.B.1.

34. *See infra* Part I.B.2.

35. *See* Chamber of Commerce v. EPA, 136 S. Ct. 999 (2016).

36. *Cf.* Order, West Virginia v. EPA, No. 15-1363 (D.C. Cir. June 26, 2016).

37. *See infra* text accompanying notes 113–22.

38. Agencies have labeled these actions "suspensions," see Notice for Suspension of Small Area Fair Market Rent (Small Area FMR), 82 Fed. Reg. 58,439 (Dec. 12, 2017), "postponements," see Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017); "delays," see Delay of Effective Date for 30 Final Regulations Published by the Environmental Protection Agency Between October 28, 2016 and January 17, 2017, 82 Fed. Reg. 8499 (Jan. 26, 2017); "stays," see Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 82 Fed. Reg. 24,878 (May 31, 2017) (to be codified at 40 C.F.R. pt. 60); or "revisions," see Refuse to Accept Procedures for Premarket Tobacco Product Submissions, 82 Fed. Reg. 8894 (Feb. 1, 2017) (to be codified at 21 C.F.R. pt. 1105). Despite the different terminology used, all these actions have fundamentally the same effect of suspending the original rule, and thus this Article uses the term "suspension" to refer to them.

icant and the cost savings of such a repeal seem more significant,[39] which can help them in any challenge to the repeal. Many courts have struck down Trump-era suspensions.[40] But even with the poor win rate, the tool has remained successful. As commentators have noted, because of the short-term quality of suspensions and the fact that the administration can either replace the rule or withdraw the delay, legal disputes over them often end up unresolved.[41] After the negative reception of the Trump administration's efforts in court and what may be seen as a "Trump taint," suspensions may be a less promising tool for a subsequent administration, yet subsequent administrations are still likely to find this tool useful.

In Part II, this Article discusses two factors that make it likely that the Trump administration's aggressive regulatory strategy will prompt a fundamental and enduring transformation in presidential administration. First, subsequent presidents are likely to have powerful incentives to use similar playbooks to try to undo the regulations of their immediate predecessors following an inter-party transition. As long as the legislative filibuster remains in place, congressional gridlock will continue to put pressure on presidents to seek policy wins in the regulatory arena.[42]

In this climate, a Democratic president is not likely to shy away from following the aggressive approach mapped out by the Trump administration after the next inter-party transition. Both the Democratic and Republican parties have participated in tit-

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39. *See* U.S. ENVT'L. PROT. AGENCY, REGULATORY IMPACT ANALYSIS: RECONSIDERATION OF THE 2017 AMENDMENTS TO THE ACCIDENTAL RELEASE PREVENTION REQUIREMENTS: RISK MANAGEMENT PROGRAMS UNDER THE CLEAN AIR ACT, SECTION 112(r)(7), REGULATIONS.GOV, at 38–39 (May 30, 2018), https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0907 [https://perma.cc/8YDF-R9E5] (taking credit in proposed rescission for saving full compliance costs after suspension of the rule).

40. *See, e.g.*, Air All. Hous. v. EPA, 906 F.3d 1049, 1069 (D.C. Cir. 2018); Nat. Res. Def. Council v. Nat. Highway Traffic Safety Admin., 894 F.3d 95, 115 (2d Cir. 2018); Clean Air Council v. Pruitt, 862 F.3d 1, 14 (D.C. Cir. 2017).

41. *See* Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 993 (2003) (stating some of the delay questions "are unlikely to ever be resolved"); *see also* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 530 (2011) (discussing the legal issues that arise with suspensions); *infra* Part I.C.3 (describing this feature of suspensions).

42. *See* Kagan, *supra* note 11, at 2248 (explaining how President Clinton "turned to the bureaucracy" to achieve his policy goals).

for-tat political behavior lately.[43] And because the parties are becoming more polarized and finding common ground between them is less possible,[44] future administrations will be under similar pressure to use these aggressive tools to cut back on the prior administration's policies as much as possible. For example, if President Trump is succeeded by Democratic control of the presidency, House, and Senate, the temptation to make the most use of the Congressional Review Act is likely to be irresistible. In 2017, when Republicans invoked the Congressional Review Act, Democrats complained bitterly about the lack of a public process in Congressional Review Act disapprovals, which take place with no hearings, reports, or public scrutiny of their rationales.[45] But not using this tool leaves important policy opportunities on the table. Congressional niceties are thus likely to be sacrificed. The same incentives exist for continuing to make aggressive use of abeyances and suspensions.

Second, the risks posed by these three tools are made more significant by the fact that major policy-oriented rules can take a substantial amount of time to propose, promulgate, implement, and shepherd through litigation. Though a president could turn towards more use of "unorthodox rulemaking,"–the use of executive orders and "quasi-rules such as guidance" to accomplish

43. *See, e.g.*, John T. Bennett, *Trump vs. Pelosi: 5 Takeaways from Their Tit-For-Tat as Shutdown Plods On*, ROLL CALL (Jan. 18, 2019), https://www.rollcall.com/news/trump-vs-pelosi-five-takeaways-tit-tat-shutdown-plods [https://perma.cc/8344-X2H4] (discussing tit-for-tat dynamics on the winter 2019 government shutdown); Nina Totenberg, *Trump, Republicans Continue Remaking the Federal Courts – Even as Senate on Recess*, NPR (Oct. 27, 2018), https://www.npr.org/2018/10/27/660643999/trump-republicans-continue-remaking-the-federal-courts-even-as-senate-on-recess [https://perma.cc/9A9V-97JB] (discussing escalation on judicial nominations).

44. Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1701–05 (2015); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 959–60 (2018).

45. *See* Laura Barron-Lopez & Arthur Delaney, *Republicans Are Using an Arcane Tool to Handcuff Federal Agencies*, HUFFPOST (Feb. 19, 2017), https://www.huffpost.com/entry/republicans-cra-federal-agencies_n_58a7776ae4b045cd34c1a44c [https://perma.cc/GHG5-A6W9] (quoting Sen. Ben Cardin, Democrat of Maryland, saying "[w]hat the Senate did with the CRA . . . is outrageous"); Thomas O. McGarity, *The Congressional Review Act: A Damage Assessment*, AM. PROSPECT (Feb. 6, 2018), https://prospect.org/article/congressional-review-act-damage-assessment [https://perma.cc/FX7P-NQLA].

her objections[46]–economically significant regulations are likely to remain at the core of a president's priorities. The process for preparing and finalizing a rule can take two to three years, and sometimes even longer.[47] As a result, rules are likely to be finalized close to the end of a president's term when they are at risk of a Congressional Review Act disapproval (or abeyances in pending litigation and suspensions). Judicial review, itself, can take more than a year.[48] Thus, even if a regulation is safe from a Congressional Review Act disapproval, a pending challenge at the end of the president's term can open the door to an abeyance request if a president of the other party is elected. In addition, a rule's compliance deadlines could stretch the timeline out for several more years, during which time the rule is also at risk of a suspension. Thus, even rules that are finalized early enough to be safe from Congressional Review Act disapprovals and abeyances might be subject to suspensions so long as compliance deadlines remain in the future.

Part III looks at the regulatory and electoral incentives that this emerging state of affairs is likely to place on future presidents. Future presidents will need to consider making significant adjustments to their regulatory activities to preserve their legacy in this new era of aggressive rollbacks. From the very beginning of a new administration, presidents will need to change the way in which notice-and-comment rulemaking is conducted, and may need to undertake substantial regulatory work even before Inauguration Day. Electoral incentives are also likely to change. For example, first-term presidents will need to change how they have traditionally weighed the decision about whether they should postpone regulatory initiatives until their second term to increase their probability of reelection. And two-term presidents will have a significant additional incentive to have their party control at least one chamber of Congress at the end of their term to avoid Congressional Review Act disapprovals.

Part IV explains how President Trump's strategies have ushered in an important reconceptualization of the nature of presidential power. With the low probability of legislative wins, presidents are likely to continue to focus on regulatory policy making. But a president's ability to make long-lasting policy

46. *See* Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1800–03 (2015) (discussing unorthodox practices).

47. *See infra* Part II.B.1.

48. *See infra* text accompanying notes 295–97.

through regulatory change is likely to depend on winning two—rather than just one—national elections. With this change, the Executive Branch may come to share common characteristics with political systems, like some states or foreign countries, in which multiple popular elections or multiple votes by a legislature are needed for constitutional amendments.[49] Thus, examining the justifications that undergird these multiple-vote requirements—legitimacy, stability, and quality[50]—is a good way of assessing the normative value of this shift. Looking at the new requirement that a president survive reelection through that lens demonstrates that there is little normative support for this reconceptualization. Nonetheless, future presidents will need to adjust to this new reality.

The Article concludes with a brief discussion of "what next," and as part of that discussion, addresses factors that could stop this reconceptualization of the Executive Branch in its tracks. Among those factors would be an end to the filibuster for legislation or major changes in doctrines governing the judicial review of administrative action. But the Article concludes that those factors are unlikely to occur in the foreseeable future.

I. TOOLS TO REVERSE REGULATORY POLICYMAKING

Given the importance that recent presidents have attached to their regulatory agenda, it should not be surprising that presidents, aided by Congress, have developed tools to dismantle a previous president's agenda. But the Trump administration has taken three relatively low-profile tools—Congressional Review Act disapprovals, abeyances in pending litigation, and regulatory suspensions—to a whole new level. These tools had been used by prior presidents, but to a far lesser extent. The Trump administration's new and more aggressive use of these tools has put a greater proportion of a prior president's agenda at risk than had previously been the case. In this Part, we describe the use of Congressional Review Act disapprovals, abeyances in

49. *See* John Dinan, *Constitutional Amendment Procedure: By the Legislature*, *in* THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 11(Audrey S. Wall et al. eds., 2016 ed. 2016) (listing requirements for approval of proposed constitutional amendments in legislature); *see also infra* Part IV.A.1 (describing multiple-vote requirements at the state level and in foreign countries).

50. *See, e.g.*, Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 22 (2010) (discussing the stability of the election system).

pending litigation, and regulatory suspensions and show how the Trump administration departed from prior practices. We also explain how each tool is likely to remain useful for future administrations.

A. Congressional Review Act

The Congressional Review Act allows Congress to repeal regulations through streamlined procedures. This Section describes the history and prior administrations' use of the Congressional Review Act and explains how the Trump administration—along with Congress—used the Act to repeal a far greater number of regulations than had ever been repealed under the Act before.

1. History and Purpose

On March 29, 1996, President Bill Clinton signed the Congressional Review Act, which was part of the Small Business Regulatory Enforcement Fairness Act of 1996.[51] Previously, Congress had used a one-house or two-house legislative veto to disapprove of agency rules.[52] But in *Immigration & Naturalization Service v. Chadha*, a 1983 decision, the Supreme Court closed this option, holding that a congressional veto over actions of the Executive Branch improperly circumvented the Constitution's requirement of bicameralism and presentment.[53]

Congress responded by passing the Congressional Review Act through a bipartisan vote.[54] Under the Congressional Review Act, Congress can disapprove of a regulation, which renders the regulation "of no force or effect."[55] After a disapproval, the regulation that was in effect immediately before the disapproved rule again becomes the effective regulation.[56] In addition, an

51. 5 U.S.C. §§ 801–808 (2012); 15 U.S.C. § 657 (2012).

52. Note, *Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2164 (2009).

53. INS v. Chadha, 462 U.S. 919, 928 (1983).

54. The House voted to pass the Act 328-91, with 201 Republicans and 127 Democrats voting yes; approximately thirty Republicans and sixty Democrats voted no. 142 CONG. REC. H2986 (daily ed. Mar. 28, 1996). The Senate passed the Act unanimously. 142 CONG. REC. S2316 (daily ed. Mar. 19, 1996).

55. 5 U.S.C. § 801(f).

56. *Id.*; *see* Congressional Nullification of the Stream Protection Rule Under the Congressional Review Act, 82 Fed. Reg. 54,924 (Nov. 17, 2017) (to be codified at 30 C.F.R. pts. 700–01, 773–74, 777, 779–80, 783–85, 800, 816–17, 824 and 827) (explaining that after disapproval of the Stream Protection Act, the regulation's text would revert to the "regulatory text in effect immediately

agency cannot issue another rule that is "substantially the same" as the disapproved rule unless authorized to do so in subsequent legislation.[57]

The Act can serve as a particularly useful tool for a new president and Congress of the same party for reviewing the actions of the prior president of the opposite party for two reasons.[58] First, the Act bypasses the usual sixty-vote requirement to advance legislation in the Senate,[59] thus facilitating more partisan disapprovals than would otherwise be possible.[60]

Second, the Act's timing rules help enable disapprovals during a political transition. The Act requires that all agencies report rules to Congress.[61] Once Congress receives this report, it has sixty legislative working days to introduce a special joint resolution of disapproval of the rule.[62] When Congress begins a new term, as it does after a presidential election, the statute provides that the review period restarts for anything finalized within the last sixty days of the last Congress, and that all the rules that were finalized within this period then become subject to review and disapproval by the new Congress for an additional seventy-five legislative days.[63] Though the exact timing varies because

prior to January 19, 2017, the effective date of the Stream Protection Rule"); *see also* Nat. Res. Def. Council Inc. v. EPA, 683 F.2d 752, 767–69 (3d Cir. 1982) (vacating a suspension rule and making clear that the original rule's deadlines were back in effect); Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 83 Fed. Reg. 62,268, 62,269 (Dec. 3, 2018) (to be codified at 40 C.F.R. pt. 68) (explaining that the amendments to the Accidental Release Prevention Requirements for Risk Management Programs under the Clean Air Act were in effect after a court decision vacating the agency's suspension of the rule).

57. 5 U.S.C. § 801(b)(2); *see also* MAEVE P. CAREY ET AL., CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 1 (2016).

58. CAREY ET AL., *supra* note 57, at 6; *see* RICHARD S. BETH, CONG. RESEARCH SERV., RL31160, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT 14 (2001); Philip A. Wallach & Nicholas W. Zeppos, *How Powerful Is the Congressional Review Act?*, BROOKINGS (Apr. 4, 2017), https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/ [https://perma.cc/66QU-M3SB]; *Mysteries of the Congressional Review Act*, *supra* note 52, at 2167–69.

59. 5 U.S.C. § 802(d)(2).

60. CAREY ET AL., *supra* note 57, at 6; BETH, *supra* note 58; *Mysteries of the Congressional Review Act*, *supra* note 52, at 2167–69; Wallach & Zeppos, *supra* note 58.

61. 5 U.S.C. § 801(a).

62. 5 U.S.C. § 802(a).

63. 5 U.S.C. § 801(d); *see* Daniel R. Pérez, *Congressional Review Act Fact*

the number of legislative days changes with each congressional calendar, this timing rule means that a new Congress may be able to target regulations issued under a prior administration dating back several months[64] and that the new Congress may have a few months to pass the disapproval resolutions.[65]

In contrast, resolutions of disapproval are not as useful during non-transition times. Any resolutions passed under the Congressional Review Act require the president's signature to become law and the president can veto the resolution.[66] A veto override requires a two-thirds majority of both houses of Congress, as for all legislation.[67] Thus, during non-transition times, resolutions, even if passed by both chambers of Congress, are unlikely to become effective because the president is likely to veto a regulation disapproving a regulation promulgated during her administration, and a veto override would require bipartisan support.[68]

Sheet, REG. STUD. CTR. (Nov. 21, 2016), https://regulatorystudies.columbian.gwu.edu/congressional-review-act-fact-sheet [https://perma.cc/QV35-2J57].

64. CHRISTOPHER M. DAVIS & RICHARD S. BETH, CONG. RESEARCH SERV., IN10437, AGENCY FINAL RULES SUBMITTED AFTER MAY 16, 2016, MAY BE SUBJECT TO DISAPPROVAL IN 2017 UNDER THE CONGRESSIONAL REVIEW ACT 2 (2016) (explaining that the Republican-controlled Congress could target any regulations issued under the Obama administration on or after May 16, 2016); CURTIS W. COPELAND & RICHARD S. BETH, CONG. RESEARCH SERV. RL34633, CONGRESSIONAL REVIEW ACT: DISAPPROVAL OF RULES IN A SUBSEQUENT SESSION OF CONGRESS at 4–10 (2008) (same); BETH, *supra* note 58, at 3–6, (explaining timing rules).

65. *See* COALITION FOR SENSIBLE SAFEGUARDS, *supra* note 27 (explaining that the period for Congress to pass disapprovals for regulations issued under Obama ended on May 11, 2017).

66. DAVIS & BETH, *supra* note 64; COALITION FOR SENSIBLE SAFEGUARDS, *supra* note 27.

67. *See* DAVIS & BETH, *supra* note 64.

68. During the Obama presidency, after the Democrats lost their majority in Congress, members of the Republican-controlled Congress sponsored bills under the Act to disapprove rules issued by the Obama administration, but all of the attempts were vetoed. *See* DAVIS & BETH, *supra* note 64. Under the Trump administration, certain factions in Congress have attempted to use the Act to signal opposition to the administration's policies, even when the resolution has no hope of ultimately passing. *See* Marianne Levine, *Senate Votes to Overturn Trump Donor Disclosure Rule*, POLITICO (Dec. 12, 2018), https://www.politico.com/story/2018/12/12/senate-democrats-overturn-trump-donor-disclosure-1057535 [https://perma.cc/K9KS-5ZV3]. *But see infra* note 89 (discussing use of CRA during non-transition time to disapprove regulations issued by independent agencies).

2. Pre-2017 Transitions

Three inter-party transitions have occurred since the passage of the Congressional Review Act: from Bill Clinton to George W. Bush; from George W. Bush to Barack Obama; and from Barack Obama to Donald Trump.[69] In all three cases, the new president's party also controlled both chambers of Congress, thereby making Congressional Review Act disapprovals a realistic possibility.[70] But prior to the Trump administration, the Act had been successfully used only once.[71] In November 2000, while the results of the presidential election were still being contested, the Occupational Safety and Health Administration (OSHA) promulgated the Ergonomics Rule requiring employers to take measures to reduce ergonomic injuries in the workplace.[72]

But the Small Business Administration claimed that OSHA had vastly underestimated the cost to employers and vigorously objected to the rule.[73] And in March 2001, after George W. Bush's election, the 107th Congress voted to overturn the regulation under the Congressional Review Act.[74] The disapproval of the Ergonomics Rule passed the Senate, which at the time was evenly split between Republicans and Democrats (but controlled by Republicans because of the possibility of vice presidential tie

69. Paul J. Larkin, Jr., *Reawakening Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 243 (2018).

70. *See* PARTY DIVISION, U.S. SENATE, https://www.senate.gov/history/partydiv.htm (providing party breakdown in the Senate for each Congress); PARTY DIVISIONS OF THE HOUSE OF REPRESENTATIVES, U.S. HOUSE OF REPRESENTATIVES, 1789 to Present, https://history.house.gov/Institution/Party-Divisions/Party-Divisions/ (same for House); *see also* Larkin, Jr., *supra* note 69, at 243.

71. Michael D. Shear, *Trump Discards Obama Legacy, One Rule at a Time*, N.Y. TIMES (May 1, 2017), https://www.nytimes.com/2017/05/01/us/politics/trump-overturning-regulations.html [https://perma.cc/KW9C-YG9R]. In general, it has been difficult for Congress to engage in systematic oversight of agency decision-making due to "institutional and political obstacles." Mendelson, *supra* note 10, at 570, 648 (describing congressional oversight of agency decisions as "relatively ad hoc" and "fragmented").

72. Ergonomics Program, 65 Fed. Reg. 68,262 (Nov. 14, 2000) (to be codified at 29 C.F.R. pt. 1910); *see also* Robert Pear, *After Long Delay, U.S. Plans to Issue Ergonomics Rules*, N.Y. TIMES (Nov. 22, 1999), https://www.nytimes.com/1999/11/22/us/after-long-delay-us-plans-to-issue-ergonomic-rules.html.

73. Pear, *supra* note 72.

74. *See* Ergonomics Program Final Rule Removal, 66 Fed. Reg. 20,403 (Apr. 23, 2001) (to be codified at 29 C.F.R. pt. 1910); *Mysteries of Congressional Removal Act*, *supra* note 52, at 2170.

breaks),[75] with 50 Republicans and 6 Democrats voting yes.[76] In the Republican-controlled House, 206 Republicans, 16 Democrats, and 1 Independent voted for the disapproval.[77] President Bush subsequently signed the resolution of disapproval and the Ergonomics Rule was invalidated.[78]

That was the last time the Act was used before the Trump administration. During the same George W. Bush transition period, there were a few other attempts by members of Congress to use the Congressional Review Act to disapprove of regulations issued in the last days of the Clinton Administration, but they were unsuccessful.[79] At the beginning of the Obama presidency, the Democratic majorities did not use the Congressional Review Act to undo any Bush-era rules.[80] Though the Bush administration had attempted to minimize the number of late-term rules it finalized,[81] there were thirty-two rules that may have been eligible for disapproval.[82] But rather than resort to using the Congressional Review Act, the Obama administration focused its early attention on filling cabinet and subcabinet positions and

75. *The Unforgettable 107th Congress*, U.S. SENATE (Nov. 22, 2002), https://www.senate.gov/artandhistory/history/minute/unforgettable_107th_congress.htm [https://perma.cc/C3J5-5K9R].

76. 147 CONG. REC. 2873 (2001). The 107th Congress had 220 Republicans, 213 Democrats, and 2 Independents in the House. CONGRESS PROFILES, 107TH CONGRESS (2001–2003), http://history.house.gov/Congressional-Overview/Profiles/107th/ [https://perma.cc/4MXT-5XBJ]. The Senate had 50 Republicans and 50 Democrats. U.S. SENATE, *supra* note 75.

77. *S.J. Res. 6 (107th): Ergonomics Regulations Resolution*, GOVTRACK.US (Mar. 7, 2001, 7:26 PM), https://www.govtrack.us/congress/votes/107-2001/h33 [https://perma.cc/RB73-D4JN].

78. *Mysteries of the Congressional Review Act*, *supra* note 52, at 2170.

79. MORTON ROSENBERG, CONG. RESEARCH SERV., RL30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE 9–10 (2008) (listing resolutions).

80. There were 257 Democrats and 178 Republicans in the House and 58 Democrats; 2 Independents, who caucused with the Democrats; and 40 Republicans in the Senate. JENNIFER E. MANNING, CONG. RESEARCH SERV., R40086, MEMBERSHIP OF THE 111TH CONGRESS: A PROFILE 1 (2009).

81. *Mysteries of Congressional Removal Act*, *supra* note 52, at 2174; Memorandum from Joshua B. Bolten, White House Chief of Staff, to the Heads of Exec. Dep'ts & Agencies (May 9, 2008), http://policyintegrity.org/documents/BoltenMemo050908.pdf [https://perma.cc/AH4Y-YSVG].

82. *Mysteries of the Congressional Review Act*, *supra* note 52, at 2175; *see also* O'Connell, *supra* note 41, at 472 (describing numerous midnight regulations issued in the waning days of the Bush presidency).

used regular rulemaking procedures, rather than the Congressional Review Act, to overturn at least some of the targeted rules.[83]

3. The Trump Administration's Record

Despite having been used successfully only once in the first twenty years of its existence, the Congressional Review Act received significant interest after the November 2016 election, in which Republicans gained unified control of government.[84] The Congressional Research Service estimated that Congress could target any completed rules submitted to Congress for disapproval on or after June 13, 2016.[85] In addition, Congress had until early May 2017, to pass the disapproval resolutions.[86]

In January 2017, as soon as the new administration and Congress were sworn in and with the clock ticking on the sixty-legislative-day limit, congressional Republicans got to work disapproving Obama-era regulations.[87] Congress passed fourteen

83. Rescission of the Regulation Entitled "Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law" Proposal, 74 Fed. Reg. 10,207 (proposed Mar. 10, 2009) (to be codified at 45 C.F.R. pt. 88); Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 728–29 (2011); *Mysteries of Congressional Removal Act*, *supra* note 52, at 2176; Emily E. Williams, *HHS Proposes Rescission of Conscience Rule*, LEXOLOGY (Mar. 19, 2009), https://www.lexology.com/library/detail.aspx?g=197683f9-eceb-4c3f-9d8f-a1dc99384d51 [https://perma.cc/G6W2-LG5X].

84. After the election, both the House and the Senate had Republican majorities. The House had 236 Republicans, 197 Democrats, and two vacant seats. JENNIFER E. MANNING, CONG. RESEARCH SERV., R44762, MEMBERSHIP OF THE 115TH CONGRESS: A PROFILE 1 (2018). The Senate had fifty-one Republicans, forty-seven Democrats, and two Independents, who both caucused with the Democrats. *See id.*

85. *See* CHRISTOPHER M. DAVIS & RICHARD S. BETH, CONG. RESEARCH SERV., IN10437, AGENCY FINAL RULES SUBMITTED ON OR AFTER JUNE 13, 2016, MAY BE SUBJECT TO DISAPPROVAL BY THE 115TH CONGRESS (2016).

86. *See id.*

87. *See* Brian Naylor, *Republicans Are Using an Obscure Law to Repeal Some Obama-Era Regulations*, NPR (Apr. 9, 2017), https://www.npr.org/2017/04/09/523064408/republicans-are-using-an-obscure-law-to-repeal-some-obama-era-regulations [perma.cc/SYY2-3ENZ]; Shear, *supra* note 71; John J. Vecchione, Opinion, *The Congressional Review Act and a Regulatory Agenda for Trump's Second Year*, THE HILL (Mar. 31, 2017, 12:30 PM), https://thehill.com/blogs/congress-blog/politics/326636-the-congressional-review-act-and-a-deregulatory-agenda-for [https://perma.cc/2BRU-Y9BU].

joint resolutions of disapproval, which were all signed by President Trump.[88] The fourteen disapproved regulations included four environmental regulations as well as regulations covering diverse topics such as health care and limits on gun ownership for the mentally ill.[89]

The main constraints on the use of the Congressional Review Act to disapprove of Obama-era rules were the provision for ten hours of debate in the Senate for each disapproval,[90] and the Act's limit on the number of legislative days that the new Congress had to pass the resolutions.[91] Likely as a result of these constraints, in early 2017, Congress targeted but did not succeed in repealing eighteen other rules.[92]

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88. COALITION FOR SENSIBLE SAFEGUARDS, *supra* note 27.

89. *Id.*; *see* Alex Guillén, *GOP Onslaught on Obama's 'Midnight Rules' Comes to an End*, POLITICO (May 7, 2017, 7:10 AM), https://www.politico.com/story/2017/05/07/obama-regulations-gop-midnight-rules-238051 [https://perma.cc/8K7S-JD9D]. In addition to disapproving the fourteen Obama-era regulations during those initial sixty days, in 2017, Congress also disapproved a rule and a guidance promulgated by the Consumer Financial Protection Bureau early during the Trump administration. *See* CONSUMER FIN. PROTECTION BUREAU, INDIRECT AUTO LENDING AND COMPLIANCE WITH THE EQUAL CREDIT OPPORTUNITY ACT (2013), https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf [https://perma.cc/TR7W-S2JH]; *Repealing the CFPB's Arbitration Rule*, REG. REV. (Nov. 6, 2017), https://www.theregreview.org/2017/11/06/repealing-cfpb-arbitration-rule/ [https://perma.cc/U2Z4-9N9K]. The Consumer Financial Protection Bureau is an independent agency whose head does not serve at the will of the President. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 786 (2013). As a result, in 2017, when those disapprovals were issued, the agency still had an Obama-appointed head, Richard Cordray. There is debate about whether disapproving a guidance document is meaningful. *See* Keith Bradley & Larisa Vaysman, *CRA Resolutions Against Agency Guidance Are Meaningless*, REG. REV. (Sept. 20, 2018), https://www.theregreview.org/2018/09/20/bradley-vaysman-cra-resolutions-agency-guidance-meaningless/ [https://perma.cc/2H72-NQXA].

90. 5 U.S.C. § 802(d)(2) (2012). The Midnight Rules Relief Act of 2017, which passed the House in 2017 but not the Senate, would allow Congress to use the Congressional Review Act to bundle multiple regulations issued within the last year of the previous presidential term into one disapproval resolution. H.R. 21, 115th Cong. (2017). But as long as the filibuster remains in place, the Midnight Rules Relief Act is not likely to pass. *See infra* text accompanying notes 526–30 (discussing the likelihood that the filibuster will remain in place).

91. 5 U.S.C. § 801(d) (2012).

92. COALITION FOR SENSIBLE SAFEGUARDS, *supra* note 27; *see also* Eric Lipton & Jasmine C. Lee, *Which Obama-Era Rules Are Being Reversed in the Trump Era*, N.Y. TIMES (May 18, 2017), https://www.nytimes.com/interactive/2017/05/01/us/politics/trump-obama-regulations-reversed.html

In addition, in one prominent case, the use of the Congressional Review Act was rejected. The House passed a resolution, disapproving the Department of Interior's regulation restricting methane pollution at mining facilities, known as the Waste Prevention Rule, but that resolution failed to pass the Senate on a 49-51 vote, when Republican Senators Collins, Graham, and McCain refused to vote for it.[93] Senator McCain explained that he had voted against the measure because of his concern that the agency could otherwise be blocked from issuing future methane regulations under the statute's bar against "substantially the same" regulations.[94]

4. Future Uses

The successful use of the Congressional Review Act during the Trump administration demonstrates that it is a powerful tool to attack a prior president's legacy, assuming the new president's party also controls both branches of Congress. Moreover, future administrations will have to weigh using limited Senate time for confirming presidential appointments against using that time for Congressional Review Act disapprovals.[95] The Obama and Trump administrations both engaged in this calculation, reaching opposite conclusions.

In addition, future administrations will need to consider the impact of the statute's bar on promulgating "substantially the same" regulations absent congressional authorization.[96] There is some uncertainty in how the term should be interpreted. The Congressional Review Act does not define the meaning or scope of the term, what criteria should be considered, or which institution should make such a determination, and the issue has never

[https://perma.cc/AF86-SJW2] (discussing regulations brought to Congress to be reversed).

93. H.R.J. Res. 36, 115th Cong. (2017); 163 CONG. REC. S2852 (daily ed. May 10, 2017).

94. Tom DiChristopher, *John McCain Just Delivered Trump a Rare Loss in His Bid to Roll Back Energy Rules*, CNBC (May 10, 2017), https://www.cnbc.com/2017/05/10/mccain-delivered-trump-a-rare-loss-in-his-bid-to-kill-energy-rules.html [https://perma.cc/F54G-E7S6].

95. *Cf. Midnight Rulemaking: Shedding Some Light: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 23 (2009) (statement of Rep. Jerrold Nadler) (remarking on the need to "pass an economic recovery package, finalize FY 2009 appropriations bills, and prepare for a new budget for the upcoming fiscal year").

96. 5 U.S.C. § 801(b) (2012).

been litigated.[97] Despite that uncertainty, the statute likely bars an agency from issuing a new rule with a new explanation or cosmetic changes,[98] as well as a rule accomplishing essentially the same purpose.[99] For example, as Senator McCain feared, disapproving the Department of Interior's Waste Prevention Rule could bar Interior from issuing a future regulation similarly aimed at cutting waste in oil and gas mining.[100]

The bar may not otherwise be that much of a concern though. For a future anti-regulatory president, the bar would not present too much of an obstacle. The idea that an agency in a subsequent administration would be barred from regulating in that area would likely be considered a plus. And even for a pro-regulatory administration, the "substantially the same" bar might not be all that significant. First, if the prior administration had issued a series of repeals and rollbacks, like the Trump administration has done,[101] a subsequent administration's Congressional Review Act disapproval of a repeal would probably not stand in the way of a measure regulating the activity because a rule that accomplished the exact opposite of a repeal is unlikely to be deemed "substantially the same" as the repeal.[102]

97. CAREY ET AL., *supra* note 57, at 16–17; *see also* Daniel Cohen & Peter L. Strauss, *Recent Developments: Regulatory Reform & the 104th Congress: Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 104 (1997); Finkel & Sullivan, *supra* note 83, at 740–42; Julie A. Parks, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187, 200–02 (2003).

98. *See* Larkin, *supra* note 69, at 250.

99. Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially the Same," and Decline to Defer to Agencies Under* Chevron, 70 ADMIN. L. REV. 53, 89–90 (2018).

100. DiChristopher, *supra* note 94.

101. *See, e.g.*, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (Aug. 24, 2018) (to be codified at C.F.R. pts. 85–86 & 49 C.F.R. pts. 523, 531, 533, 536, 537 & 40) (proposing to reduce existing average fuel economy and carbon dioxide emission standards); Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles, 83 Fed. Reg. 16,077 (Apr. 2, 2018) (withdrawing previous Final Determination of the Mid-term Evaluation of greenhouse gas emission standards); Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36,934 (Aug. 7, 2017) (to be codified at 30 C.F.R. pts. 1202 & 1206).

102. *See* Finkel & Sullivan, *supra* note 83, at 741 (concluding that the statute likely does not bar an agency from engaging in "whole categories" of related activity).

Second, even for rollbacks that are not outright repeals, a Congressional Review Act disapproval resolution could be of great value to a pro-regulatory administration. Under the Congressional Review Act, a disapproved rule must be "treated as though such rule had never taken effect," allowing the previous regulatory regime to come back into effect.[103] In the case of an administration seeking to reverse course on a rule that weakened the Clean Power Plan, for example, such a disapproval would have the salutary effect of putting the Clean Power Plan back in place.[104] And the disapproval would probably not stand in the way of the subsequent promulgation of an even more stringent rule because the strengthening of a standard is unlikely to be deemed "substantially the same" as the weakening of that standard.

Also, the impact of the "substantially the same" provision may be muted by the Congressional Review Act's prohibition of judicial review over any "determination, finding, action, or omission" under the statute.[105] Most courts that have ruled on this question have interpreted the provision to bar review of claims that agencies failed to comply with the Congressional Review Act's reporting requirement.[106] In light of these rulings, it is possible that challenges to regulations on the grounds that they are "substantially the same" as disapproved ones might similarly not be judicially cognizable.

In sum, the Congressional Review Act is an attractive tool for a future administration with unitary party control of the presidency, House, and Senate, which seeks to undo its predecessor's regulatory policies. The use of Senate time early in the administration and, to a lesser extent, possible constraints on future rulemaking are the main pitfalls to be considered.

103. 5 U.S.C. § 801(f) (2012).

104. Reinstating the Clean Power Plan would, of course, spur new challenges. *See infra* Part I.B.2.

105. 5 U.S.C. § 805 (2012).

106. *See, e.g.*, Montanans for Multiple Use v. Barbouletos, 568 F.3d 225, 229 (D.C. Cir. 2009) (declining to review amendments of a forest plan by the U.S. Forest Service for compliance with the Congressional Review Act reporting requirement); Via Christi Reg'l Med. Ctr., Inc. v. Leavitt, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007) (declining to review compliance with the Congressional Review Act in reviewing denial of reimbursement of Medicare depreciation expenses by the Secretary of Health and Human Services). *But see* United States v. S. Ind. Gas & Elec. Co., IP99-1692-C-M/S, 2002 U.S. Dist. LEXIS 20936, at *11–18 (S.D. Ind. Oct. 24, 2002) (holding that court was not barred from reviewing EPA's compliance with the CRA).

B. ABEYANCES

In order to gain an advantage in efforts to roll back the challenged Obama-era rules, the Trump administration has also used another tool—abeyances in pending litigation—in a way that goes far beyond what its predecessors ever did. This Section describes this tool and shows how the Trump administration expanded the use of abeyances from cases that had not progressed far, to cases where briefing was complete, or even where oral argument had taken place.

1. Background and Prior Uses

When an agency contemplates launching a new rulemaking that would significantly amend a rule for which judicial review is pending, it can be extremely useful to the new administration to make sure that the pending challenge remains undecided. Abeyances are court orders that put off briefing, argument, and decision in the pending case and thus can accomplish this task.[107] Typically, abeyances in a pending lawsuit are granted to allow a new rulemaking to "run its course" and save the judicial resources, which would otherwise be involved in deciding the pending matter.[108] If the agency ultimately revises the challenged rule in a way that moots the issues in the pending case,[109] the abeyance saves the court the resources that it would have expended on that case.[110] If the agency decides not to change the rule under review, the court can proceed with the pending case, avoiding a situation where the challengers are forced to bring a new suit.[111] In addition, where there is a significant likelihood that the decision under review is subject to change, courts prefer

107. *See* Am. Petrol. Inst. v. EPA, 683 F.3d 382, 386 (D.C. Cir. 2012); FBME Bank Ltd. v. Lew, 142 F. Supp. 3d 70, 73 (D.D.C. 2015).

108. *Am. Petrol. Inst.*, 683 F.3d at 386; *FBME Bank Ltd.*, 142 F. Supp. 3d at 73.

109. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 71–76 (1997); Akiachak Native Cmty. v. U.S. Dep't of Interior, 827 F.3d 100, 105–06 (D.C. Cir. 2016).

110. *See, e.g.*, California v. EPA, No. 08-1178, 2009 WL 2912910 (D.C. Cir. Sept. 3, 2009) (dropping suit over denial of a waiver to enforce the state's own emission standards after EPA granted California's waiver); Order, Specialty Steel v. EPA, No. 00-1434, 2007 U.S. App. LEXIS 27889* (D.C. Cir. Nov. 28, 2007) (dismissing suit after abeyance and settlement reached between the parties).

111. *See* Mississippi v. EPA, 744 F.3d 1334, 1341 (D.C. Cir. 2013) (explaining that the court had granted an abeyance to allow the agency to decide whether to reconsider a rule).

not to become entangled in an "abstract disagreement[]" while the agency reconsiders the rule.[112]

The clearest recent example of an abeyance serving the needs of a new administration concerns the Clean Power Plan, which had been stayed by the Supreme Court, and which the Trump administration has now repealed.[113] Under its terms, the stay was meant to stay in place until the D.C. Circuit decided the pending challenge and the Supreme Court reviewed the case, through either a denial of certiorari or by deciding the case on the merits.[114] So the abeyance kept in place a stay of a policy that the Trump administration deeply disliked, long enough for the rule to be repealed.[115]

The Supreme Court's stay of the Clean Power Plan was exceptional.[116] Even without an ongoing court-issued stay in place, however, an abeyance can be useful because it allows the administration to avoid a decision which might uphold the former administration's rule. For example, should that court find that a statute is unambiguous on a particular question, the court's interpretation of the statute in that case would preclude an agency's attempt to rely on any contrary construction in a rewrite;[117] an abeyance protects the agency from this undesirable outcome.

Even where the statute is ambiguous, the abeyance will aid the agency. Without an abeyance, if an incoming administration disagrees with the legal position in support of the prior administration's rule and wants its new views taken into account be-

112. *Am. Petrol. Inst.*, 683 F.3d at 386.

113. *See* Repeal of Clean Power Plan, 84 Fed. Reg. 32,520 (July 8, 2019).

114. Chamber of Commerce v. EPA, 136 S. Ct. 999 (2016) (granting a stay pending applicants' petitions for review in the Court of Appeals).

115. *What Is the Clean Power Plan, and How Can Trump Repeal It?*, N.Y. TIMES (Oct. 10, 2017), https://www.nytimes.com/2017/10/10/climate/epa-clean-power-plan.html [https://perma.cc/Z68T-J3Q2].

116. Jonathan H. Adler, Opinion, *Supreme Court Puts the Brakes on the EPA's Clean Power Plan*, WASH. POST (Feb. 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan [https://perma.cc/HM38-XP44] (describing the unprecedented nature of the stay).

117. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

fore the court decides a case, it would need to file a brief renouncing the government's prior legal position. But the Justice Department, which represents federal agencies in the courts,[118] has no authority to change the agency's policy position[119] and generally disfavors changing the government's litigation position in administrative law cases unless the agency has first repealed or modified the rule.[120] Even if the Justice Department set aside its customary reluctance on this front, the agency could not benefit from the various doctrines providing for judicial deference of administrative decisions,[121] because those doctrines would attach to agency decisions following notice-and-comment rulemaking and not to representations made by Justice Department lawyers.[122] An abeyance keeps the case on hold until the agency can complete the lengthy process. Once the agency has completed that process, its new position can benefit from judicial deference. This also addresses the Justice Department's concerns about changing its legal position prior to the agency coming to a new conclusion itself.

In addition, avoiding a decision upholding the former administration's rule can help to keep public opinion from solidifying in support of the original rule. For example, the Trump administration has been able to work on building political support for its change in policy on the Clean Power Plan by decrying the illegality of the prior regulation without needing to worry about the possibility of a judicial decision upholding that rule.[123] And

118. Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1345–46 (2000); *cf.* Datla & Revesz, supra note 89, at 799–801, 801 n.171 (describing statutes that authorize certain agencies to conduct their own litigation).

119. *See* DONALD L. HOROWITZ, THE JUROCRACY: GOVERNMENT LAWYERS, AGENCY PROGRAMS, AND JUDICIAL DECISIONS 5, 37 (1977); Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 291–92 (2002).

120. *See* Freeman, *supra* note 12, at 551 (explaining that the Justice Department's practice in such cases is not to adopt a new view until the agency announces its decision following notice and comment).

121. *See generally* HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 211–58 (3d ed. 2018) (discussing the various doctrines providing for judicial deference of administrative decisions).

122. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (explaining the court "must judge the propriety" of an agency's action based on the agency's reasoning).

123. *See, e.g.*, Emission Guidelines for Greenhouse Gas Emissions From Ex-

a future administration seeking to roll back Trump administration policies could do the same thing.

But the usual justifications for an abeyance are not as strong where there is no firm deadline on any potential rewrite of a rule, and where the pending case has already been fully briefed and argued and is ready for decision.[124] Without a firm deadline on a new rule, there is little chance that any new rule would turn the existing case into an "abstract disagreement[]."[125] And the agency could drag its feet and use an abeyance simply as an attempt to evade review of the original rule. Moreover, if all the briefs have been filed, it is likely that the court has started working on the case, thus making it *unlikely* that an abeyance will actually save judicial resources. That is definitely the case if oral argument has already taken place, because the court will have expended judicial resources to prepare for argument. In fact, an abeyance could waste judicial resources because work that the court likely already did on the case could go stale and would need to be redone should the court need to decide the case in the future.

Prior to the Trump administration, courts granted abeyances in cases where the argument that the court would save judicial resources by waiting was relatively strong.[126] For example, while the Obama administration filed several abeyance requests to facilitate its review of Bush-era rules, those requests were made in cases where briefing had not yet been completed and, with few exceptions, were unopposed.[127] Similarly, during

isting Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44,746, 44,753 (proposed Aug. 31, 2018) (to be codified at 40 C.F.R. pts. 51, 52 & 60) (proposing to conclude that the statute "does not, in fact, delegate discretion" to the agency to establish the standard); Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Unit, 82 Fed. Reg. 48,035, 48,037-38 (proposed Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 60) (asserting that the Clean Power Plan "is not within Congress's grant of authority to the Agency under the governing statute" and "exceeds the bounds of the statute").

124. *Cf.* Am. Petrol. Inst. v. EPA, 683 F.3d 382, 389 (D.C. Cir. 2012) (explaining that the court reviews an agency's "finalized" decisions).

125. *Id.* at 386.

126. *See* B.J. Alan Co. v. ICC, 897 F.2d 561, 563, 582 n.1 (D.C. Cir. 1990) (explaining that the court had granted an abeyance because the agency had granted reconsideration and the court had "not yet taken up the case for preparation and argument" at that time).

127. *See, e.g.*, Order at 1, Am. Petrol. Inst. v. EPA, No. 08-1277 (D.C. Cir. Apr. 1, 2009) (granting abeyance in proceeding regarding Bush-era emissions

the George W. Bush administration, the courts placed cases in abeyance when agencies explained that they planned to reconsider a portion of the challenged rule, but those requests were made before the briefs had been filed.[128] As a result, in these prior situations, the courts would not have expended any resources in reviewing the merits of the cases.

2. The Trump Administration's Record

During the Trump administration, just like under prior administrations, several abeyances were granted in cases that had yet to be briefed.[129] But in contrast to the practice under prior administrations, agencies in the Trump administration asked for abeyances in a substantial number of cases that had already been fully briefed and, in one case (the Clean Power Plan litigation), had already been argued.[130]

standards for petroleum refineries); Order at 1, Mississippi v. EPA, 744 F.3d 1334 (D.C. Cir. 2009) (No. 08-01200) (granting abeyance in proceeding regarding Bush-era ozone regulation); Order at 1, Am. Petrol. v. EPA, 883 F.3d 918 (D.C. Cir. 2009) (No. 09-1038) (granting abeyance in proceeding regarding Bush-era rule deregulating certain materials under the Resource Conservation and Recovery Act); Order at 1, California v. EPA, No. 08-1178 (D.C. Cir. Feb. 25, 2009) (granting abeyance in proceeding regarding California authority to set automobile standards during Bush era); Order at 1, Sierra Club v. EPA, No. 09-1018 (D.C. Cir. Feb. 19, 2009) (granting abeyance in proceeding regarding Bush-era Clean Air Act regulation); Order at 1, New Jersey v. EPA, No. 08-1065 (D.C. Cir. Apr. 2, 2008) (granting unopposed motion to hold case in abeyance).

128. *See, e.g.*, Order at 1, Sierra Club v. EPA, 551 F.3d 1019 (D.C. Cir. 2004) (No. 02-1135) (ordering case be placed in abeyance); Order at 2, New York v. EPA, 413 F.3d 3 (D.C. Cir. 2003) (No. 02-1387) (ordering case to be placed in abeyance "pending completion of respondent's administrative reconsideration process"); Order at 1, Am. Iron & Steel v. EPA, No. 00-01435 (D.C. Cir. Oct 10, 2000) (per curiam) (ordering case to be held in abeyance "pending the disposition of the administrative petition for reconsideration").

129. *See, e.g.*, Nat'l Waste & Recycling Ass'n v. EPA, No. 16-1372 (D.C. Cir. June 14, 2017) (granting abeyance in a challenge to new source performance standards in the oil and natural gas sector); Order at 1, Am. Petrol. Inst. v. EPA, No. 13-1108 (D.C. Cir. May 18, 2017) (granting abeyance); Order at 1, Truck Trailer Mfrs. Ass'n v. EPA, No. 16-1430 (D.C. Cir. May 8, 2017) (per curiam) (challenge to medium- and heavy-duty truck emissions rule); Order at 4, Am. Chemistry Council v. EPA, No. 17-1085 (D.C. Cir. Apr. 4, 2017) (granting abeyance in challenge to Chemical Disaster Rule); Notice of Voluntary Dismissal Pursuant to F.R.C.P. 41(a)(1)(A)(i) at 1, Cloud Peak Energy, Inc. v. U.S. Dep't of Interior, No. 16-CV-315-F (D. Wyo. Nov. 3, 2017) (granting voluntary dismissal); Order Granting Motion for Temporary Stay at 1, Cloud Peak Energy, Inc. v. U.S. Dep't. of Interior, No. 16-CV-315-F (D. Wyo. Mar. 24, 2017) (granting temporary stay in a case regarding challenge to Valuation Rule).

130. Multiple examples of abeyances of this type demonstrate the wide use

Unlike the generally unopposed abeyance requests of the past, many of the Trump administration's requests faced stiff opposition from intervenors supporting the rules and even from some petitioners challenging the rules.[131] The issues raised in the pending cases are likely to be raised again in litigation over any revision and thus opponents have stressed that holding off on deciding the pending cases will not serve the interests of judicial economy.[132] For example, in the challenge to the Clean Power Plan, one of the main issues in the litigation was whether the EPA had the authority to set emission standards for power plants that take into account the ability of states to induce shifts from dirty fuels to cleaner fuels.[133] Now, under the Trump administration, the EPA has proposed to find that the agency does

of this tool in pending and briefed cases. *See* Order at 1, Murray Energy v. EPA, No. 15-1385 (D.C. Cir. 2019) (granting opposed abeyance in challenge to ozone regulations after all briefs had been filed and only days before argument had been scheduled); Order at 2, Dalton Trucking, Inc. v. EPA, No. 13-74019 (9th Cir. May 10, 2017) (granting opposed motion to postpone oral argument in case challenging diesel-engine regulation after all briefs had been filed); Order at 2, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Apr. 28, 2017) (granting opposed abeyance in case challenging the Clean Power Plan after all briefs had been filed and en banc oral argument held); Order at 1, ARIPPA v. EPA, No. 15-1180 (D.C. Cir. Apr. 27, 2017) (per curiam) (granting abeyance in challenge to EPA's denial of reconsideration in mercury rule after all briefs were filed and when oral argument was less than a month away); Order at 1, Murray Energy Corp. v. EPA, No. 16-1127 (D.C. Cir. April 27, 2017) (granting opposed abeyance in case regarding Obama-era mercury rule after all briefs had been filed); Order at 2, Sw. Elec. Power Co. v. EPA, No. 15-60821 (5th Cir. Apr. 24, 2017) (granting opposed abeyance in case challenging wastewater limits after opening briefs had been filed); Order at 2, Walter Coke, Inc. v. EPA, No. 15-1166 (D.C. Cir. Apr. 24, 2017) (granting opposed abeyance in case challenging EPA's start-up and shutdown rule after briefs had been filed and shortly before oral argument was meant to happen); Order at 1, North Dakota v. EPA, No. 15-1381 (D.C. Cir. Apr. 17, 2017) (granting opposed abeyance in case challenging carbon dioxide emissions from new and modified power plants after briefing was complete).

131. *See supra* note 129.

132. *See* Environmental Intervenors' Opposition to Motion to Postpone Oral Argument at 2–3, Walter Coke, Inc. v. EPA, No. 15-1166 (D.C. Cir. Apr. 20, 2017) (explaining that an abeyance would serve no purpose because the question at the center of the case concerning the scope of EPA's authority was likely to recur).

133. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,760–61 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (responding to comments received regarding EPA's authority to set emission standards by weighing factors outside of the source).

not have authority to rely on such generation shifting.[134] Since supporters of the Clean Power Plan disagree with that interpretation, the D.C. Circuit will need to decide this issue eventually.[135]

Nonetheless, many courts have granted the Trump administration's abeyance requests, leaving the challenges in limbo, despite the fact that the usual justifications for abeyances are not present.[136] The long-time horizon for the administration's revision efforts[137] means that action on the new rules would be unlikely to moot out the existing case before a decision could be issued. The fact that the issues are likely to remain central in any litigation over potential revisions means that the courts were unlikely to save any effort by putting off deciding those issues.[138]

Some judges have expressed reservations about granting the continued abeyance requests. Following the D.C. Circuit's grant of the first short-term abeyance in the Clean Power Plan litigation, the court continued to grant similar short-term abeyances up through April 2019.[139] But a few judges on the court expressed reservations during the course of issuing those orders. In June 2018, Judge Tatel, joined by Judge Millett, criticized

134. *See supra* note 123.

135. *See* COMMENTS OF THE ATT'YS GEN. OF N.Y., ET AL., ON THE ENVIRONMENTAL PROTECTION AGENCY'S PROPOSED EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS 14–18 (2018), https://ag.ny.gov.sites/default/files/cpp_replacement_comments.pdf [https://perma.cc/9NX9-PFZ9] (arguing in response to the proposed rule that EPA has no basis for determining that it lacks authority to rely on generation-shifting).

136. *See, e.g.*, *supra* notes 127–31 (exemplifying instances where abeyance requests were granted, including during the Trump era).

137. *See, e.g.*, Status Report Update (July 2018) at 2, Sw. Elec. Power Co. v. EPA, No. 15-60821 (5th Cir. July 6, 2018) (reporting to the court that the agency continues to consider its plans to revise the effluents limitations, after almost a year and a half had passed since the abeyance began); State Petitioners' Motion to Lift Abeyance at 5–8, Murray Energy Corp. v. EPA, 2019 WL 3977557 (D.C. Cir. May 18, 2018) No. 15-1385 (arguing that a lengthy abeyance during reconsideration had denied petitioners the ability to have arguments decided).

138. State and Municipal Respondent-Intervenors' Opposition to Motion to Hold Proceeding in Abeyance at 14, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Apr. 5, 2017) (arguing that assessing whether a repeal of the Clean Power Plan is arbitrary and capricious will require an assessment of whether the policy was illegal).

139. *See* Court Docket at 114, 117–18, 120, 129, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Oct. 23, 2015) (granting continued abeyances on August, 8, 2017, November 9, 2017, March 1, 2018, June 26, 2018, December 21, 2018, and April 5, 2019).

EPA for using the abeyance, combined with the Supreme Court's stay, to avoid complying with its duty to regulate greenhouse-gas emission from power plants.[140] Judge Wilkins also wrote separately to say that, in his opinion, because of the stay, EPA had used the abeyance to "hijack[] the Court's equitable power" for the purpose of facilitating the agency's continued review and reconsideration of the rule.[141] In August 2018, EPA published its proposed replacement plan.[142] And, in December 2018 and again in April 2019, the court again renewed the abeyance, these times unanimously and without any concurring opinions.[143] In July 2019, EPA published its repeal and replacement rule.[144] The petitioners and EPA then moved to have the case dismissed as moot and the court granted the motion.[145]

Though the D.C. Circuit granted a significant majority of abeyance requests, there have been a few exceptions.[146] In one case in which the court denied the abeyance request, the court did not explain its reasons for rejecting the abeyance, but at oral

140. Order at 2, *West Virginia*, No. 15-1363 (D.C. Cir. Aug. 8, 2017) (Tatel, J., concurring) (per curiam) (arguing EPA has an affirmative statutory obligation to regulate greenhouse gases as a result of a 2009 endangerment finding).

141. Order at 3, *West Virginia*, No. 15-1363 (D.C. Cir. June 26, 2018) (Wilkins, J., concurring) (per curiam).

142. Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44,746, 44,797–813 (proposed Aug. 31, 2018) (to be codified at 40 C.F.R. pts. 51, 52 & 60) (proposing replacement plan).

143. *See* Order at 1, *West Virginia*, No. 15-1363 (D.C. Cir. Apr. 5, 2019) (granting further abeyance); Order at 1, *West Virginia*, No. 15-1363 (D.C. Cir. Dec. 21, 2018) (granting additional abeyance).

144. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,575–84 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60) (publishing the repeal and replacement rule).

145. Order at 3, *West Virginia*, No. 15-1363 (D.C. Cir. Sept. 17, 2019); Petitioners and Petitioner-Intervenors' Motion for Dismissal of Petitions for Review as Moot, *West Virginia*, No. 15-1363 (D.C. Cir. July 15, 2019), No. 1797267 (requesting dismissal as case was now moot); EPA's Response in Support of Petitioners' Motion to Dismiss, *West Virginia*, No. 15-1363 (D.C. Cir. July 17, 2019), No. 1797703 (supporting dismissal and agreeing case was now moot).

146. *See* Util. Solid Waste Activities Grp. v. EPA, 901 F.3d 414, 426 (D.C. Cir. 2018) (declining to exercise discretion to place case in abeyance and leaving it open for EPA to address the relevance of certain statutory issues in the case on remand); Sierra Club v. EPA, 895 F.3d 1, 6 (D.C. Cir. 2018) (denying motion to hold case in abeyance).

argument, Judge Millett noted that EPA was two decades overdue on its statutory duty to issue an effective rule.[147] In another case, the court rejected EPA's request to hold off on deciding whether the agency had statutory authority to issue a particular rule pending reconsideration because, in the court's view, the statutory authority question was "intertwined with any exercise of agency discretion going forward."[148] And in one case, the court took a case out of abeyance[149] after petitioners argued that EPA had made no progress in its reconsideration of the rule and that the continued abeyance "effectively denies" the petitioners' right to challenge the rule.[150]

In two other cases where a lower court had already ruled, the reviewing courts were also less receptive to the Trump administration's abeyance requests than the D.C. Circuit has been. For example, the Supreme Court denied the government's motion to put off a decision in an appeal over whether a challenge to an Obama-era Clean Water Act regulation should be filed in the district or circuit court,[151] which ultimately led to a lifting of the circuit court's stay of the regulation.[152] In another case, a district court vacated the Bureau of Land Management's fracking regulation and the Bureau announced it would be reconsidering the rule.[153] The Tenth Circuit then held that the appeals were "prudentially unripe" and, rather than letting the case sit in abeyance as the government had requested, vacated the district court's decision.[154]

147. Stuart Parker, *D.C. Circuit Judges Lean Against Abeyance for Industry's Brick MACT Suit*, INSIDE EPA'S ENVIRONMENTAL POLICY ALERT, Vol. 34, No. 24 (Nov. 9, 2017) (discussing Judge Millet's opinion).

148. *See Utility Solid Waste*, 901 F.3d at 437 (D.C. Cir. 2018) (declining EPA's request for a remand to reconsider its interpretation of a statute because the claim "involve[d] a question—the scope of the EPA's statutory authority—that is intertwined with any exercise of agency discretion going forward").

149. Order at 1, *In re* Murray Energy Corp. v. EPA, No. 15-1385, 2019 WL 3977557 (D.C. Cir. 2019), No. 1739106 (ordering consolidated cases be returned to the court's active docket).

150. State Petitioners' Motion to Lift Abeyance at 7, *Murray Energy Corp*. No. 15-1385, 2019 WL 3977557 (D.C. Cir. May 18, 2018), No. 1731770.

151. *See* Nat'l Ass'n of Mfrs. v. U.S. Dep't of Def., 137 S. Ct. 1452 (2018).

152. *See In re* U.S. Dep't of Def., 713 F. App'x 489, 490 (6th Cir. 2018).

153. *See* Wyoming v. U.S. Dep't of the Interior, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *12 (D. Wyo. June 21, 2016) (vacating a Bureau of Land Management rule regulating fracking), *vacated sub nom.* Wyoming v. Zinke, 871 F.3d 1133, 1146 (10th Cir. 2017); *Wyoming*, 871 F.3d at 1140 (discussing agency announcements that it would reconsider and rescind the rule).

154. *Zinke*, 871 F.3d at 1143 (vacating the district court's decision).

Despite the fact that the Trump administration has not been able to make continued use of abeyances in some cases, it is clear that agencies under Trump made much more aggressive use of this tool than administrations had in the past. Before the Trump administration, abeyances were used exclusively in cases where little or no briefing had occurred, and they were generally unopposed.[155] In contrast, the pattern is very different in cases in which the Trump administration has requested abeyances.[156] In many of the cases, briefing had already been filed and oral argument had either been scheduled or had taken place.[157] Moreover, the abeyance requests in those cases were often opposed, making clear that the issues would likely remain disputed.[158] Yet in many circumstances, courts have remained willing to grant abeyances for long periods of time.[159]

The Trump administration has derived considerable benefit from this practice by keeping courts from ruling in favor of rules the agencies seek to repeal. Benefits of this kind are likely to accrue after an inter-party transition to future administrations of either party because either party could find it useful to use alleged problems with the original rule to justify replacing or repealing it. As a result, abeyances are likely to remain an attractive tool for helping undo a prior administration's regulatory output.

C. SUSPENSIONS

The final tool that the Trump administration has used to an unprecedented extent has been suspensions of final regulations: regulatory decisions that defer compliance by either postponing the compliance dates or putting off a regulation's effective

155. *See supra* notes 126–28 (discussing Bush- and Obama-era abeyance practices).

156. *See supra* note 130 (discussing Trump-era abeyances).

157. *See, e.g.*, Jonathan H. Adler, *The En Banc D.C. Circuit Meets the Clean Power Plan*, WASH. POST (Sept. 28, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/28/the-en-banc-d-c-circuit-meets-the-clean-power-plan/ [https://perma.cc/H5KN-MCR6] (exemplifying a case where an oral argument had taken place).

158. *See supra* note 138 (arguing that assessing whether a repeal of the CPP is arbitrary and capricious will require a decision about whether the policy was illegal).

159. *See, e.g.*, *supra* note 139 (listing repeated grants of abeyances).

date,[160] prior to substantively changing or repealing the regulation itself.[161] Suspensions can be extremely useful to a new administration seeking to change or alter rules because once implemented a rule is always harder to change.[162]

While prior administrations have used suspensions in limited circumstances, the Trump administration has used them far more aggressively, suspending rules that are already effective and suspending rules indefinitely. This Section analyzes these trends and concludes by showing how, despite the numerous court losses suffered by the Trump administration, agencies may nonetheless be able to promote their objectives through the use of suspensions.

1. Prior Uses

Before the Trump administration, suspensions were used aggressively under President Reagan, both with and without notice and comment, to indefinitely delay regulations.[163] But the courts pushed back, holding that indefinite delays were "tantamount to a revocation" and that the APA's procedural requirements applied to those delays just like they applied to repeals.[164] As a result, both the notice-and-comment requirements[165] and

160. The "effective date" is the date when a rule is officially added to the Code of Federal Regulations and, depending on the rule, that date might be the date by which entities must be in full compliance with the rule. *See* NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, DOCUMENT DRAFTING HANDBOOK loc. 3-7 to 3-8 (2018), https://www.archives.gov/federal-register/write/handbook [https://perma.cc/GT44-HTGV]. Some rules also contain "compliance" dates, which are additional dates by which regulated entities must have taken specified actions. *See id.* loc. 3-9.

161. *See supra* note 38.

162. Freeman, *supra* note 12, at 559 (explaining that "the longer the rules have been in place, the harder they may be to undo").

163. *See* William M. Jack, *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, 1498–99 (2002) (explaining that Reagan delayed as many as 119 regulations and that many of those suspensions led to lawsuits).

164. Nat. Res. Def. Council v. EPA, 683 F.2d 752, 762 n.23 (3d Cir. 1982); *accord* Envtl. Def. Fund v. EPA, 716 F.2d 915, 920 (D.C. Cir. 1983) ("The suspension or delayed implementation of a final rulemaking normally constitutes substantive rulemaking.").

165. *See* Jack, *supra* note 163, at 1503–04, 1504 nn.132–34 (listing cases that held the APA's procedural requirements applied to delays).

the APA's arbitrary and capricious standard apply, requiring an agency to provide a reasoned explanation for the change.[166]

Some commentators argue that "midnight regulations" issued near the end of a president's term are more likely to be of poor quality because they are rushed.[167] Thus, with few exceptions,[168] between the Reagan administration and the beginning of the Trump administration, agencies did not suspend already-effective rules and instead focused on suspending regulations that were not yet effective and thus were more likely to be seen as so-called "midnight regulations."[169]

166. *See* Pub. Citizen v. Steed, 733 F.2d 93, 99–105 (D.C. Cir 1984) (finding an indefinite suspension to be arbitrary and capricious); *accord* Air All. Houston v. EPA, 906 F.3d 1049, 1066 (D.C. Cir. 2018) (finding a delay arbitrary and capricious under the *State Farm* standard).

167. *See* Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441, 1448 (2005) (exploring the argument that midnight rules are more rushed and are therefore less likely to satisfy high standards of administrative rulemaking). *See generally* Edward H. Stiglitz, *Unaccountable Midnight Rulemaking? A Normatively Informative Assessment*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 137 (2014) (discussing a recent study finding that last-term Presidents, but not continuing Presidents, issue considerably more rules categorized as "controversial" during their midnight period, according to a variety of proxy measures).

168. *See* Safety-Kleen Corp. v. EPA, 111 F.3d 963 (D.C. Cir. 2017) (vacating a Clinton-era suspension of a Bush-era rule exempting oil mixtures from hazardous waste regulations because the oil mixture rule was already effective).

169. *See* VICTOR S. REZENDES, U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-370R, REGULATORY REVIEW: DELAY OF EFFECTIVE DATES OF FINAL RULES SUBJECT TO THE ADMINISTRATION'S JANUARY 20, 2001 MEMORANDUM 5–6 (2002) (describing Bush-era suspensions of rules that had not yet reached their effective dates); Beermann, *supra* note 41, at 986–89 (describing Bush-era suspensions); Jack, *supra* note 163, at 1486–87 (describing Bush-era suspensions); *see also* Railroad Workplace Safety; Adjacent-Track On-Track Safety for Roadway Workers, 78 Fed. Reg. 33,754 (June 5, 2013) (to be codified at 49 C.F.R. pt. 214) (further delaying effective date by one year); Railroad Workplace Safety; Adjacent-Track On-Track Safety for Roadway Workers, 77 Fed. Reg. 13,978 (Mar. 8, 2012) (to be codified at 49 C.F.R. pt. 214) (delaying effective date by five months); Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-of-Train Devices, 66 Fed. Reg. 29,501, 29,502 (May 31, 2001) (to be codified at 49 C.F.R. pt. 232) (delaying effective date from May 31, 2001, to a future date to be specified); Service Difficulty Reports, 66 Fed. Reg. 21,626 (Apr. 30, 2001) (to be codified at 14 C.F.R. pts. 121, 125, 135 & 145) (delaying effective date by one year); Aluminum in Large and Small Volume Parenterals Used in Total Parenteral Nutrition; Delay of Effective Date, 66 Fed. Reg. 7864 (Jan. 26, 2001) (to be codified at 21 C.F.R. pt. 201) (delaying effective date by two years).

In addition, agencies generally avoided issuing lengthy suspensions—which could be seen as an attempt to effectively repeal the regulation without going through the appropriate process[170]—typically restricting their duration to sixty days.[171] President Obama, for example, instructed agencies to issue sixty-day extensions for regulations that were not yet effective, but instructed them to immediately provide the public with an opportunity to comment on both the extension and the merits of the original rule.[172] Obama also instructed agencies not to issue indefinite suspensions.[173] As a result of these precautions, many of the delays were not challenged—perhaps because of their short duration.[174]

In the case of higher-profile suspensions that were challenged, the courts confirmed that delaying a regulation is a substantive change and that agencies are required to have statutory

170. *See* Nat. Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 763 (3d Cir. 1982) (stating that an "indefinite postponement could have operated as a repeal").

171. *See, e.g.*, PETER R. ORSZAG, OFFICE OF MGMT. & BUDGET, MEM. FOR THE HEADS AND ACTING HEADS OF EXECUTIVE DEPARTMENTS AND AGENCY, IMPLEMENTATION OF MEMORANDUM CONCERNING REGULATORY REVIEW 1–2 (2009) (directing agencies to consider postponing the effective dates of rules for sixty days, and to immediately open the notice-and-comment period for thirty days to allow comment on those rules).

172. *See* Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435, 4435–36 (Jan. 26, 2009) (instructing agencies to "consider" delaying for sixty days the effective dates of final rules for the purpose of "reviewing questions of law and policy raised by those regulations"); O'Connell, *supra* note 41 (describing the suspension process engaged in by President Obama's administration as "careful").

173. ORSZAG, *supra* note 171, at 2 ("In no event should you extend the effective date of rules indefinitely.").

174. *See* O'Connell, *supra* note 41 (explaining that despite the "legal issues," presidents can evade review by issuing only short extensions or being prepared to "unfreeze" the suspension in order to moot out a challenge).

authority for the changes.[175] Some agencies either lifted the challenged suspensions[176] or allowed the suspensions to expire after being sued,[177] without waiting for a judicial resolution.

2. The Trump Administration's Record

In contrast to recent administrations, the Trump administration revived many of the strategies that the Reagan administration had used: more aggressively using suspensions to delay rules that were already effective but still had compliance dates in the future[178] and using suspensions to delay rules for lengthy and sometimes indefinite periods of time. The problem was that many of the suspensions blatantly violated the law. Thus, they led to fierce resistance. This Section describes the Trump administration's suspension efforts and explains how the suspensions have fared in court.

Many agencies under the Trump administration have followed the Reagan playbook, including the EPA,[179] the Food and

175. *See, e.g.*, N.C. Growers' Ass'n v. United Farm Workers, 702 F.3d 755, 765–66 (4th Cir. 2012) (holding that Obama-era suspension of George W. Bush regulation was illegal); Nat. Res. Def. Council v. Abraham, 355 F.3d 179, 194–204 (2d Cir. 2004) (vacating Bush-era suspension of Clinton efficiency rule for lack of statutory authority); Nat. Res. Def. Council, Inc. v. Reilly, 976 F.2d 36, 40–41 (D.C. Cir. 1992) (vacating George H.W. Bush-era suspension of congressionally mandated radioactive pollutant emissions standards); Sierra Club v. Jackson, 833 F. Supp. 2d 11, 29–34 (D.D.C. 2012) (vacating Obama-era suspension of court-ordered emissions standards).

176. *See, e.g.*, National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring: Delay of Effective Date, 66 Fed. Reg. 28,342 (May 22, 2001) (to be codified at 40 C.F.R. pts. 9, 141–142) (imposing a nine-month suspension in arsenic regulation); Order at 1, Nat. Res. Def. Council v. EPA, No. 01-1291 (D.C. Cir. Apr. 17, 2002) (dismissing lawsuit after agency announced intent to keep original rule); Press Release, Envtl. Prot. Agency, EPA Announces Arsenic Standard for Drinking Water of 10 Parts Per Billion, 2001 WL 1337226 (Oct. 31, 2001) (lifting suspension of arsenic regulation).

177. Final Rule to Stay the Grandfathering Provision for $PM_{2.5}$, 74 Fed. Reg. 48,153 (Sept. 22, 2009) (to be codified at 40 C.F.R. pt. 52); *see* Clerk's Order, Util. Air Regulatory Grp. v. EPA, No. 09-1287 (D.C. Cir. Aug. 27, 2010) (dismissing case after stay expired).

178. *See supra* note 160 (describing difference between effective and compliance dates).

179. *See* Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards, 82 Fed. Reg. 19,005 (Apr. 25, 2017) (to be codified at 40 C.F.R. pt. 423) (indefinite suspension of rule after it was effective).

Drug Administration,[180] the Department of Labor,[181] the Department of Transportation,[182] the Department of Energy,[183] the Department of the Interior,[184] and the Department of Housing and Urban Development.[185] Many other agencies also suspended rules before their effective dates.[186]

180. Three-Month Extension of Certain Tobacco Product Compliance Deadlines, 82 Fed. Reg. 22,338 (May 15, 2017) (publishing guidance to delay compliance deadlines for three months, after the rule was already effective); Extension of Compliance Date, 82 Fed. Reg. 20,825 (May 4, 2017) (to be codified at 21 C.F.R. pt. 11,101) (one-year delay of compliance deadline); Revised Effective Date, 82 Fed. Reg. 8894 (Feb. 1, 2017) (to be codified at 21 C.F.R. pt. 1105) (short-term delay of effective date issued two days after date had passed).

181. Definition of the Term "Fiduciary," 82 Fed. Reg. 16,902 (Apr. 7, 2017) (to be codified at 29 C.F.R. pt. 2510) (delaying rule regarding investment advisors for two months after the effective date).

182. Final Rule, 82 Fed. Reg. 32,139 (July 12, 2017) (to be codified at 49 C.F.R. pt. 578) (indefinite delay after effective date passed); Extension of Compliance Date, 82 Fed. Reg. 14,437 (Mar. 21, 2017) (to be codified at 14 C.F.R. pt. 234) (one-year delay of rule after the effective date); Federal Motor Vehicle Safety Standards, 82 Fed. Reg. 9368 (Feb. 6, 2017) (to be codified at 10 C.F.R. pts. 571, 578) (thirty-six day delay after the effective date).

183. Procedural Rules for DOE Nuclear Activities, 82 Fed. Reg. 8807 (Jan. 31, 2017) (to be codified at 10 C.F.R. pt. 820) (two-month delay issued after the effective date).

184. Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430 (June 15, 2017) (postponing compliance dates pending judicial review after effective date); Postponement of Effectiveness, 82 Fed. Reg. 11,823 (Feb. 27, 2017) (postponing effectiveness after rule was effective pending review).

185. Open Cmtys. All. v. Carson, 286 F. Supp. 3d 148, 158 (D.D.C. 2017) (describing memo that delayed fair housing rule for two years after the effective date of the rule).

186. Energy Conservation Program, 82 Fed. Reg. 8985 (Feb. 2, 2017) (to be codified at 10 C.F.R. pts. 429–30); Small Business Investment Companies, 82 Fed. Reg. 8499 (Jan. 26, 2017) (to be codified at 13 C.F.R. pt. 107); Delayed Effective Rule, 82 Fed. Reg. 9501 (Feb. 7, 2017) (to be codified at 21 C.F.R. pts. 201 801 & 1100); National Performance Management Measures, 82 Fed. Reg. 10,441 (Feb. 13, 2017) (to be codified at 23 C.F.R. pt. 490); Affirmative Action for Individuals with Disabilities in Federal Employment, 82 Fed. Reg. 10,863 (Feb. 16, 2017) (to be codified at 29 C.F.R. pt. 1614); Occupational Exposure to Beryllium: Delay of Effective Date**,** 82 Fed. Reg. 8901 (Feb. 1, 2017) (to be codified at 29 C.F.R. pts. 1910, 1915, 1926); Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. 8499 (Jan. 26, 2017) (to be codified at 40 C.F.R. pts. 22, 51, 52, 61, 68, 80, 81, 124, 147, 171, 239, 259, 300, 770); Delay of Effective Date, 82 Fed. Reg. 14,464 (Mar. 21, 2017); Chemical Substances When Manufactured or Processed as Nanoscale Materials, 82 Fed. Reg. 22,088 (May 12, 2017) (to be codified at 40 C.F.R. pt. 704); Drug Pricing Program Delay of Effective Date, 82 Fed. Reg. 12,508 (Mar. 6, 2017) (to be codified at 42 C.F.R. pt. 10);

Multiple agencies issuing these suspensions failed to follow the requirements established by law and the courts have repeatedly ruled against the Trump administration after finding both procedural and substantive violations.[187] For example, many courts found that agencies had no excuse for failing to go through notice and comment for the suspensions.[188] Presumably in light of the clear case law, in several cases, the Trump administration withdrew suspensions issued without notice and comment after being sued.[189]

Some agencies that failed to go through notice and comment attempted to rely on § 705 of the APA, which allows an agency to "postpone the effective date" of a regulation "pending judicial review," as justification for that shortcut.[190] But § 705 may be used only to suspend a rule before it is effective, not after it is effective but before the compliance deadline.[191] And this provision requires agencies to make some showing that a suspension is necessary to enable judicial review over the original rule to

Federal Railroad Administration, 82 Fed. Reg. 10,443 (Feb. 13, 2017) (to be codified at 49 C.F.R. pt. 270).

187. *See, e.g.*, Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin., 894 F.3d 95 (2d Cir. 2018) (vacating suspension of increased penalties for violations of fuel economy standards); Sierra Club v. Pruitt, 293 F. Supp. 3d 1050 (N.D. Cal. 2018) (vacating delay of Formaldehyde Rule); California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106 (N.D. Cal. 2017) (vacating Interior's delay of a rule restricting leaks of natural gas from mining facilities on public lands); Becerra v. U.S. Dep't of Interior, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (declaring illegal Interior's delay of a rule updating royalty payment procedures).

188. *Nat. Res. Def. Council*, 894 F.3d at 114 (rejecting reliance on imminent deadlines); Pineros y Campesinos Unidos del Noroeste v. Pruitt, 293 F. Supp. 3d 1062 (N.D. Cal. 2018) (vacating delay of Pesticide Rule and rejecting claim that agency needed time to further review and reconsider the rule); Nat'l Venture Capital Ass'n v. Duke, 291 F. Supp. 3d 5, 17–21 (D.D.C. 2017) (vacating delay of the International Entrepreneur Rule and rejecting reliance on limited agency resources and the stop-work order to justify failure to go through notice and comment).

189. *See* BETHANY DAVIS NOLL & ALEC DAWSON, DEREGULATION RUN AMOK: TRUMP-ERA REGULATORY SUSPENSIONS AND THE RULE OF LAW 3 (2018), https://policyintegrity.org/files/publications/Deregulation_Run_Amok_Report.pdf [https://perma.cc/9HM9-B8CS] (collecting examples).

190. Waste Prevention, Production Subject to Royalties, and Resource Conservation, 82 Fed. Reg. 27,430, 27,431 (June 15, 2017) (quoting 5 U.S.C. § 705 (2018)).

191. 5 U.S.C. § 705; Safety-Kleen Corp. v. EPA, 111 F.3d 963 (D.C. Cir. 1997).

proceed in a "just" manner.[192] Courts ruled against agencies for violating these principles.[193]

Agencies have also lost several suspension cases for failure to show that they had the necessary authority under the relevant substantive statute. For example, the D.C. Circuit vacated EPA's suspensions of two Clean Air Act regulations because of the agency's failure to provide an adequate explanation for how each suspension was consistent with EPA's authority under that statute.[194] In another example, the Northern District of California vacated EPA's delay of a formaldehyde emissions rule after finding that the applicable statute did not allow the agency to extend compliance with the formaldehyde standards past a statutorily mandated 180-day deadline.[195] Here too, the mere filing of a lawsuit led agencies to drop some of their suspensions, presumably because the legal basis for their actions was weak or nonexistent.[196]

Agencies have also lost cases for failure to comply with the reasoned explanation requirement of the APA.[197] For example, the D.C. Circuit vacated EPA's suspension of the Chemical Disaster Rule, designed to improve safety procedures at chemical plants, after finding that the agency had not adequately justified forgoing the rule's benefits, among other failings.[198] Just like in cases where agencies were challenged for failure to comply with notice-and-comment requirements and for lack of statutory authority, agencies have also dropped suspensions after being sued

192. Bauer v. DeVos, 325 F. Supp. 3d 74, 107 (D.D.C. 2018).

193. *See, e.g.*, *id.* at 108–10; California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106 (N.D. Cal. 2017) (holding against agency); Becerra v. U.S. Dep't of the Interior, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (same).

194. Air All. Hous. v. EPA, 906 F.3d 1049, 1060–61 (D.C. Cir. 2018) (vacating suspension in part because EPA failed to show how the suspension was authorized by the Clean Air Act); Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017) (vacating suspension of EPA's methane rule for failure to satisfy requirements of Clean Air Act).

195. Sierra Club v. Pruitt, 293 F. Supp. 3d 1050, 1056 (N.D. Cal. 2018) (describing series of delays issued by EPA).

196. *See* DAVIS NOLL & DAWSON, *supra* note 189, at 8 (collecting examples).

197. *Air All. Hous.*, 906 F.3d at 1069 (vacating suspension of Chemical Disaster Rule in part for EPA's failure to satisfy the arbitrary and capricious standard); California v. Bureau of Land Mgmt., 286 F. Supp. 3d 1054 (N.D. Cal. 2018) (enjoining second suspension of the Waste Prevention Rule for failure to provide a reasoned explanation); *U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d at 1122–23 (vacating first suspension of the Waste Prevention Rule for the same reason).

198. *Air All. Hous.*, 906 F.3d at 1067–68.

for failing to comply with the duty to provide a reasoned explanation for the action.[199]

3. Value of Suspensions Despite Potential for Court Losses

Despite significant losses and an uphill battle in the courts, not all suspension efforts have failed. In some cases, agencies have not faced a legal challenge and in others they were able to evade review. In addition, it may be possible for agencies to be more careful about following the law than agencies have been under Trump and still issue quick suspensions, which might survive judicial review. As a result, suspensions are likely to remain a powerful tool. This Subsection discusses some possibilities for suspensions that would not cause as much court drama and gives reasons why agencies may even be successful using the strategies that agencies under Trump have used. The Subsection then analyzes how suspensions could be useful to deregulatory or regulatory administrations.

a. Strategies for Successful Suspensions

Agencies under Trump tripped up on basic procedural rules such as notice-and-comment requirements and the requirement that they have statutory authority to issue the suspensions.[200] But it may be possible to issue suspensions quickly without making these mistakes. Agencies seeking to suspend rules could instead simply follow the basic notice-and-comment requirements. And there may be circumstances where an agency could provide good reasons to change a rule's deadlines and could justify that as a reasonable action that is permissible under the relevant statute.

Moreover, even if there are obvious procedural violations, future agencies may still get away with suspensions. There are several barriers, driven primarily by resource constraints, that stand in the way of lawsuits being brought to challenge suspensions in the first place. Litigation is an expensive and time consuming process and potential challengers must prove standing[201] as well as marshal the resources to file a motion seeking

199. *See* DAVIS NOLL & DAWSON, *supra* note 189, at 9.

200. *See* text accompanying notes 187–96 (discussing times agencies tripped up on basic procedural rules).

201. *See, e.g.*, *Air All. Hous.*, 906 F.3d at 1058–59 (holding that workers suffered tangible harm during the time that the Chemical Disaster Rule was delayed); Nat. Res. Def. Council v. Nat. Highway Traffic Safety Admin., 894 F.3d 95, 104 (2d Cir. 2018) (holding that states and environmental petitioners had

vacatur quickly with what are generally time-limited suspensions.[202] Perhaps as a result of some of these roadblocks, several of the Trump administration's suspensions have not been challenged in court.[203]

In addition, even when lawsuits are brought, an agency can play a game of "whack-a-mole," withdrawing a challenged suspension and replacing it with a different rule.[204] For example, in *Clean Water Action v. Pruitt*,[205] EPA had invoked § 705 to indefinitely suspend[206] a rule limiting toxic metal wastewater discharges from power plants, known as the Effluents Rule, after its effective date.[207] Eight environmental organizations promptly sued the agency arguing that the agency had violated the APA by not seeking public comment, among other deficiencies, and moved quickly for summary judgment.[208] But one day after the motion for summary judgment had been fully briefed, EPA finalized a second suspension, this time with notice and comment, withdrawing the first indefinite suspension.[209] EPA

standing to challenge the agency's suspension of penalties for violation of fuel-economy standards, because the suspension could lead to increased air emissions); *see also* Nat. Res. Def. Council v. EPA, 683 F.2d 752, 763 n.23 (3d Cir. 1982) (observing that indefinite stays are "tantamount to a revocation").

202. *See* Emergency Motion for a Stay or in the Alternative, Summary Vacatur, Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017) (No. 17-1145) (compiling motion papers and almost 125 pages of affidavits from scientists, experts, and affected individuals in support of motion to vacate three-month suspension).

203. *See* DAVIS NOLL & DAWSON, *supra* note 189, at 10 (collecting examples).

204. *See, e.g.*, Partial Delay of Effective Date, 83 Fed. Reg. 11,639 (Mar. 16, 2018) (indefinite suspension following previous delays and providing that knowledge of off-label uses of tobacco products could make those uses "intended uses" of the products); Medicare Program, 82 Fed. Reg. 57,066 (Dec. 1, 2017) (to be codified at 42 C.F.R. pts. 510, 512) (rescinding the rule bundling payments for cardiac care and joint replacement following early delays issued without notice and comment); *see also* Clean Water Action v. Pruitt, 315 F. Supp. 3d 72, 86 (D.D.C. 2018) (ruling a case moot because EPA withdrew and replaced the challenged rule).

205. *Clean Water Action*, 315 F. Supp. 3d at 77.

206. Postponement of Certain Compliance Dates for Effluent Limitations Guidelines, 82 Fed. Reg. 19,005 (Apr. 25, 2017) (to be codified at 40 C.F.R. pt. 423).

207. Effluent Limitations Guidelines and Standards, 80 Fed. Reg. 67,838 (Nov. 3, 2015) (to be codified at 40 C.F.R. pt. 423).

208. *Clean Water Action*, 315 F. Supp. 3d at 78.

209. Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards, 82 Fed. Reg. 43,494 (Sept. 18, 2017) (to be codified at 40 C.F.R. pt. 423).

then argued that the challenge to the first suspension should be dismissed as moot and the court agreed.[210] Though plaintiffs have a pending appeal, thus far the timing of EPA's actions has allowed the agency to avoid any declaration that the first indefinite suspension violated the APA.[211] The Department of the Interior similarly avoided the vacatur of its § 705 suspension of the Valuation Rule, aimed at reforming royalty procedures for the exploitation of natural resources on federal lands.[212] In that case, the agency rushed out a repeal of the rule.[213] Though the court hearing the challenge found that the suspension was illegal,[214] it did not vacate the suspension because the repeal was due to be promulgated only a few days later.[215] Thus, the suspension remained in effect until the repeal went into place. Now though, a different court has vacated the repeal.[216]

b. What Makes Suspensions Useful

Though brazen use of suspensions that look obviously illegal is likely tainted now given the Trump administration's failure to succeed in this area, suspensions could still be useful to future administrations, whether they are seeking to promulgate more or roll back regulations. For agencies seeking to roll regulations back, suspensions can be helpful because they can tip the scales in favor of subsequent repeals. Typically, on repeal, agencies must assess both the costs of the repeal (in the form of the forgone benefits) and the benefits of the repeal (in the form of cost savings). Stated differently, the baseline for analysis should include the rule being repealed.[217] The agency must then assess the costs and benefits of departing from that baseline and "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits."[218]

210. *Clean Water Action*, 315 F. Supp. 3d at 86.

211. *Id.*

212. Postponement of Effectiveness of the Valuation Rule, 82 Fed. Reg. 11,823 (Feb. 27, 2017).

213. Repeal of Valuation Reform, 82 Fed. Reg. 36,934 (Aug. 7, 2017) (to be codified at 30 C.F.R. pts. 1202, 1206).

214. Becerra v. U.S. Dep't of Interior, 276 F. Supp. 3d 953, 960–61 (N.D. Cal. 2017).

215. *Id.* at 967.

216. California v. U.S. Dep't of Interior, 381 F. Supp. 3d 1153 (N.D. Cal. 2019).

217. Air All. Hous. v. EPA, 906 F.3d 1049, 1068 (D.C. Cir. 2018).

218. Exec. Order No. 12,866 § 1(a), 3 C.F.R. § 638 (1994), *reprinted in* 5 U.S.C. § 601 app. at 557–61 (1994).

Courts review an agency's assessment of those costs and benefits in order to ensure that agencies considered "an important aspect of the problem."[219] Forgone benefits have been held to be an important aspect of a repeal, which agencies must address.[220]

But suspensions help because they ensure that businesses do not spend money coming into compliance with a new regulation that the agency hopes to repeal or weaken.[221] When firms have already spent the money needed to come into compliance, for example by purchasing durable equipment, the proposed repeal might not save any money and thus would not have any benefits (in the form of cost savings). Weighed against the forgone benefits, the repeal could look particularly unjustified. On the other hand, if the rule has been suspended, when the agency proposes a repeal it can take credit for the compliance cost savings, which would not be available if the rule had been implemented.

For example, when EPA proposed to repeal the Chemical Disaster Rule,[222] the agency had issued a suspension, making it unnecessary for firms to comply with the rule.[223] In the proposed repeal, the agency then credited itself with saving the rule's compliance costs, making the repeal therefore look more beneficial than it would have looked without the suspension.[224] As another example, the Department of Agriculture twice delayed the Or-

219. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

220. *See, e.g.*, *Air All. Hous.*, 906 F.3d at 1067–69 (holding that suspension was arbitrary and capricious for failing to adequately address the rule's forgone benefits); California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1122–23 (N.D. Cal. 2017) (holding that agency's failure to consider forgone benefits was arbitrary and capricious).

221. *See* O'Connell, *supra* note 41, at 527 (explaining that rules are "harder to undo" once they have taken effect).

222. Accidental Release Prevention Requirements, 83 Fed. Reg. 24,850 (May 30, 2018) (to be codified at 40 C.F.R. pt. 68).

223. Further Delay of Effective Date, 82 Fed. Reg. 27,133 (June 14, 2017) (to be codified at 40 C.F.R. pt. 68).

224. Accidental Release Prevention Requirements, 83 Fed. Reg. 24,850 (May 30, 2018) (to be codified at 40 C.F.R. pt. 68).

ganic Livestock Rule, a rule regarding welfare for organic livestock, first without[225] and then with[226] notice-and-comment. After a challenge to these suspensions,[227] the agency repealed the rule and withdrew the suspensions.[228] The suspensions, despite their withdrawal, enabled the agency to claim that the repeal would save all of the costs of the original rule.[229] In contrast, had the rule gone into effect, the regulated entities would have begun coming into compliance, and any of those sunk costs could not have been counted toward the repeal's cost savings. Indeed, implementation may take even the political impetus for repeal away,[230] which can be problematic for an administration intent on trumpeting its deregulatory achievements.

By making it possible for firms not to implement a rule, agencies can also make the repeal's forgone benefits seem less significant. For example, while EPA acknowledged in its proposal to replace the Clean Power Plan that a weaker rule would cut fewer greenhouse gas emissions, at public events, Acting Administrator Wheeler was able to downplay the harm of the change because the Clean Power Plan had never been implemented.[231]

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225. Organic Livestock and Poultry Practices, 82 Fed. Reg. 21,677 (May 10, 2017) (to be codified at 40 C.F.R. pt. 205).

226. Organic Livestock and Poultry Practices, 82 Fed. Reg. 52,643 (Nov. 14, 2017) (to be codified at 40 C.F.R. pt. 205).

227. Complaint for Declaratory and Injunctive Relief, Organic Trade Ass'n v. U.S. Dep't of Agric., 370 F. Supp. 3d 98 (D.D.C. 2019) (No. 17-01875).

228. Organic Livestock and Poultry Practices, 83 Fed. Reg. 10,775 (Mar. 13, 2018) (to be codified at 40 C.F.R. pt. 205).

229. *Id.* at 10,781.

230. Connor Raso, *Trump's Deregulatory Efforts Keep Losing in Court—and the Losses Could Make It Harder for Future Administrations to Deregulate*, BROOKINGS (Oct. 25, 2018), https://www.brookings.edu/research/trumps-deregulatory-efforts-keep-losing-in-court-and-the-losses-could-make-it-harder-for-future-administrations-to-deregulate [https://perma.cc/PZV4-X9Z7] (explaining that when regulated parties invest in compliance they may lose their "appetite . . . to eliminate the rule"); Amena H. Saiyid, *We Already Spent the Money, Keep Air Toxics Rule: AEP, Duke to EPA (Corrected)*, (July 13, 2018), TOXICS L. REP. (BNA), https://www.bloomberglaw.com/document/XBG7N7A0000000?bna_news_filter=environment-and-energy&jcsearch=BNA%2520000001648e8dd62fad769fedd21e0000#jcite (explaining that power companies generally can recoup through customer fees only costs that are deemed "prudent" and that rolling back a rule might interfere with those companies' ability to recoup the costs they spent on complying with a now-defunct rule).

231. Lee Logan, *Health Risk Dispute Over EPA's ACE Rule Focuses on Regulatory Baseline*, INSIDEEPA (Sept. 6, 2018), https://insideepa.com/weekly-focus/health-risk-dispute-over-epas-ace-rule-focuses-regulatory-baseline

Presidents who generally oppose regulations may also benefit from issuing suspensions even if they are all ultimately all struck down, because that type of agency action can undermine the sense that agencies are subject to the rule of law and that they can be trusted to act in the public interest. Moreover, an anti-regulatory administration can win political points through quick and dirty suspensions, even if they are all struck down eventually—as the Trump administration has done.[232]

For both pro- and anti-regulatory agencies seeking to roll back rules after an inter-party transition, suspensions can also be useful because they allow an agency to take advantage of implementation uncertainties when justifying a repeal. For example, with the Organic Livestock Rule, the agency's repeal proposal argued that the repeal was justified because of concerns that the rule "could have" unintended consequences in the marketplace.[233] Without the suspension, challengers may have been able to rebut those claims with facts showing the actual market reactions to implementation. Similarly, in the case of the Valuation Rule, the Department of the Interior claimed that several "potential" problems with the original rule required its repeal.[234] Had Interior not delayed the Valuation Rule's implementation, there would have been evidence on whether those "potential" problems were indeed occurring.[235] Both deregulatory and regulatory administrations may want to repeal rules and could thus benefit from the uncertainty that a suspension produces.

[https://perma.cc/QFG6-3926]; Richard J. Pierce, Jr., *Putting Trump's "Affordable Clean Energy" Plan in Perspective*, REG. REV. (Aug. 28, 2018), https://www.theregreview.org/2018/08/28/pierce-trumps-affordable-clean-energy-plan-perspective/ [https://perma.cc/3F3P-H76X].

232. *See* Bethany Davis Noll, *Trump's Regulatory 'Whack-a-Mole,'* POLITICO (Apr. 10, 2019), https://www.politico.com/agenda/story/2019/04/10/trump-federal-regulations-000890 [https://perma.cc/T9AE-CNX3] (explaining the Trump administration's use of this tactic); Neomi Rao, *The Trump Administration's Deregulation Efforts Are Saving Billions of Dollars*, WASH. POST (Oct. 17, 2018), https://www.washingtonpost.com/opinions/the-trump-administration-is-deregulating-at-breakneck-speed/2018/10/17/09bd0b4c-d194-11e8-83d6-291fcead2ab1_story.html [https://perma.cc/2PQF-NCVV] (making use of the tactic).

233. Organic Livestock and Poultry Practices-Withdrawal, 82 Fed. Reg. 59,988, 59,990 (proposed Dec. 18, 2017) (to be codified at 7 C.F.R. pt. 205).

234. Repeal of Valuation Reform, 82 Fed. Reg. 36,934, 36,939 (Aug. 7, 2017) (to be codified at 30 C.F.R. pts. 1202, 1206).

235. The repeal was eventually struck down for other reasons. *See* California v. U.S. Dep't of the Interior, 381 F. Supp. 3d 1153 (N.D. Cal. 2019).

Suspensions may also be useful to a new pro-regulatory administration seeking to quickly tighten standards. For example, if the prior administration had loosened a formerly tighter regulatory standard, a suspension could be useful for reinstating the formerly stricter regime.[236] Or if the prior administration had exempted a category of manufacturers from a rule, suspending the exemption could subject those manufacturers to the rule.[237] As these examples show, the aggressive use of suspensions will likely remain a useful tool to administrations of both parties, despite the significant court losses suffered by Trump-era agencies. Litigation challenging a suspension is difficult to bring and an agency can play a game of "whack-a-mole" by keeping suspensions short and replacing them with new suspensions or repeals.[238] Thus, future presidents may be able to use suspensions to help undo a substantial portion of the last several years of a predecessor's regulatory policies, as the Trump administration is currently doing.

II. THE FUTURE OF ROLLBACKS

Part I discussed the Trump administration's aggressive use of three rollback tools, which will likely remain effective tools for either repealing regulations wholesale, in the case of the Congressional Review Act, or tools for facilitating regulatory rollbacks, in the case of abeyances in pending litigation and suspensions. In this Part, we discuss why these tools are likely to continue to be used in future inter-party transitions.

First, the Trump administration's aggressive use of rollback tactics is the latest step in a game of norm-breaking and political tit-for-tat in which the dominant political parties have been engaged for the past few decades. These pathologies have been escalating for several years and they are not likely to subside anytime soon. Because of the ongoing partisan struggle, it is likely that future transitions will want to continue making significant efforts to roll back or reverse the prior administration's regulatory policies. Indeed, it is completely possible that future administrations will resort to even more rollback tools and push norms

236. *See* N.C. Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755, 760 (4th Cir. 2012).

237. *See, e.g.*, Hazardous Waste Management System, 60 Fed. Reg. 55,202 (Oct. 30, 1995) (reinstating rule requirements).

238. *See* Beermann, *supra* note 41, at 992–94 (suggesting that incoming Presidents can suspend regulations and simply unfreeze the suspension to make legal challenges moot); O'Connell, *supra* note 41, at 530 (same).

even further to unsettle the prior administration's regulations. Political tit-for-tat could easily extend beyond just the tools we know about now into new areas.

Second, regulatory policymaking requires a significant investment of time and promulgating a single regulation can stretch through almost all of a president's term. And, judicial review and implementation very often stretch beyond the term. As a result, the three tools discussed in this Article can be invoked to place a president's regulatory policymaking at risk in the event of an inter-party transition. We conclude this Part by discussing the timing of a few of the Trump's administration's own signature regulatory efforts. Their timing could well make them vulnerable should a Democratic president be inaugurated in January 2021.

A. TIT-FOR-TAT STRATEGIES

The two dominant political parties are currently engaged in a game of tit-for-tat, where one party departs from a norm that had been widely considered to be institutionally desirable and, in response, the other party complains. But later, when given the opportunity, that other party uses the same tool itself and may even double down in the game, breaking further norms. This ongoing game of tit-for-tat is likely to play out in future regulatory rollbacks because it is the optimal strategy for the back-and-forth between the two political parties. As Robert Axelrod explained, when two actors are engaged in repeated games, a tit-for-tat strategy is generally understood to be optimal.[239] Under this strategy, one actor will be cooperative in one period only if the other actor was cooperative in the prior period.[240] In contrast, non-reciprocation, or "unconditional cooperation," can hurt not just the target party but it can also embolden the attacker and further reduce social welfare.[241]

239. *See* ROBERT M. AXELROD, THE EVOLUTION OF COOPERATION: REVISED EDITION (2009) (presenting the findings of the original tournaments of iterated prisoners' dilemma games). An extensive literature has complicated this finding, while still affirming the wisdom of the tit-for-tat approach. *See, e.g.*, Amnon Rapoport, et al., *Is Tit-for-Tat the Answer? On the Conclusions Drawn from Axelrod's Tournaments*, PLOS ONE (2015), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0134128&type=printable [https://perma.cc/G4GD-ZKDU] (discussing Axelrod's work).

240. AXELROD, *supra* note 239, at 136.

241. *Id.* ("Unconditional cooperation tends to spoil the other player; it leaves a burden on the rest of the community to reform the spoiled player, suggesting

The clearest example of this game of tit-for-tat in recent U.S. politics is the use of the filibuster. Under the George W. Bush administration, the Democratic minority in the Senate used the filibuster to block several judicial nominations.[242] In response, under the Obama administration, when control of the Senate had shifted, then-Minority Leader McConnell used the filibuster to block Executive Branch and judicial nominees.[243] These tactics delayed confirmation for many individuals, including Defense Secretary Chuck Hagel, Consumer Financial Protection Bureau Director Richard Cordray, Federal Housing Finance Agency Administrator Mel Watts, and three D.C. Circuit nominees.[244]

At that point, the tit-for-tat escalated. In November 2013, Democrats responded to the Republican's obstreperousness on circuit court nominees by invoking the "nuclear option" to do away with the filibuster's requirement of sixty votes to Executive Branch appointments and lower-court judges.[245] The filibuster remained in place for Supreme Court nominees and for legislation. In response, Minority Leader McConnell complained and somewhat ominously warned that Democrats would regret it and "may regret it a lot sooner" than they thought.[246] This prediction turned out to be accurate. After the 2016 election, with the presidency now controlled by a Republican, the Republican Senate majority did away with the filibuster for Supreme Court nominations,[247] allowing President Trump to obtain confirmation for both Neil Gorsuch and Brett Kavanaugh to the Supreme Court

that reciprocity is a better foundation for morality than is unconditional cooperation.").

242. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 524 (2004).

243. 159 CONG. REC. S8414 (daily ed. Nov. 21, 2013) (statement of Sen. Harry Reid).

244. *See id.* at S8414–15.

245. *See* Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), https://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html [https://perma.cc/6GWW-E99X]; *see also* Ryan Teague Beckwith, *Donald Trump Won by Breaking Norms. Democrats Are Starting to Consider It Too*, TIME (Sept. 7, 2018), http://time.com/5390143/donald-trump-democrats-norms [https://perma.cc/6ERC-PMRQ] (citing recent examples of Democratic norm-breaking).

246. 159 CONG. REC. S8416 (daily ed. Nov. 21, 2013) (statement of Sen. Mitch McConnell).

247. *See* Ali Rogin, *Senate Approves 'Nuclear Option,' Clears Path for Neil Gorsuch Supreme Court Nomination Vote*, ABC NEWS (Apr. 6, 2017), https://abcn.ws/2GyulTj [https://perma.cc/63EK-9TBW].

without the sixty votes that would have otherwise been required.[248]

The Senate has not yet crossed what is perhaps the biggest line in the escalating partisan fights. The legislative filibuster remains in place and requires sixty Senate votes to obtain cloture and thus bring legislation to a vote.[249] As Senator Schumer, the Democratic Minority Leader, explained in 2017, losing the filibuster for legislation would turn the Senate into a "majoritarian institution like the House, much more subject to the winds of short-term electoral change."[250] And at least for now that seems unlikely.[251]

Even though the filibuster has not been eliminated for legislation, the tit-for-tat game has entered the legislative sphere. In particular, the parties' use of the "reconciliation" process for legislation has allowed some legislation to evade the Senate filibuster rule and be enacted on a simple majority vote. Reconciliation was created to allow Congress to adjust the draft budget so that it would line up with substantive legislation enacted by Congress.[252] An additional rule, known as the Byrd Rule, restricts the use of reconciliation to pass provisions that are "extraneous" to the budgetary process.[253] Despite that rule's restrictions, over time, both parties have expanded the scope of the

248. BRETT KAVANAUGH VOTE SUMMARY, U.S. SENATE, (Oct. 6, 2018), (showing that fifty senators voted yea and forty-eight voted nay); NEIL GORSUCH VOTE SUMMARY, U.S. SENATE, (Apr. 7, 2017), (showing that fifty-four senators voted yea and forty-five senators voted nay).

249. STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, Rule XXII, at 15–17 (2013) (filibuster rule).

250. 163 CONG. REC. S2436 (daily ed. Apr. 7, 2017) (statement of Sen. Chuck Schumer).

251. *See infra* Conclusion.

252. ALLEN SCHICK, RECONCILIATION AND THE CONGRESSIONAL BUDGET PROCESS 4–8 (1981), http://www.aei.org/wp-content/uploads/2014/07/-reconciliation-and-the-congressional-budget-process_153715450859.pdf [https://perma.cc/NLN9-R25J]; *see also* Sarah Kliff, *Paul Ryan's Big Enemy on Health Care? Senate Rules.*, VOX (Mar. 9, 2017, 06:50 PM), https://www.vox.com/2017/3/9/14876100/ryan-health-care-enemy-parliamentarian-ahca [https://perma.cc/AA3J-US52] (quoting a Senate parliamentarian as saying "reconciliation was designed for minor budgetary adjustments, not major policy proposals").

253. BILL HENIFF JR., CONG. RESEARCH SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" 1–2 (2016), https://fas.org/sgp/crs/misc/RL30862.pdf [https://perma.cc/FV2C-6BCA]; *see* 2 U.S.C. § 644 (2018).

reconciliation procedure, using it to pass significant substantive legislation without bipartisan support.[254]

Partisan use of reconciliation began in the Clinton administration when Republicans uniformly refused to support Clinton's proposed fiscal stimulus plan.[255] The Democrats responded by using reconciliation to pass a budget containing tax increases and funding for other policies such as education initiatives, which received no Republican support.[256] Later in 2001, President George W. Bush used the same process to deliver on his campaign promise of tax cuts, despite lack of bipartisan support and despite Democratic claims that the use of reconciliation for this purpose was improper.[257]

Tit-for-tat responses heated during the Obama administration when Senate Democrats used reconciliation, thereby avoiding a filibuster, to pass the Affordable Care Act.[258] The law was passed in two steps. First, Congress passed the Patient Protection and Affordable Care Act through ordinary procedures.[259] But that bill had amendments that some Democrats in the House "loathed," and so the administration used the promise of a second bill removing those provisions to bring those members on board to pass the first bill.[260] And a few days after the first

254. *See, e.g.*, HENNIFF, *supra* note 253, at 15–19 (explaining the Byrd Rule's effect on tax cut legislation and healthcare and education reform).

255. *See* Jeff Davis, *The Rule That Broke the Senate*, POLITICO (Oct. 15, 2017), https://www.politico.com/magazine/story/2017/10/15/how-budget-reconciliation-broke-congress-215706 [https://perma.cc/59QE-L7MQ] (calling this incident "the first time budget reconciliation had been used successfully in what turned out to be a partisan manner").

256. William E. Foster, *Partisan Politics and Income Tax Rates*, 2013 MICH. ST. L. REV 703, 719 (2013) (describing bill and passage); *see* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (delineating education initiatives and tax increases).

257. Charles Tiefer, *How to Steal a Trillion: The Uses of Laws about Lawmaking in 2001*, 17 J.L. & POL. 409, 411 (2001); *see also* BARBARA SINCLAIR, UNORTHODOX LAWMAKING 242–51 (4th ed. 2012) (giving thorough history of the use of the reconciliation process to enact Bush era tax cuts).

258. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); *see also* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029.

259. *See* Patient Protection and Affordable Care Act, 124 Stat. 119.

260. SINCLAIR, *supra* note 257, at 220; *see* Michael O'Brien, *Reid: Dems Will Use 50-Vote Tactic to Finish Healthcare in 60 Days*, THE HILL (Feb. 20, 2010), https://thehill.com/blogs/blog-briefing-room/news/82461-reid-dems-will-use-50-vote-tactic-to-finish-healthcare-within-60-days [https://perma.cc/ZX83-PCJD].

bill was enacted, the Democrats implemented this promise, using the reconciliation procedure to pass the Health Care and Education Reconciliation Act, without any Republican support.[261] President Obama then signed both laws on the same day.[262]

Republicans complained bitterly that the use of reconciliation to pass the Affordable Care Act was "underhanded" and "anti-democratic."[263] But after the 2016 election, Republicans responded in kind by using the reconciliation process to pass a massive tax bill.[264] In doing so, Republicans made it even harder for the minority to resist the bill by moving it through Congress so fast that Democrats and the public barely had a chance to build political opposition, or even to read it.[265]

There is no end in sight to the partisan politics that have dominated U.S. politics recently.[266] Some commentators have noted that the incentives to engage in norm-breaking may be different for the Republican party than for the Democratic party.[267]

261. Health Care and Education Reconciliation Act of 2010, 124 Stat. 1029.

262. SINCLAIR, *supra* note 257, at 230.

263. *Id.* at 215 ("Republicans tried hard to paint the use of reconciliation as an underhanded, undemocratic trick, but their own use of the procedure in the past undercut their claims."); *see also* 159 CONG. REC. S8415-16 (daily ed. Nov. 21, 2013) (statement of Sen. McConnell) (complaining that Democrats had "muscled" healthcare legislation through Congress without taking into account "the views of the minority").

264. Z. Byron Wolf, *The Senate Voted on a Tax Bill Pretty Much Nobody Had Read*, CNN (Dec. 2, 2017, 5:20 AM), https://www.cnn.com/2017/12/01/politics/senate-vote-still-writing-tax-bill/index.html [https://perma.cc/S5Y5-GTDK].

265. *See* Elizabeth Drew, *How Republicans Killed the Legislative Process*, NEW REPUBLIC (Dec. 4, 2017), https://newrepublic.com/article/146107/republicans-killed-legislative-process [https://perma.cc/7M2B-Y3JZ] (describing how the GOP "rush[ed] its tax reform bill through the Senate"); *see also* Tara Golshan, *Republicans Are Handwriting Their Tax Bill at the Last Minute*, VOX (Dec. 1, 2017), https://www.vox.com/policy-and-politics/2017/12/1/16726234/handwritten-republican-tax-bill [https://perma.cc/K3ZW-YRUZ] (describing that "mere hours ahead of the Senate's tax vote" Republicans had "yet to release an official copy of the tax bill").

266. *See* Tushnet, *supra* note 242, at 551–52; *see also* Tara Golshan, *Pelosi Says Trump's National Emergency Sets a New Precedent for Democrats*, VOX (Feb. 14, 2019), https://www.vox.com/2019/2/14/18225379/pelosi-national-emergency-wall-gun-control-democrat [https://perma.cc/SGU6-QMFW] (describing Democratic tit-for-tat threats in reaction to President Trump's proposal to declare a national emergency to obtain funds for building a wall along the southern border).

267. Fishkin & Pozen, *supra* note 44, at 961. *But see* David Bernstein, *Constitutional Hardball Yes, Asymmetric Not So Much*, 118 COLUM. L. REV. ONLINE

They have argued that Republicans may be more prone to this behavior because escalating tit-for-tat carries the risk of "undermin[ing] the constitutional system," in a way that might serve the goals of a party intent on "incapacitat[ing] the government."[268] For those reasons, some commentators have argued that Democrats should not "fight like Republicans."[269]

But other commentators have argued that Democrats *should* "'fight like Republicans' and play more constitutional hardball."[270] And in the current political climate, continued escalation seems likely.[271] The parties are more polarized than they were in the past and may be unable to seek out a middle ground with each other.[272] They lack the "internal ideological diversity" that is necessary to form a moderating force and to develop policies that have at least some degree of inter-party consensus.[273]

The academic literature contemplates the possibility of noncooperation in perpetuity,[274] and some commentators predict that this will cause the parties to escalate "with no obvious endpoint."[275] The last instance of norm-eroding governance with high political polarization ended with the Civil War, when gov-

207, 213 (2018) (arguing that Democrats have just as much of an incentive to engage in constitutional hardball as Republicans).

268. Fishkin & Pozen, *supra* note 44, at 940, 980.

269. STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 215 (2018).

270. Fishkin & Pozen, *supra* note 44, at 979 (quoting Dahlia Lithwick & David S. Cohen, Opinion, *Buck Up Democrats and Fight Like Republicans*, N.Y. TIMES (Dec. 14, 2016), https://www.nytimes.com/2016/12/14/opinion/buck-up-democrats-and-fight-like-republicans.html [https://perma.cc/A92J-TKDN]).

271. Bernstein, *supra* note 267, at 232–33.

272. *See* Fishkin & Pozen, *supra* note 44, at 959–60; Brian F. Schaffner, *Party Polarization*, *in* THE OXFORD HANDBOOK OF THE AMERICAN CONGRESS 527, 539 (George C. Edwards et al. eds., 2011).

273. Fishkin & Pozen, *supra* note 44, at 959–60; Barbara Sinclair, *Is Congress Now the Broken Branch*, 2014 UTAH L. REV. 703, 716–18 (2014).

274. *See* AXELROD, *supra* note 239, at 138 (noting that once a feud starts, it can continue indefinitely); *see also* Jonathan Levin, *Bargaining and Repeated Games*, STANFORD 1, 6 (2002), http://web.stanford.edu/~jdlevin/Econ%20203/RepeatedGames.pdf [https://perma.cc/A2UZ-SRF3] (giving an example of infinitely repeated games). *See generally* Peter T. Leeson, *The Laws of Lawlessness*, 38(2) J. LEGAL STUD. 480 (2009) ("Note that even in the mutual violence equilibrium, both borderers earn a positive payoff.").

275. *See* Fishkin & Pozen, *supra* note 44, at 977, 980.

ernmental "dysfunction" was cured only because one of the parties won control of all institutions following untold horror.[276]

To de-escalate in a less traumatic manner, actors can encourage cooperation by agreeing to change payoff structures so as to reward cooperation and "enlarge the shadow of the future."[277] Research also suggests that the two parties are fundamentally different: the Republican party is a "vehicle of an ideological movement" while the Democratic party is a "group coalition."[278] A "fuller recognition of the distinctive characters" of the two parties might help "reduce the growing antipathy expressed by partisan voters toward the opposition."[279] But for now, it seems unlikely that the tit-for-tat going on between the Democratic and Republican parties will end unless the parties move closer to the center, creating more space for bipartisanship.[280] That does not seem to be in the cards anytime soon, though history suggests that it could happen at some point in the future.[281] In the meantime, partisan politics and the continued escalation of norm-breaking is likely to remain a significant driving force in regulatory policy. As a result, game theory predicts that, as soon as it has the opportunity to do so, a Democratic administration is likely to respond to the Trump administration's aggressive use of Congressional Review Act disapprovals, abeyances in pending litigation, and suspensions with the same or similar moves.

276. Jack Balkin, *The Last Days of Disco: Why the American Political System is Dysfunctional*, 94 B.U. L. REV. 1159, 1190 (2014); *see also* Mark A. Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order*, 94 B.U. L. REV. 611, 644–47 (2014) (describing earlier times of constitutional collapse and reinvention).

277. *See* AXELROD, *supra* note 239, at 125–36; Tushnet, *supra* note 242, at 552–53.

278. MATT GROSSMANN & DAVID HOPKINS, ASYMMETRIC POLITICS 3 (2016).

279. *Id.* at 331.

280. *See* Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 DRAKE L. REV. 989, 995 (2013) (concluding before the 2016 election that it is "worth waiting to see if the political system self-corrects").

281. *See* Russell Berman, *What's the Answer to Political Polarization in the U.S.?*, ATLANTIC (Mar. 8, 2018), https://www.theatlantic.com/politics/archive/2016/03/whats-the-answer-to-political-polarization/470163/ [https://perma.cc/F2LV-Q8VQ].

B. TIME FRAME FOR THE REGULATORY PROCESS

As explained in the previous Section, because of the continued calls for escalation, the next Democratic president, and subsequent presidents of both parties following inter-party transitions, are likely to use the same rollback tools as the Trump administration if they can obtain policy advantages. And that is likely to be the case because of the protracted timeline for issuing significant rules through notice-and-comment rulemaking, a significant mechanism under which agencies establish major regulatory policies.[282]

To issue rules, agencies must engage in a lengthy process. The rules are then subject to lengthy judicial review, and the period between a rule's promulgation and its compliance deadlines are sometimes lengthy as well. The longer any of these processes take, the more likely it is that a regulation will face a risk of disapproval under the Congressional Review Act, an abeyance in pending litigation, or a suspension. And as a result of all these risks, any one-term president is unlikely to be able to protect her regulatory policy legacy from the risk of significant rollbacks. In this Section, we describe the average timeline for promulgation, judicial review, and implementation of regulations and show how the timing of each of those steps could expose rules to one or more of the rollback tools.

1. Promulgation

The timeline for promulgating a rule includes two components: (1) preparation of a proposed rule, and (2) the notice-and-comment period and promulgation of a final rule. Together, these phases could take up an entire presidential term, particularly for major, economically significant rules, potentially subjecting them to the risk of Congressional Review Act disapprovals, abeyances, and suspensions.

For significant rules with large economic impacts—the types of rules that presidents care the most about—agencies are likely to need to invest significant time and resources prior to the publication of a proposed rule.[283] The statement of basis and purpose accompanying a proposed rule is often hundreds of

282. *See* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 929–52 (2008) (describing notice-and-comment rulemaking).

283. CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 43–44 (2018).

pages long and includes highly complex, technical details, such as data, studies regarding that data, and explanations about how the agency interpreted and used the data.[284] Though it is difficult to pinpoint exactly when work begins on a proposed rule, research by the Government Accountability Office found that the development of such proposals by the Department of Transportation, EPA, and Federal Drug Administration typically took at least two years.[285] And for some regulations, this period spanned four to six years.[286] For example, in a study of ninety EPA rules issued under the Hazardous Air Pollutant program during the Clinton and George W. Bush presidencies, EPA took close to four years to issue a proposed rule after initiating review.[287]

The timing of the notice-and-comment period and promulgation of a final rule is also lengthy, though shorter than the average time it takes to prepare a proposed rule. Two different studies found that the average notice-and-comment rulemaking for the last several decades has been about a year and a half from the publication of the proposed rule until the publication of the final rule; the median time was one year.[288] And some agencies took significantly longer.[289] For example, the averages at agencies with "controversial regulatory histories and mandates," such as EPA and the Federal Drug Administration, were twenty-eight and forty-two months, respectively.[290] Significant rules, defined as those having large economic effects, also took longer, averaging 596 days.[291]

As a result of the multi-year process for preparation of a proposed rule and the one- to two-year period required for the notice-and-comment period and the promulgation of the final rule,

284. Richard J. Pierce, *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1497 (2012).

285. CURTIS W. COPELAND, CONG. RESEARCH SERV., R40713, THE UNIFIED AGENDA: IMPLICATIONS FOR RULEMAKING TRANSPARENCY AND PARTICIPATION 4 (2009).

286. *Id.*

287. Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 144 n.150, 144–45 (2011) (analyzing the length of the entire "life cycle" for ninety EPA rules).

288. *See* O'Connell, *supra* note 41, at 513; Jason Webb Yackee & Susan Webb Yackee, *Delay in Notice and Comment Rulemaking: Evidence of Systemic Regulatory Breakdown?*, *in* REGULATORY BREAKDOWN 163, 168 (Cary Coglianese ed. 2012); *see also* Webb Yackee & Webb Yackee, *supra* note 23, at 1414.

289. Webb Yackee & Webb Yackee, *supra* note 288, at 164.

290. *Id.* at 164, 171.

291. *See* O'Connell, *supra* note 41, at 514.

it is highly likely that future presidential administrations will be finalizing a significant proportion of their major rules sufficiently close to the end of the presidential term to put those rules at risk of rollback tactics. This problem will be particularly salient for one-term presidents but, as we discuss in Part III, it will affect two-term presidents as well.

2. Judicial Review

Rules that are completed far enough in advance to be safe from the Congressional Review Act may still be under judicial review when the presidency changes hands, making them vulnerable to the two other rollback tools: abeyances and suspensions.

The speed at which the government is able to get through judicial review, both for the original challenge and for any possible further review, can have a significant impact on rollback efforts. While no comprehensive empirical studies have sought to document the typical length of judicial review, the D.C. Circuit's review period can provide a useful gauge because the court has jurisdiction, including in some cases exclusive jurisdiction, over several categories of administrative challenges. As a result, in 2010, the court heard 36% of all administrative review cases.[292] The D.C. Circuit's review period starts with petitioners filing their challenges, in accordance with the timing requirements in the relevant statute.[293] For important categories of regulations under the Clean Air Act, petitioners typically have sixty days from the publication of the final rule in the *Federal Register* to file challenges in the D.C. Circuit.[294] The median time from filing a notice of appeal until the disposition of a case on the merits in all D.C. Circuit cases is a little bit more than twelve months.[295]

292. *See* Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131, 138–42 (2013).

293. Brigida Benitez, *D.C. Court of Appeals Inside the Numbers*, WASH. LAW. (Apr. 2015), https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/april-2015-from-the-president.cfm [https://perma.cc/2K4W-6X3W].

294. *See* 42 U.S.C. § 7607(b)(1) (2012).

295. *See* ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURT OF APPEALS SUMMARY—12-MONTH PERIOD ENDING MARCH 31, 2018, (2018) (showing the D.C. Circuit's median time as 12.3 months); ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURT OF APPEALS SUMMARY—12-MONTH PERIOD ENDING MARCH 31, 2017, FED. COURT MGMT STAT. ARCHIVE (2017) (11.5 months); ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURT OF APPEALS SUMMARY—12-MONTH PERIOD ENDING MARCH 31, 2016, FED. COURT MGMT STAT. ARCHIVE (2016) (14.2

But challenges to complex administrative cases can take considerably longer.[296] This means that it is likely that a rule finalized within the last year or so of a presidential term is likely to be undergoing judicial review at the end of the presidency. The additional delay caused by Supreme Court review, whether at the certiorari stage or on the merits, makes more rules vulnerable to rollback efforts.

Several rules illustrate these dynamics. Two mercury regulations finalized in 2005 under President George W. Bush were challenged at the D.C. Circuit and struck down in February 2008.[297] The government obtained several extensions in the deadline for filing a certiorari petition, pushing the appeal beyond the inauguration of President Obama in January 2009.[298] As a result, the Obama administration was able to proceed with its planned revision before supporters of the Bush-era rule could have a chance to ask the Supreme Court to reverse the D.C. Circuit's decision.[299]

The Obama administration's experience with some of its key environmental regulations also illustrates this dynamic.[300] Consider, for example, the Cross State Air Pollution Rule, which requires states to reduce emissions interfering with the ability of downwind states to comply with air quality standards.[301] EPA began drafting this rule in mid-2008 in response to a court decision remanding a previous attempt to regulate those emissions. Three years later, in August 2011, EPA promulgated the final

months); ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURT OF APPEALS SUMMARY—12-MONTH PERIOD ENDING MARCH 31, 2015, FED. COURT MGMT STAT. ARCHIVE (2015) (13.4 months); ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURT OF APPEALS SUMMARY—12-MONTH PERIOD ENDING MARCH 31, 2014, FED. COURT MGMT STAT. ARCHIVE (2014) (12.2 months).

296. *See, e.g.*, White Stallion Energy Ctr. LLC v. EPA, No. 12-1100, 2014 WL 140294 (D.C. Cir. Apr. 15, 2014) (showing petition for review filed in February 2012, and opinion issued in April 2014, challenging EPA's mercury regulation); Coal. for Responsible Regulation v. EPA, No. 10-1073, 2012 WL 2381955 (D.C. Cir. Apr. 10, 2015) (showing petition for review filed in April 2010, and opinion issued in June 2012, challenging EPA's greenhouse gas emissions limits for new stationary sources).

297. New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008).

298. *See* Richard Lazarus, *The Transition and Two Court Cases*, 26 ENVTL. L.F. 12 (2009).

299. *Id.*

300. A similar pattern emerges with other Obama-era rules, but for the sake of brevity, this Article discusses only two.

301. 40 C.F.R. pts. 51, 52, 72, 78, 97 (2011).

Cross States Air Pollution Rule.[302] In 2012, the D.C. Circuit vacated the rule,[303] but two years later, the Supreme Court reversed and upheld the rule.[304] In total, nearly six years elapsed between the time the agency began to work on this rule and when the Supreme Court upheld its validity. Had this work not begun before President Obama took office, the case might have been pending before the Supreme Court at the beginning of the Trump administration. And had President Obama not won a second term, the new administration almost certainly would have sought an abeyance in the pending litigation.[305]

Perhaps the most ominous illustration of the dangers posed by a lengthy rulemaking process combined with time-consuming legal challenges, is President Obama's Clean Power Plan. Obama initially directed EPA to begin preparations for a rule regulating carbon dioxide emissions in June 2013, early in his second term.[306] EPA released the proposed rule a year later in June 2014[307] and published the final rule on October 23, 2015, more than halfway through the presidential term.[308] That same day, twenty-four states and regulated entities sued to have the rule stayed.[309] The D.C. Circuit initially denied a motion for a stay and granted expedited consideration of the case, scheduling oral argument before a panel on June 2, 2016,[310] but in February 2016, the Supreme Court granted a stay in a 5-4 decision and prevented the rule from going into effect while the case was litigated.[311] Presumably in order to expedite matters, the D.C. Cir-

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302. *See id.*

303. EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012).

304. EPA v. EME Homer City Generation, L.P., 572 U.S. 489 (2014).

305. 83 Fed. Reg. 50,444 (Oct. 5, 2018) (denying petitions to regulate cross-state air pollution coming into Delaware and Maryland).

306. Office of the Press Secretary, *Presidential Memorandum – Power Sector Carbon Pollution Standards*, OBAMA WHITE HOUSE (June 25, 2013), http://www.obamawhitehouse.archives.gov/the-pressoffice/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards [https://perma.cc/RX4J-XEJX].

307. 79 Fed. Reg. 34,830 (June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

308. 80 Fed. Reg. 64.662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

309. Associated Press, *States, Industry Groups Sue to Block Obama's "Clean Power" Plan*, NBC NEWS (Oct. 23, 2015, 12:42 PM), https://www.nbcnews.com/business/energy/states-industry-groups-sue-block-obamas-clean-power-plan-n450216 [https://perma.cc/J7MD-KRBN].

310. Order, West Virginia v. EPA, No. 15-1363 (D.C. Cir. May 16, 2016).

311. West Virginia v. EPA, 136 S. Ct. 1000 (2016); *see* Tatiana Schlossberg,

cuit then ordered the case to be heard by the en banc court instead of a panel, putting off argument until September 27, 2016.[312] The court then did not issue a decision during the Obama administration.[313]

After President Trump took office, EPA successfully convinced the D.C. Circuit to place the case in abeyance while the agency reviewed whether it should rescind or revise the Clean Power Plan.[314] All told, the development of the Clean Power Plan and subsequent judicial proceedings stretched on for more than six years, from June 2013 to September 2019.[315] Had the rule not been stayed already, it is possible that EPA would have used the pending litigation to justify a suspension.[316] Now EPA has repealed the Clean Power Plan,[317] and the case was never decided as it remained in abeyance until it was dismissed.[318]

As these examples help show, even for cases not reaching the Supreme Court, judicial review can easily extend one year or more past the publication of the final rule. As a result, even if a rule is finalized early enough to avoid the Congressional Review Act, judicial review could still be ongoing when there is an interparty transition, thereby making the rule vulnerable to the new administration's use of the abeyance and suspension tools.

3. Implementation

Even if a rule has been finalized and has survived judicial review, long implementation periods can also pose a threat to the

What to Know About Trump's Order to Dismantle the Clean Power Plan, N.Y. TIMES (Dec. 22, 2017), https://www.nytimes.com/2017/03/27/science/what-to-know-about-trumps-order-to-dismantle-the-clean-power-plan.html [https://perma.cc/G9UV-KAW9].

312. Order, West Virginia v. EPA, No. 15-1363 (D.C. Cir. May 16, 2016).

313. *See generally* Transcript of Oral Argument, *West Virginia*, No. 15-1363 (D.C. Cir. Sept. 27, 2016) (resulting in a delay of decision).

314. Order, West Virginia v. EPA, No. 15-1363, (D.C. Cir. May 16, 2016); see *supra* text accompanying notes 139–45.

315. Order, West Virginia v. EPA, No. 15-1363, (D.C. Cir. September 17, 2019); *See also* Niina Heikkinen, *Court Becoming Impatient with EPA Over Clean Power Plan*, SCI. AM. (June 27, 2018), https://www.scientificamerican.com/article/court-becoming-impatient-with-epa-over-clean-power-plan/ [https://perma.cc/8UY7-9HQ7].

316. *Cf.* 82 Fed. Reg. 27,430 (June 15, 2017) (announcing a suspension of the Waste Prevention Rule in "light of the existence and potential consequences of the pending litigation"); 82 Fed. Reg. 19,005 (Apr. 25, 2017) (announcing suspension of Effluents Rule pending judicial review).

317. *See* Repeal of Clean Power Plan, 84 Fed. Reg. 32,520 (July 8, 2019).

318. *See supra* Part I.B.2.

rule's long-term viability. If the rule's compliance deadlines extend beyond an inter-party presidential transition, the incoming administration could seek to suspend those future compliance deadlines.[319]

For some rules, the deadlines for compliance are long after the rule's promulgation. At a minimum, under the Congressional Review Act, agencies generally must set a regulation's "effective date" thirty days after final publication in the *Federal Register*,[320] in order to give regulated entities time to prepare for compliance,[321] with sixty days granted if the rule is categorized as "major."[322] But agencies often must also set "compliance deadlines," as distinct from effectiveness, when designing the rule. While some agencies must set those additional deadlines within a prescribed timeframe,[323] many agencies have discretion over those deadlines.[324] Thus, the compliance period is often much longer than the required thirty or sixty-day period required before a rule becomes effective.[325] In some cases, compliance can be delayed for several years after final publication to give regulated entities sufficient time to meet the rule's requirements.[326]

319. *See supra* Part I.C.

320. 5 U.S.C. § 553(d) (2012); *see also* MAEVE P. CARY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER 2–3 (2016) (explaining that some rules are exempt from the requirements of § 553).

321. *See* U.S. v. Gavrilovic, 551 F.2d 1099, 1104 (8th Cir. 1977) (collecting legislative history of provision).

322. 5 U.S.C. § 801(a)(3) (2012).

323. *See, e.g.*, Sierra Club v. Pruitt, 293 F. Supp. 3d 1050, 1055 (N.D. Cal. 2018) (finding that EPA could not delay compliance in formaldehyde emissions standards beyond the 180 days stipulated by Congress in the relevant statute).

324. *See* 42 U.S.C. § 7412(p)(7)(A) (2012) (providing that "[r]egulations promulgated pursuant to this subparagraph shall have an effective date . . . assuring compliance as expeditiously as practicable").

325. *See, e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVS. & U.S. FOOD & DRUG ADMIN., THE FOOD SAFETY LAW AND THE RULEMAKING PROCESS: PUTTING FSMA TO WORK 1–2 (2011), https://www.fda.gov/downloads/Food/GuidanceRegulation/UCM277713.pdf [https://perma.cc/JBW6-Y263]; *see also* 17 C.F.R. pt. 162 (2012) (setting effective date for thirty days after date of publication in the Federal Register and compliance date for thirty days plus six months after date of publication in the Federal Register).

326. *See* Heinzerling, *supra* note 12, at 27 n.85 ("Compliance dates set by agencies are often later than effective dates, in order to give affected parties time to bring their activities into conformity with the rule."); *see also, e.g.*, 40 C.F.R. pt. 46 (2017) (setting the compliance date "that is not earlier than three years after" final publication); 40 C.F.R. pt. 63 (2013) (setting the compliance date for existing sources three years after final publication); 40 C.F.R. pt. 141

Although empirical work on the average time between a rule finalization and the compliance deadlines has not yet been performed, major environmental rulemakings illustrate that these periods can be longer than the rulemaking process itself.[327] Multiple rules issued in the Obama administration had compliance deadlines years after the effective date of the final rule. For example, the Effluents Rule, an EPA regulation limiting toxic metals in wastewater discharges finalized in 2015 had a compliance deadline three years after promulgation of the rule.[328] An EPA regulation concerning chemical accident prevention finalized in January 2017, had a compliance deadline four years after finalization of the rule.[329] The Clean Power Plan set significant compliance deadlines starting in 2018, three years after it was finalized.[330] These long deadlines are not a recent phenomenon. During the George W. Bush administration, for example, EPA set a compliance date for its key environmental regulation, the Clean Air Interstate Rule, four years after publication of the final rule.[331]

Agencies have generally granted these lengthy compliance periods to accommodate industry concerns that compliance would require large-scale, complex changes to their operations.[332] Indeed, some industry officials have argued that even the long deadlines are insufficient.[333] In the future, rules with those long compliance deadlines are likely to be at risk of suspensions. In sum, given the long promulgation, judicial review, and compliance timeframes, a large proportion of significant rules may face rollback efforts.

(2009) (setting the compliance date for the sampling plan required by the rule at eighteen months after final publication).

327. Literature on agency ossification does not examine this question. *See, e.g.*, Webb Yackee & Webb Yackee, *supra* note 288, at 171 (measuring time between notice of proposed rulemaking and finalization of the rule); Webb Yackee & Webb Yackee, *supra* note 23, at 1446 (same); O'Connell, *supra* note 41, at 513; Wagner, *supra* note 287, at 145 (noting her research quantified the time until finalization of a rule).

328. *See* 40 C.F.R. pt. 423 (2015).

329. *See* 40 C.F.R. pt. 68 (2017).

330. 40 C.F.R. pt. 60 (2015).

331. *See* 40 C.F.R. pts. 51, 72, 73, 74, 77, 78 and 96 (2005).

332. *See, e.g.*, 40 C.F.R. pt. 423 (2015); *see also* 40 C.F.R. pt. 68 (2017).

333. *See* 40 C.F.R. pts. 51, 72, 73, 74, 77, 78, 96 (2005).

C. LIKELY FATE OF THE TRUMP ADMINISTRATION'S REGULATIONS

The timeline of the Trump administration's own rules, often seeking to repeal or amend signature Obama-era regulations,[334] helps illustrate the risks that presidents now face. At the two-year mark, the Trump administration had proposed, among other initiatives, to flatline EPA's vehicle emissions standards,[335] repeal and replace EPA's Clean Power Plan,[336] repeal and replace EPA's Clean Water Rule,[337] and weaken EPA's methane emissions rule.[338]

But as of July 2019, only one of those proposals was finalized, the replacement of the Clean Power Plan.[339] As a result, after the final rules are eventually promulgated, should President Trump not win re-election, the Justice Department might not have sufficient time to guide them through litigation while it is still under his control.[340] A Democratic administration could then seek abeyances in the pending litigation to aid efforts to undo the rollbacks. And even if the litigation were to be completed in time, rules with long compliance periods would be vulnerable to suspension efforts.

Moreover, the Trump administration has not taken the proposal steps yet in numerous other promised revisions. Among other proceedings, EPA announced that it is reconsidering its

334. *See* Freeman, *supra* note 12, at 566.

335. 83 Fed. Reg. 42,986 (proposed Aug. 24, 2018) (to be codified at 40 C.F.R. pts. 85–86).

336. Revisions to Emission Guideline Regulations, 83 Fed. Reg. 44,746 (proposed Aug. 31, 2018) (to be codified at 40 C.F.R. pts. 51, 52, 60).

337. Definition of "Waters of the United States," 82 Fed. Reg. 34,899 (proposed July 27, 2017) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401).

338. Emission Standards for New, Reconstructed and Modified Sources, 83 Fed. Reg. 52,056 (proposed Oct. 15, 2018) (to be codified at 40 C.F.R. pt. 60).

339. 40 C.F.R. pt. 60 (2019).

340. Coral Davenport, *Automakers Plan for Their Worst Nightmare: Regulatory Chaos After Trump's Emissions Rollback*, N.Y. TIMES (Apr. 10, 2019), https://www.nytimes.com/2019/04/10/climate/auto-emissions-cafe-rollback-trump.html [https://perma.cc/Q22P-CDUF] (describing fear that a "new administration could simply decline to defend the plan in court" if the agencies do not publish the proposed rollback in time); Dawn Reeves, *EPA Scrambles to Complete Rollbacks, Suits Before End of Trump's Term*, INSIDEEPA (Jan. 2, 2019), https://insideepa.com/outlook-2019/epa-scrambles-complete-rollbacks-suits-end-trumps-term [https://perma.cc/RR75-DLFK].

rule limiting methane emissions at landfills.[341] EPA has been planning to reconsider and revise the Effluents Rule, the rule limiting toxic metal wastewater discharges at power plants.[342] And EPA announced it would "review" a pesticide rule.[343] Yet at the two-year mark, EPA had not published proposals repealing those regulations. If the agencies wait too long and if President Trump serves only one term, repeals, even if they are finalized, could be at risk of Congressional Review Act disapprovals, and would almost certainly be at risk of abeyance and suspension efforts.[344]

III. IMPACT ON FUTURE PRESIDENTS

This Part analyzes the political implications of the transformation put in motion by the Trump administration's use of Congressional Review Act disapprovals, abeyances, and suspensions to roll back Obama administration regulations. Section A looks at the effects of this transformation on the strategies that subsequent presidents are likely to follow with respect to the promulgation of regulations that are central to their agenda. Section B explores the electoral incentives that are likely to be put in motion by the Trump administration's practices.

A. Regulatory Strategies

As Parts I and II show, a significant number of regulations are likely to be at risk after an inter-party presidential transition as a result of the rollback efforts put in play by the Trump administration. And though presidents might make more use of "unorthodox lawmaking and unorthodox rulemaking,"[345] regulatory policymaking will nonetheless remain a significant strategy that presidents use to establish major regulatory policies.[346] As a result, future presidents are likely to face different incentives with respect to their regulatory strategies than has been the case before the Trump presidency.

341. 82 Fed. Reg. 24,878 (May 31, 2017).

342. 82 Fed. Reg. 19,005 (Apr. 25, 2017).

343. 82 Fed. Reg. 22,294 (May 15, 2017).

344. Outside of the regulatory process, an anti-regulatory president such as Trump may be able to accomplish a lot through other means, such as budget and staffing cuts, ceasing enforcement of regulations, or appointing heads that are hostile to the agency's mission. But that topic is outside of the scope of this Article.

345. Gluck et al., *supra* note 46, at 1865.

346. *See* O'Connell, *supra* note 282.

Previously, outgoing presidents worried that regulations issued in the last few months of the administration—the so-called "midnight rules"—would be at risk of rollbacks.[347] For example, in May 2008, facing an election, George W. Bush instructed agencies not to propose any new regulations after June 1, 2008 or to finalize any new regulations after November 1, 2008.[348] Similarly, Barack Obama instructed agencies to "strive to complete their highest priority rulemakings by the summer of 2016."[349]

Now a much greater proportion of a president's regulatory output is at risk from the bigger arsenal of rollback tools deployed by the Trump administration and likely to be deployed as well by subsequent administrations. This Section explores how the actions of the Trump administration may affect future presidential strategies during transition planning, when making decisions about how fast to issue new regulations and how much to compromise on them, and when making decisions about whether to wait on a new regulatory initiative until after surviving reelection. The Section also explains how each of these areas presents progressively more potential pitfalls.

347. *See, e.g.*, Beermann, *supra* note 41, at 949–50 (explaining that attention has been paid to the actions taken at the very end of an administration); Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441, 1447 (2005); Stuart Shapiro, *Will Congressional Review Act Repeals Change Agency Behavior?*, REG. REV. (Apr. 3, 2007), https://www.theregreview.org/2017/04/03/shapiro-congressional-review-act-agency-behavior/ [https://perma.cc/ZR5Q-MXLS].

348. Memorandum from Joshua Bolten, White House Chief of Staff, to Heads of Executive Departments and Agencies (May 9, 2008), https://www.biologicaldiversity.org/campaigns/esa/pdfs/BoltenMemo05092008.pdf [https://perma.cc/X6H3-9SLG].

349. Memorandum from Howard Shelanski, Administrator of the Office of Information and Regulatory Affairs, to Deputy Secretaries (Dec. 17, 2015), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/agencyinformation_circulars_memoranda_2015_pdf/regulatory_review_at_the_end_of_the_administration.pdf [https://perma.cc/U3ZK-VS3G] (explaining that agencies should finish significant regulations by the summer of 2016 in order to "avoid an end-of-year scramble that has the potential to lower the quality of regulations that OIRA receives for review").

1. Transition Planning

Presidents have long been concerned with completing important regulatory initiatives before leaving office.[350] And with the threat of rollback, a future president will need to work hard to avoid repeating the mistakes of prior transitions and use both the pre-election and post-election transition times to develop and hone her regulatory agenda. In the past, not enough attention has been placed on getting started quickly enough to issue rules early. Research on recent administrations has found that fewer rules are promulgated in a president's first year in office than in later years.[351] In the future, as a result of the broader rollback strategies that are likely to become commonplace, presidential candidates should plan that the period for completing action on their regulatory initiatives, without risking rollbacks following an inter-party transition, will be shorter. And adjusting to that will require presidents to place more attention on the transition period before they take office. By focusing on this time, a candidate or incoming president can get a jump-start on two tasks that are crucial to issuing regulations quickly: developing a regulatory agenda and having the political appointees in place for shepherding the rules through the process.

Developing a regulatory agenda has been a focus for some presidents in the past. For example, President Reagan's transition period is generally considered one of the most successful in recent decades.[352] He instructed his advisers to prepare policy recommendations which would enable him to begin work right after the inauguration.[353] These helped ensure a smoother transition and quicker implementation of Reagan's policy choices.[354] But many recent presidents have not placed this much of a focus on getting policy goals in place. President Carter, for example, began low-profile planning for his transition in the spring of 1976, but his transition team was not formed officially until after the election, and he limited his time in Washington before the inauguration.[355] President Clinton, like Carter, stayed out of

350. *See* Mendelson, *supra* note 10, at 597 (describing the "end of a presidential term" as the "natural deadline"); O'Connell, *supra* note 41, at 503.

351. O'Connell, *supra* note 282, at 896.

352. *See* Stephanie Smith, *Presidential Transitions*, *in* PRESIDENTIAL TRANSITIONS: BACKGROUNDS AND ISSUES 19 (Ida Burkhalter ed., 2009).

353. *Id.*

354. JOHN P. BURKE, PRESIDENTIAL TRANSITIONS: FROM POLITICS TO PRACTICE 178–79 (2000).

355. *See id.* at 17–19, 25; Smith, *supra* note 352, at 18.

Washington, and his transition was marked by delay and problems, including a dispute about who would run the transition effort.[356] George W. Bush's transition faced its own unique problems because of the dispute over the 2000 election results; Bush did not immediately receive funding or office space for his transition planning.[357] President Trump also faced problems when he changed his transition team after the election, which delayed agency-level transition work.[358]

Working to develop goals earlier in the process has some limitations. For example, developing priorities and writing draft rules will be hampered by the lack of access to career staff, a crucial part of any effort to complete the technical tasks necessary to shepherd a successful rule through the notice-and-comment process.[359] In addition, the substance of important rules will need to have approval from the presumptive agency head, an individual who is unlikely to be in place until after the election. But there are many steps that can be undertaken before the election and before the inauguration. The Presidential Transition Act, originally enacted in 1963 and recently updated to address pre- and post-election needs, provides funding for many key tasks that need to be accomplished in order to get to the policy-making job quickly, such as support for developing a human resources management system and office space and providing for negotiation of a memorandum of understanding between the incumbent president and eligible candidate to facilitate communications with the agencies.[360] The Act also allows likely political appointees to receive orientation on matters like the functions, duties, responsibilities, and mission of the agencies and to meet with agency staff tasked to the transition before and after the election, with certain restrictions.[361]

356. BURKE, *supra* note 354, at 284–86; Smith, *supra* note 352, at 21.

357. Smith, *supra* note 352, at 22–23.

358. CTR. FOR PRESIDENTIAL TRANSITION, AGENCY TRANSITION GUIDE 72 (2017), https://presidentialtransition.org/wp-content/uploads/sites/6/2017/08/6f0fe583ba38281b78fcf0756580aa39-1503408279.pdf [https://perma.cc/E8VZ-MXYU].

359. *See* Richard L. Revesz, *Pruitt Exemplified How Partisanship Hinders Policymaking*, SLATE (July 10, 2018), https://slate.com/technology/2018/07/pruitt-exemplified-how-partisanship-hinders-policymaking.html [https://perma.cc/QDW4-B6RX].

360. HENRY B. HOGUE, CONG. RESEARCH SERV., RS22979, PRESIDENTIAL TRANSITION ACT: PROVISIONS AND FUNDING 6 (2016).

361. CTR. FOR PRESIDENTIAL TRANSITION, *supra* note 358, at 16–17, 72; HOGUE, *supra* note 360.

Candidates can also prepare a list of policy priorities and begin discussing or drafting outlines of rules that would be necessary to accomplish their regulatory goals. Getting started on regulatory policymaking before the election is important because even without taking into account the tasks of developing a regulatory agenda and choosing agency staff, the period between the election and when a president-elect takes office is typically too short to adequately prepare for the basic requirements necessary for launching new substantive initiatives.[362] For example, President Clinton spent months prior to his election preparing a new approach to regulation that eventually culminated in the issuance of Executive Order 12,866.[363] He convened numerous meetings with groups such as the U.S. Chamber of Commerce and OMB Watch to discuss how to make the regulatory process more efficient.[364] Despite this advance work, it was nevertheless six months into his administration before he issued his executive order and began to coordinate regulatory planning among various agencies.[365]

To issue rules quickly, a president will also need to move expeditiously on presidential appointees. In the past, presidents have focused on announcing cabinet nominees in the month after the election.[366] But it is an enormous task to fill the rest of the political positions at agencies at the start of an administration, as there are more than 700 top agency positions that require Senate confirmation.[367] Delays in rulemakings are associated with delays in filling these positions, which can be exacerbated by insufficient preparation during the transition period.[368] Over

362. John P. Burke, *Lessons from Past Presidential Transitions: Organization, Management, and Decision Making*, 31 PRESIDENTIAL STUD. Q. 5, 7 (2001).

363. Robert J. Duffy, *Regulatory Oversight in the Clinton Administration*, 27 PRESIDENTIAL STUD. Q. 71, 73–74 (1997).

364. *Id.*

365. *Id.*

366. *See, e.g.*, Coral Davenport, *Trump Is Said to Offer Interior Job to Ryan Zinke, Montana Lawmaker*, N.Y. TIMES (Dec. 13, 2016), https://www.nytimes.com/2016/12/13/us/politics/donald-trump-ryan-zinke-interior-secretary.html [https://perma.cc/4YNW-V5YW]; Coral Davenport & Eric Lipton, *Trump Picks Scott Pruitt, Climate Change Denialist, to Lead E.P.A.*, N.Y. TIMES (Dec. 7, 2016), https://www.nytimes.com/2016/12/07/us/politics/scott-pruitt-epa-trump.html [https://perma.cc/M3V7-JG42].

367. *See* O'Connell, *supra* note 41, at 484–85.

368. Anne Joseph O'Connell, *Let's Get It Started: What President-elect Obama Can Learn from Previous Administrations in Making Political Appointments*, CTR. FOR AM. PROGRESS 11–13 (2009), https://cdn.americanprogress

the last few decades, presidents have taken longer to find suitable professionals to fill all of the many posts. While the Reagan administration filled 86.4% of Senate-confirmed agency positions during its first year in office, George H.W. Bush managed to have 80.1% in place, Clinton 69.8%, George W. Bush 73.8%, and Obama 64.4 %, showing a marked decline over the years.[369] The trend has continued in the Trump administration. About one year into Trump's first year, he had *nominated* only 40% of 633 key positions.[370] By December 31, 2017, Trump had succeeded in having only 300 appointees confirmed, compared to 452 for Barack Obama and 493 for George W. Bush at the same point in their presidencies.[371] Without sufficient personnel in place, it may be difficult for agencies to undertake the necessary preparations for new rules, including the development of solid working relationships between career staff and incoming political appointees.[372]

Significant improvements in transition planning are likely to be crucial for both anti- and pro-deregulatory presidents to accomplish their goals. Presidents seeking to issue new regulations and presidents seeking to roll regulations back both need to put serious effort into those new rules.[373] Without appointees, that can be difficult. In fact, recent evidence demonstrates that this is crucial even for anti-regulatory presidents, such as Trump.[374] Trump seems to have tried to use the lack of appoint-

.org/wp-content/uploads/issues/2009/01/pdf/presidential_appointments.pdf [https://perma.cc/A32G-PM27].

369. *See* O'Connell, *supra* note 41, at 532 n.210.

370. Charles S. Clark, *Trump Continues to Set Records for Agency Vacancies*, GOV'T EXEC. (Jan. 16, 2018), https://www.govexec.com/oversight/2018/01/trump-continues-set-records-agency-vacancies/145218/ [https://perma.cc/B43X-XWYR]; *see also* Juliet Eilperin, Josh Dawsey & Seung Min Kim, *'It's Way Too Many': As Vacancies Pile Up in Trump Administration, Senators Grow Concerned*, WASH. POST (Feb. 4, 2019), https://www.washingtonpost.com/national/health-science/its-way-too-many-as-vacancies-pile-up-in-trump-administration-senators-grow-concerned/2019/02/03/c570eb94-24b2-11e9-ad53-824486280311_story.html [https://perma.cc/8VNR-2AMT].

371. Jay Diehm et al., *Tracking Trump's Nominations*, CNN (Dec. 31, 2017), https://www.cnn.com/interactive/2017/politics/trump-nominations [https://perma.cc/UNK6-7A84].

372. *See* Revesz, *supra* note 359.

373. *See supra* Part I.C.

374. *See* Randall Lane, *Inside Trump's Head: An Exclusive Interview with the President, and the Single Theory That Explains Everything*, FORBES (Oct.

ments as one way to accomplish his anti-regulatory goals, asserting that staffing agencies was "totally unnecessary" because the agencies already have "hundreds thousands" of employees.[375] But as agencies under Trump have lost case after case in court over their deregulatory rules, the administration's anti-regulatory plans seem to have faltered.[376] One reason for that has certainly been poor management of the process.[377]

In some ways, transition efforts have become considerably more robust over the last two decades, with improvements in areas such as national security since 9/11.[378] But these improvements have not trickled down into agencies, which continue to be plagued by staffing shortages into the first months of an administration.[379] To ameliorate these shortcomings, transition teams should at a minimum devote more efforts to agency staffing, particularly identifying personnel for top administrative positions. While the transition period does not provide a magic bullet, by devoting significantly more attention to regulatory planning than has been the case to date incoming administrations make it more likely that rules are completed earlier in the president's first term and are therefore more likely to be safe from the rollback tactics discussed in this Article, should the president fail to be reelected.

2. Speed, Quality, and Compromise

The threat posed by the rollback tools is also likely to have an impact on agency decisions when planning and drafting regulations in three significant ways. Each, in turn, could have its own potential pitfalls. First, agencies might try to complete rules

10, 2017), https://www.forbes.com/donald-trump/exclusive-interview/#7efe027bdeca [https://perma.cc/52TY-FKQK#6fb8042cbdec].

375. *Id*.

376. *See, e.g.*, Anna M. Phillips, *In California vs. Trump, the State Is Winning Nearly All Its Environmental Cases*, L.A. TIMES (May 7, 2019), https://www.latimes.com/politics/la-na-pol-california-trump-environmental-lawsuits-20190507-story.html [https://perma.cc/VKA6-LPHL].

377. *See* Revesz, *supra* note 359.

378. Richard Skinner, *9/11 Improved Presidential Transitions*, VOX (Oct. 10, 2016), https://www.vox.com/mischiefs-of-faction/2016/10/10/13143264/september-11-improved-presidential-transitions [https://perma.cc/BP9-PXXA].

379. Russell Berman, '*The Most Important Takeover of Any Organization in History*,' ATLANTIC (Apr. 22, 2016), https://www.theatlantic.com/politics/archive/2016/04/improving-the-presidential-transition-2016/477528 [https://perma.cc/6HHM-2TJG].

more quickly than has historically been the case.[380] For example, an agency could devote more resources to a smaller list of important rules in order to promulgate them quickly, while working more slowly on a bigger list. To be sure, some presidents may face factors outside of the administration's control, such as congressional resistance, when attempting to speedily issue new and important rules.[381] For example, during the Clinton administration, Congress used appropriations riders to block the Department of Labor from issuing any rule addressing ergonomics injuries.[382] But focused attention on this issue could help an administration finalize at least some significant rules more quickly.

A potential pitfall with this strategy is that issuing regulations quickly could lead to a sacrifice of research and reasoning. Some studies suggest that the quality of economic analyses may suffer when agencies are placed on tight deadlines.[383] Cutting corners in that way could lead to judicial reversal.[384] As a recent example, many rules issued by the Trump administration were finalized very quickly and a significant number of those rules have been struck down for cutting corners.[385] In fact, a stronger economic analysis is likely to make the rule more resilient in the face of aggressive rollback efforts.[386] Thus, while it makes sense for agencies to give serious thought to speeding up the various components of the rulemaking process, agencies need to be cognizant of the tradeoff between shortcuts that might make rules more vulnerable to judicial review and delays that might make the rules more vulnerable to rollback efforts.

Agencies may also work with the White House to speed up review by the Office of Management and Budget, a process that is meant to ensure that other affected agencies have been consulted and to shore up the technical and economic soundness of

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380. *See* Shapiro, *supra* note 347 (noting that although final regulations rushed by agencies "might get to bed earlier, there is no guarantee that they will wake up looking better").

381. *See* Beermann, *supra* note 41, at 957, 960–61.

382. *See id.*

383. *See id.*

384. *See* Jerry Ellig & Christopher J. Conover, *Presidential Priorities, Congressional Control, and the Quality of Regulatory Analysis: An Application to Healthcare and Homeland Security*, 161 PUB. CHOICE 305, 306–07 (2014).

385. *See* Raso, *supra* note 230.

386. *See* Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593, 1628 (2019).

the rule.[387] But review time is not typically a substantial part of the process, so there is not much time to be saved there.[388] Moreover, a sacrifice in review time could also lead to shakier rules.

Second, to avoid the threat of future suspensions, agencies might need to shorten compliance deadlines. Industry often asks for long compliance deadlines to allow time to install complex equipment or technology and to train staff to comply with complicated new procedures.[389] And to set shorter deadlines, an agency would need to be able to provide a reasoned explanation for why the shorter deadlines are realistic.[390] Otherwise, the agency risks having a court strike down the compliance deadline, or maybe even the rule itself. Thus, here too, agencies face a difficult tradeoff between shorter compliance deadlines, which might be attacked in court as infeasible, and longer ones, which would increase the risk that the rule would be subjected to rollback efforts following an inter-party transition.

Third, facing a bigger threat of rollbacks might also cause agencies to be less likely to be ambitious or take policy risks, especially with rules they issue later in the presidential term. For example, if an agency is issuing a rule near the end of the presidential term, keeping the rule limited and relatively uncontroversial or obtaining more buy-in from more stakeholders might help protect the rule from disapproval under the Congressional Review Act, though this could mean that the president might have to compromise on a policy priority. These changes might help because, depending on the composition of the Senate, it may be necessary to sway only a few Senators from the other party to protect a rule from disapproval under the Act and a somewhat less ambitious rule might be perceived as less threatening by at least a few Senators of the opposite party.[391] The example of the defeat of the resolution to disapprove the Waste Prevention Rule, with three Republican Senators defecting from a party-line

387. O'Connell, *supra* note 41, at 533 (suggesting that OIRA "could establish a separate, faster review track for rulemaking proposals connected to important regulatory priorities").

388. *See id.* at 476.

389. *See* Risk Management Programs Under the Clean Air Act, 82 Fed. Reg. 4594, 4676 (Jan. 13, 2017) (to be codified at 40 C.F.R. pt. 88).

390. *See* Covad Commc'ns Co. v. FCC, 450 F.3d 528, 550 (D.C. Cir. 2006).

391. *See, e.g.*, Kellie Lunney, *Surprise! Senate Fails to Kill Obama Methane Rule*, E&E NEWS (May 10, 2017), https://www.eenews.net/stories/1060054362 [https://perma.cc/7CE5-X54H].

vote to join all the Democratic Senators, is instructive in this regard.[392]

For rules issued earlier and therefore immune from Congressional Review Act disapprovals, but which would otherwise face a risk of suspension or an abeyance in pending litigation, it is possible that a regulation that looks for consensus might not rise to the top of the list of regulations that the new administration targets with its rollback tactics. Thus, as a result of the transformations wrought by the Trump administration, agencies will need to balance the interest in promoting the president's policy agenda, which might call for promulgating a more ambitious rule, against the higher probability that a less ambitious rule would not be subjected to rollback efforts.

3. Regulatory Timing and Elections

A president's reelection, of course, ameliorates the time pressure that agencies face as a result of rollback threats. In theory, a smooth transition and an early start to rulemaking, if combined with a second term, could ensure that at least some number of major rules can be finalized, survive legal challenges, and have their compliance deadlines take effect before a possible inter-party transition at the end of a president's second term.

But this rosy picture does not reflect the difficult tradeoffs a president needs to make between the timing of significant rulemakings and her reelection campaign. If an agency moves forward with a regulation on a divisive issue during a president's first term, there is the potential for public backlash that could damage the president's reelection prospects.

These considerations deeply shaped the Obama administration's approach to certain environmental regulations, and its recent experiences serve as a warning for future presidents who might seek to delay rulemaking out of fear of electoral consequences. President Obama entered his first term seemingly well positioned to quickly tackle his policy priorities through rulemaking.[393] His transition to office in 2008 is generally viewed as one of the most effective in recent administrations, thanks in part to President Bush's extensive preparations, that began a year before the election, to turn over the reins of power.[394]

392. *See supra* text accompanying notes 93–94.

393. *See* MARTHA JOYNT KUMAR, BEFORE THE OATH: HOW GEORGE W. BUSH AND BARACK OBAMA MANAGED A TRANSFER OF POWER 249–50 (2015).

394. *See id.*

Obama also paid significant attention to planning for the transition and was able to begin the presidency with White House staff "in place, a personnel operation up and running," and a set of legislative and executive priorities ready to announce.[395] But despite this running start, President Obama did not address a number of regulatory initiatives during his first term, instead spending the administration's initial political capital on legislative initiatives. Obama met mixed success with this strategy. He focused on healthcare reform, which resulted in the passage of the Affordable Care Act.[396] But his focus on greenhouse gas reductions led to the failed Waxman-Markey bill, which passed the House in 2009 but did not clear the filibuster hurdle in the Senate in 2010.[397]

Following that mixed success on legislative initiatives, the Obama administration chose to postpone important administrative actions until after the 2012 election to increase the president's probability of reelection.[398] The Office of Information and Regulatory Affairs (OIRA) appears to have played an important role in delaying potentially controversial regulatory initiatives prior to Obama's reelection. Cass Sunstein, who served as director of OIRA, has been accused of using his position to stall agency actions at the behest of the White House prior to the 2012 election.[399] For example, before the 2012 election, President Obama instructed Sunstein to send back an EPA rule that would have

395. *Id.* at 250.

396. *See* Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, Pub. L. No. 111-192, 124 Stat. 1280–1307.

397. Amanda Reilly & Kevin Bogardus, *7 Years Later, Failed Waxman-Markey Bill Still Makes Waves*, E&E NEWS (June 27, 2016), https://www.eenews.net/stories/1060039422 [https://perma.cc/9QYR-A6MM].

398. *See* Evan Lehmann & Jean Chemnick, *Obama's Climate Legacy: 8 Years of Troubles and Triumphs*, E&E NEWS (Jan. 20, 2017), https://www.eenews.net/stories/1060048703 [https://perma.cc/Z4PP-A5YL].

399. *See* Helena Bottemiller Evich, *Why President Obama and Congress Turned Their Backs on Food Safety*, POLITICO (July 14, 2015), https://www.politico.com/story/2015/07/sickness-in-the-system-120057 [https://perma.cc/3PE7-Y882]; Scot J. Paltrow, *How a Small White House Agency Stalls Life-Saving Regulations*, REUTERS (Oct. 29, 2015), http://www.reuters.com/investigates/special-report/usa-regulations-oira [https://perma.cc/WJF8-N59L].

tightened the ozone standard,[400] prompting many to suspect that the administration had "caved" to election pressures.[401]

With the benefit of hindsight, the decision to put off important regulatory initiatives until the second term has generated widespread criticism,[402] because, had EPA, for example, moved more quickly and issued the rules earlier, some of its more controversial rules, such as the Clean Power Plan and methane emissions rules, may have been less vulnerable to reversal later.[403] But, on the other hand, these regulatory initiatives would have been dead in their tracks had their unveiling in the first term doomed President Obama's reelection.

The Obama administration is not alone in delaying rules and regulations until after reelection. Stalling potentially controversial regulations is part of a broader pattern political scientists have documented in reelection campaigns, in which presidents avoid divisive issues to maximize their appeal to the electorate.[404] Although no studies have precisely documented this phenomenon for prior presidents, there is evidence that the George W. Bush administration postponed rules on food safety, land development, telecommunications, and corporate governance until after the 2004 election.[405] President Reagan slowed his agency "deregulatory" efforts ahead of his 1984 reelection campaign, fearing political backlash.[406] Reagan later sped up his

400. *See* John M. Broder, *Re-election Strategy Is Tied to a Shift on Smog*, N.Y. TIMES (Nov. 16, 2011), https://www.nytimes.com/2011/11/17/science/earth/policy-and-politics-collide-as-obama-enters-campaign-mode.html [https://perma.cc/26NE-JH6F] (citing and linking to Sunstein's letter to EPA's administrator returning the rule for reconsideration).

401. *See* Robin Bravender, *Obama Blindsides Enviros and EPA*, POLITICO (Sept. 2, 2011), https://www.politico.com/story/2011/09/obama-blindsides-enviros-and-epa-062586 [https://perma.cc/9AZF-BPTT].

402. Marianne Lavelle, *2016: Obama's Climate Legacy Marked by Triumph and Lost Opportunities*, INSIDECLIMATE NEWS (Dec. 26, 2016), https://insideclimatenews.org/news/23122016/obama-climate-change-legacy-trump-policies [https://perma.cc/FCS7-XH93]; *see also* Beermann, *supra* note 41, at 966–69 (describing the political incentives that presidents may face when deciding whether to act quickly or slowly).

403. *See* Emily Atkin, *Scott Pruitt Is the Hypocritical Liar That Trump Deserves*, NEW REPUBLIC (May 19, 2017), https://newrepublic.com/article/142671/scott-pruitt-hypocritical-liar-trump-deserves [https://perma.cc/4WYE-HPUY].

404. *See* Michael Nelson, *Bill Clinton and the Politics of Second Terms*, 28 PRESIDENTIAL STUD. Q. 786, 788 (1998).

405. Stephen Labaton, *Agencies Postpone Issuing New Rules as Election Nears*, N.Y. TIMES, Sept. 27, 2004, at A1.

406. Joann S. Lublin & Christopher Conte, *The Rule Slashers*, WALL ST. J.,

regulatory work and issued several controversial midnight regulations at the end of his term so as to avoid interfering with President George H.W. Bush's incoming message of a "kinder, gentler" nation.[407] This gamesmanship stretches as far back as the Nixon administration, which was accused of delaying worker health and safety standards in 1972 as part of a broader effort to manipulate agency activities in order to maximize campaign contributions ahead of his reelection bid.[408]

The difference now is that presidents who engage in this practice are putting more of their regulatory initiatives at risk of rollbacks. As a result, future presidents will need to consider the significant potential tradeoff between promulgating controversial regulations in their first term, which might negatively affect their reelection chances, and waiting until the second term, which increases the probability that the regulations would be rolled back following an inter-party transition.

Assuming a president is reelected, a second-term president has an advantage that a first-term president does not. She can spend the first four years in office developing a proposed rule, potentially having it ready to publish in the *Federal Register* right after the election and before the second term even begins; though care would need to be taken to avoid leaks that could have negative electoral consequences. Waiting to go public until after the election could avoid the reelection fears that fuel delays in regulation while simultaneously completing one of the lengthiest steps in the regulatory process for significant rules with more than four years to spare. Under typical circumstances, this strategy could protect rules from Congressional Review Act disapprovals and abeyances, and if the compliance deadlines are short enough, it could also help shield the rules from suspension efforts.[409] If President Obama had followed this protocol with the Clean Power Plan shortly after the November 2012 election instead of in June 2014, the additional year and a half probably would have shielded the rule from an abeyance.[410]

Dec. 14, 1983, at 1.

407. *See* O'Connell, *supra* note 41, at 479.

408. *When Safety Didn't Come First*, NEWSDAY, July 17, 1974, at 4.

409. *See supra* Part II.B.

410. *See supra* text accompanying notes 402–03.

B. ELECTORAL INCENTIVES

The changes in the administrative state that are likely to result from the actions of the Trump administration will also affect electoral incentives. This Section discusses congressional control and presidential succession, respectively. On the first, it argues that outgoing presidents will face a significant additional incentive to try to maintain their party's control of at least one chamber of Congress at the end of their terms. On the second, it argues that presidents will now need to think not only about how a successor might imperil their legacy through future policies but also about whether a successor might dismantle a significant portion of their own regulatory achievements.

1. Presidential Succession

Presidents have understood for a long time that their legacy is likely to be better protected by a successor of the same party, and commentators have traditionally been concerned with the impact of a successor's policies on that president's legacy.[411] As more policy is made through the executive branch through regulatory action,[412] control of the presidency is increasingly important. But now, due to the Trump administration's rollback tactics, outgoing presidents will also need to worry more about efforts to dismantle their legacy through regulatory rollbacks if their successor is of a different party.

An outgoing president seeking to help elect a successor, however, is likely to face significant hurdles. One difficulty is that there is little historical precedent for the same party to keep control of the Executive Branch for three terms in a row,[413] suggesting that Americans may desire a change in leadership after a

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411. *See, e.g.*, THE PRESIDENCY OF BARACK OBAMA: A FIRST HISTORICAL ASSESSMENT (Julian E. Zelizer, ed. 2018) (surveying key policies of President Obama with a strong focus on the predicted impact of President Trump); THE PRESIDENCY OF GEORGE W. BUSH: A FIRST HISTORICAL ASSESSMENT (Julian E. Zelizer, ed. 2010) (doing the same for Presidents Bush and Obama, respectively); *see also* Richard Alexander Izquierdo, *The Architecture of Constitutional Time*, 23 WM. & MARY BILL RTS. J. 1089, 1097–1101 (2015) (describing presidential efforts to create enduring legacies).

412. *See generally* Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549 (2018) (examining presidential direction of administrative action through case studies).

413. *See* Raymond A. Smith, *Is It That Hard for a Party to Hold the White House for Three Terms?*, THE HILL (Apr. 15, 2015), http://thehill.com/blogs/pundits-blog/presidential-campaign/238812-is-it-that-hard-for-a-party-to-hold

two-term president. Since the ratification in 1951 of the Twenty-Second Amendment, limiting presidents to two terms in office, the same party has occupied the White House for three straight terms only once, when George H.W. Bush succeeded Ronald Reagan.[414] This poor track record may be deceptive because some of those elections were very close, but it does not bode well for future attempts to secure three-term party control of the White House.[415]

Another problem is that outgoing presidents, as noted above, tend to be fairly unpopular.[416] This unpopularity has led to either the outgoing president declining to campaign or to the candidate refusing the assistance.[417] For example, Vice President Al Gore distanced himself from President Clinton during his campaign, publicly saying he felt "disappointed" about the Monica Lewinsky scandal.[418]

Even presidents who maintain their popularity have shown little interest in helping their party's candidate.[419] One exception may be President Reagan, who had historically high approval ratings at the end of his second term.[420] Yet the successful campaign of then Vice President George H.W. Bush may not have benefited significantly from his help.[421] After giving a somewhat

-the-white-house [https://perma.cc/S8YU-XU9C].

414. *See id.*

415. *See id.*

416. *See* Rebecca Kaplan, *Why Outgoing Presidents Stay Off the Campaign Trail*, CBS NEWS (Nov. 24, 2014), https://www.cbsnews.com/news/why-outgoing-presidents-stay-off-the-campaign-trail [https://perma.cc/8ZFW-DJAH].

417. *See* Domenico Montanaro, *Why President Obama Campaigning for Clinton Is Historic*, NPR (July 5, 2016), https://www.npr.org/2016/07/05/484817706/looking-back-at-a-century-of-presidents-not-campaigning-for-their-successor [https://perma.cc/F8VD-YWTX].

418. Interview by Diane Sawyer, ABC 20/20, with Albert Gore, Jr. (June 16, 1999), https://votesmart.org/public-statement/1873/abc-2020-transcript#.XD41vM1OmHs [https://perma.cc/E4YX-JB7E] (quoting Gore describing the Monica Lewinsky affair as "inexcusable" and explaining that he was "disappointed"); *see also* Melinda Henneberger & Don Van Natta Jr., *Once Close to Clinton, Gore Keeps a Distance*, N.Y. TIMES, Oct. 20, 2000, at A1.

419. *See* Montanaro, *supra* note 417.

420. Some scholars have found evidence suggesting that this may have helped Bush in the election. *See* J. Merrill Shanks & Warren E. Miller, *Partisanship, Policy and Performance: The Reagan Legacy in the 1988 Election*, 21 BRIT. J. POL. SCI. 129 (1991).

421. *See* Newsweek Staff, *Reagan and Bush: Call It a Snub*, NEWSWEEK (Mar. 8, 1992), https://www.newsweek.com/reagan-and-bush-call-it-snub

tepid endorsement, Reagan hit the campaign trail for Bush, traveling at least once a week in the final months before the election.[422] Although polling evidence indicates that Reagan's popularity may have helped Bush in a way that Bill Clinton's lower popularity could not help Gore,[423] Bush's win may actually have resulted from his subtle attempts to distance himself from President Reagan on matters ranging from foreign policy to the environment.[424]

Considering the long history of presidents staying out of the campaigns of their possible replacements, President Obama's serious efforts to assist Hillary Clinton's election bid after she was formally nominated were quite notable.[425] There were good reasons to think his appearances at rallies and fundraisers would be beneficial, as he had worked closely with Clinton during her tenure as Secretary of State and had high approval ratings among Democrats.[426] However, some observers believe that President Obama stole the limelight from Clinton at public events, with Obama himself admitting that he might be enjoying the 2016 campaign "too much."[427] And his ability to connect with certain groups, particularly African-American voters, did not seem to convince them to turn out for Clinton in the same numbers as they did for his elections.[428]

-196034 [https://perma.cc/GZS4-BNGD].

422. James Gerstenzang, *President Emerging as Major Asset of the Bush Campaign*, L.A. TIMES (Oct. 15, 1988), https://www.latimes.com/archives/la-xpm-1988-10-15-mn-3344-story.html [https://perma.cc/KJ8A-HC5R].

423. *See* William Schneider, *Al Gore's Challenges*, NAT'L J. (Aug. 12, 2000), https://www.nationaljournal.com/s/605549/politics-al-gores-challenges? [https://perma.cc/V6UX-L6SE].

424. *See* JAMES MANN, THE REBELLION OF RONALD REAGAN: A HISTORY OF THE END OF THE COLD WAR 307–09 (2009) (explaining how Bush distanced himself from Reagan's policies); Barbara Rosewicz & Michel McQueen, *Bush, Resolving Clash in Campaign Promises, Tilts to Environment*, WALL ST. J., June 13, 1989, at A1.

425. *See* Montanaro, *supra* note 417.

426. *See* Nora Kelly, *Obama Makes His Debut on the Campaign Trail*, ATLANTIC (July 5, 2016), https://www.theatlantic.com/politics/archive/2016/07/obama-clinton-campaign-north-carolina/490079/ [https://perma.cc/P7VT-EV9G].

427. Matt Flegenheimer, *How Obama Stole the Show at Hillary Clinton's Campaign Rally*, N.Y. TIMES (July 5, 2016), https://www.nytimes.com/2016/07/06/us/politics/obama-hillary-clinton.html [https://perma.cc/3FGZ-DR2N].

428. Eugene Scott, *Obama Campaigns for Doug Jones, but the Obama Effect Doesn't Always Extend Beyond Obama*, WASH. POST (Dec. 11, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/12/11/obama-campaigning-for

Despite these challenges caused by the administrative law transformations on which this Article focuses, outgoing presidents will have an additional reason for benefiting if their successor is of the same party. Under that scenario, all three of the rollback tools used vigorously by the Trump administration become inoperable.

2. Congressional Control

The Trump administration's aggressive use of the Congressional Review Act underscores the importance of an electoral incentive that has gotten little attention: the incentive to retain control of at least one chamber of Congress at the end of a president's final term. As explained above, after two terms, presidents are likely to turn the presidency over to the other party.[429] Thus, to avoid the risk of the Congressional Review Act disapprovals, control of at least one branch of Congress is crucial.

Presidents have more than one opportunity to address this issue. One-third of all Senators face reelection every two years,[430] and a party's control of the House during a mid-term election can give that party the incumbent advantage at the end of a president's term. As a result, a president can help ensure that her party controls at least one chamber of Congress following the end of her term not only by making electoral efforts in the last congressional election of her presidency, but also by doing so in each prior congressional election.

But there is little historical precedent for robust presidential involvement in congressional elections, particularly at the end of the tenure of a term-limited president. This is perhaps in part because for much of the twentieth century, control of Congress was relatively stable.[431] Between 1933 and 1981, the Democratic Party had almost exclusive control of both the House and the Senate except for two short periods in the late 1940s and early 1950s.[432] Because competition for congressional seats was relatively low, party campaigning and collective action was "meager"

-doug-jones-but-the-obama-effect-doesnt-always-extend-beyond-obama/ [https://perma.cc/2K6R-SZYM].

429. *See* Smith, *supra* note 413.

430. U.S. CONST. art. I, § 3, cl. 2.

431. FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 1–2 (2016).

432. *See id*. As a result, scholarly interest in the drive to hold Congressional majorities has been relatively recent. *See id.* at 9–10.

and there was no serious contest for control of Congress.[433] The stability and consistency of party control of the House and Senate reduced the incentive on presidents to invest time and energy seeking to ensure their party's success in congressional elections.[434] Some scholars have even gone so far as to refer to certain Democratic presidents, including John F. Kennedy, as "party predators" who used funds and resources for their own reelections rather than for strengthening the overall party apparatus.[435]

Since the 1980s, contests over congressional seats have become much more competitive, increasing the incentives for presidents to take an active role and interest in securing congressional seats for their party.[436] While the turnover rate in the 1980s was under 10%, by the 2000s the rate was in the teens, and in 2010, 2012, and 2018, it was over 20%.[437] The 2018 election cycle saw the third highest turnover rate since 1974, due to a large number of resignations and retirements.[438] This change, however, has not been reflected in significant shifts in the fundraising priorities of recent presidents.[439] Both George W. Bush and Barack Obama focused considerably more attention on raising money for their own campaigns rather than on assisting their parties' congressional candidates.[440] President Obama inherited perhaps the best-organized Democratic Party in recent memory, thanks to the efforts of Howard Dean between 2005 and 2009.[441] Yet under his watch, Democrats saw the worst election losses at all levels of government than had occurred in any prior administration.[442] In contrast to a Senate majority that had fifty-

433. *Id.* at 3–4, 18–19.

434. *See* DANIEL J. GALVIN, PRESIDENTIAL PARTY BUILDING: DWIGHT D. EISENHOWER TO GEORGE W. BUSH 170, 251 (2010).

435. *Id.*

436. *See* LEE, *supra* note 431, at 2.

437. *Id.*

438. *See* Geoffrey Skelley, *There Was a Lot of Turnover in the House in the 2018 Cycle*, FIVETHIRTYEIGHT (Nov. 13, 2018 5:58 AM), https://fivethirtyeight.com/features/retirements-resignations-and-electoral-losses-the-104-house-members-who-wont-be-back-next-year/ [https://perma.cc/89FX-Q3JP] ("[T]he [2018 Congressional elections] had the third-highest turnover rate since at least 1974.").

439. *See* BRENDAN J. DOHERTY, THE RISE OF THE PRESIDENT'S PERMANENT CAMPAIGN 83-84 (2012).

440. *Id.*

441. *See* GALVIN, *supra* note 434, at 250.

442. *See* Mara Liasson, *The Democratic Party Got Crushed During the*

nine members (fifty-seven Democrats and two independents) in April 2009 after Obama was inaugurated and Arlen Specter switched to the Democratic party, Obama's majority had been reduced to a forty-six member minority at the end of his second term (forty-four Democrats and two independents).[443] During the same period, the number of house seats fell from 257 to 188.[444] Similar losses occurred in governorships as well as in state and local offices.[445]

Many members of Congress felt that President Obama did little to help them win elections. This narrative first surfaced during the 2010 midterm elections, when House Democrats claimed he had not given them sufficient public credit for helping him accomplish his agenda,[446] and continued throughout his presidency.[447] President Obama did eventually take on a more active role in party campaigning for the 2016 elections.[448] Unfortunately, he could not overcome several political and cultural forces that hurt Democratic candidates, including partisan gerrymandering and deepening racial and social divisions.[449]

Obama Presidency. Here's Why, NPR (Mar. 4, 2016), https://www.npr.org/2016/03/04/469052020/the-democratic-party-got-crushed-during-the-obama-presidency-heres-why [https://perma.cc/B7UG-9JW9].

443. PARTY DIVISION, U.S. SENATE, https://www.senate.gov/history/partydiv.htm (providing historical party breakdown in Senate).

444. PARTY DIVISIONS OF THE HOUSE OF REPRESENTATIVES, U.S. HOUSE OF REPRESENTATIVES, 1789 to Present, https://history.house.gov/Institution/Party-Divisions/Party-Divisions/ (providing party breakdown in House).

445. Liasson, *supra* note 442.

446. *See* Jake Tapper, *House Democrats Furious with President Obama*, ABC NEWS (July 16, 2010), https://abcnews.go.com/WN/house-democrats-furious-president-barack-obama-lack-support/story?id=11174124 [https://perma.cc/QV86-CXFJ].

447. *See* Chris Cillizza, *President Obama Never Cared All That Much About Downballot Democrats. Until Now.*, WASH. POST (Nov. 15, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/15/obama-is-going-to-try-to-do-something-out-of-office-that-he-never-did-in-office-build-the-democratic-party [https://perma.cc/9QPR-ZR49].

448. *See* Ed O'Keefe & Paul Kane, *On the Airwaves, Obama Is Stepping Up for Down-Ballot Democrats Like Never Before*, WASH. POST (Oct. 20, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/10/20/on-the-airwaves-obama-stepping-up-for-down-ballot-democrats-like-never-before [https://perma.cc/S3BJ-S2EH].

449. Clare Malone, *Barack Obama Won the White House, but Democrats Lost the Country*, FIVETHIRTYEIGHT (Jan. 19, 2017), https://fivethirtyeight.com/features/barack-obama-won-the-white-house-but-democrats-lost-the-country [https://perma.cc/NZS8-SJLQ?type=image].

In seeking to reverse this pattern of historic detachment, however, outgoing presidents are likely to contend with the general trend of waning public support for lame-duck administrations. Presidents are usually unpopular during the last two years of their final term in office, which may in part explain why President Obama stayed off the campaign trail in 2014, even though he raised considerable money for the party.[450] President George W. Bush faced a similar problem in the waning years of his presidency because of the unpopular Iraq war, which likely cost his party control of both chambers of Congress in 2006.[451] President Trump showed considerable interest in campaigning to maintain control of Congress, though he has declined to follow the advice of Republican party leaders about the best way to do so and his efforts have proved toxic to at least some Republican candidates.[452]

As a result of the increasing importance of having a president's party control at least one of the chambers of Congress at the end her term, we might observe a greater commitment by future presidents to providing logistical support to their party's electoral structures. For example, President Obama had a massive database of supporters that was kept a tightly guarded secret after his election, and he has been criticized for housing his campaign's data and analytics separately from those of the Democratic Party.[453] Future presidents might, instead, opt to cooperate more closely and earlier with their party's national committees in order to improve the odds of protecting their regulatory legacy through control of Congress. In summary, while presi-

450. Jay Newton-Small, *Vulnerable Democrats Run Away from Obama*, TIME (Oct. 14, 2014), http://time.com/3507165/alison-grimes-barack-obama-midterm-elections [https://perma.cc/3BXG-WE9E].

451. *See id.*

452. *See* Jonathan Martin et al., *Trump's Role in Midterm Elections Roils Republicans*, N.Y. TIMES (Apr. 28, 2018), https://www.nytimes.com/2018/04/28/us/politics/trump-midterm-elections.html [https://perma.cc/E8BW-EKY9].

453. *See* Lois Beckett, *Three Things We Don't Know About Obama's Massive Voter Database*, PROPUBLICA (Mar. 27, 2012), https://www.propublica.org/article/three-things-we-dont-know-about-obamas-massive-voter-database [https://perma.cc/PB4U-XQCU]; Maggie Haberman, *Obama 2012 Data to DNC*, POLITICO (Nov. 20, 2013), https://www.politico.com/story/2013/11/barack-obama-2012-campaign-data-100133.html [https://perma.cc/K6HM-HG33]; *see also* Eric Bradner, *Democrats to Clinton: The DNC's Data Was Fine – You Just Used It Wrong*, CNN (June 2, 2017), https://www.cnn.com/2017/06/02/politics/hillary-clinton-dnc-data-pushback/index.html [https://perma.cc/4GMM-5MR6].

dents have spent significant time fundraising for party candidates over the last two decades, the threat of Congressional Review Act disapprovals is likely to intensify this trend.[454]

IV. RECONCEPTUALIZING THE EXECUTIVE BRANCH

The Trump administration's actions, and the reaction that is likely to follow, will produce an important reconceptualization of the nature of the Executive Branch. As discussed throughout this Article, one-term presidents are likely to be significantly constrained in their ability to have important policy initiatives adopted through regulation, which has emerged as the predominant tool for making domestic policy as a result of congressional gridlock. To be effective on the domestic front, a president will need to be reelected. As a result, we are moving from a world in which a single electoral victory was sufficient to effect significant policy changes through regulation to one in which consecutive victories in national elections will be necessary.

In analyzing whether this shift is normatively justified, it is useful to draw an analogy to requirements in other political systems where a provision must receive support through multiple votes across time before becoming effective (multiple-vote requirements). Such requirements are not uncommon.[455] And though the Executive Branch of the federal government has never been viewed in this light, the justifications for those requirements provide a useful lens through which to examine the new reelection requirement.

This Part describes multiple vote requirements, discusses the normative justifications for those requirements, and analyzes whether those justifications can be applied to the new reelection requirement. This Part then provides some final thoughts on the perennial question of "What can be done?" and on whether the reconceptualization will indeed take place.

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454. Sebastian Payne, *Obama Extends Long-Term Trend of Fundraising Presidents*, WASH. POST (July 26, 2014), https://www.washingtonpost.com/politics/obama-extends-long-term-trend-of-fundraising-presidents/2014/07/26/668cda78-14d8-11e4-9285-4243a40ddc97_story.html [https://perma.cc/49EH-JDKL?type=image].

455. The idea that there should be multiple electoral victories before certain legislative acts become final goes as far back as the American colonial period. *See* PA. CONST. of 1776, § 15, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3086 (Francis Newton Thorpe ed., 1909).

A. EXAMINING THE RECONCEPTUALIZATION THROUGH THE LENS OF MULTIPLE VOTE REQUIREMENTS

To analyze whether the shift we are witnessing is normatively justified, it is useful to draw an analogy to multiple-vote requirements. Multiple-vote requirements for constitutional changes exist in many U.S. states as well as in other countries. Like with multiple-vote requirements, the new and aggressive use of the rollback tools effectively means that an incoming president needs two terms to ensure that a substantial proportion of her regulatory achievements remain in place. Multiple-vote requirements have been justified primarily on legitimacy, stability, and quality grounds. Those justifications provide a vantage point for a normative evaluation of the transformation of the Executive Branch set in motion by the Trump administration's rollback actions.

The analogy is not perfect of course. With the multiple-vote requirements for constitutional amendments, because there is typically an intervening election between two legislative votes in favor of an amendment, the opponents have the opportunity to evaluate the amendment and punish the legislators who voted for it. In contrast, a president's reelection is not a referendum on any particular regulatory measure. In fact, presidential candidates advocate a large number of domestic and foreign policies and the fate of any single regulation is likely to play a small role in a voter's decision. And voters may well be more influenced by a candidate's style and values than by her policy prescriptions.[456]

But the reelection of legislators also does not always serve as a referendum on the constitutional amendment. Voters electing a legislator presumably have preferences over many dimensions. As a result, some might prefer a legislator despite their

456. *See, e.g.*, GEORGE E. MARCUS, W. RUSSELL NEUMAN & MICHAEL MACKUEN, AFFECTIVE INTELLIGENCE AND POLITICAL JUDGMENT (2000) (outlining a model of electoral decision-making that incorporates both rational choice and emotional reaction); Max Ehrenfreund, *A Strange but Accurate Predictor of Whether Someone Supports Donald Trump*, WASH. POST (Feb. 1, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/01/how-your-parenting-style-predicts-whether-you-support-donald-trump [https://perma.cc/PU7V-Y7H2?type=image] (connecting authoritarian attitudes and personality traits to electoral decision-making); Amanda Taub, *Why Americans Vote 'Against Their Interest': Partisanship*, N.Y. TIMES (Apr. 12, 2017), https://www.nytimes.com/2017/04/12/upshot/why-americans-vote-against-their-interest-partisanship.html [https://perma.cc/FDZ2-9Q5C] (explaining the impact of partisan identity on electoral decision-making).

opposition to the amendment that the legislator favors. And others might oppose a legislator despite their support for the amendment that the legislator opposes. The analogy between the Executive Branch, as it is in the process of being transformed, and the constitutional amendment regimes of some states and foreign jurisdictions, is therefore relatively strong.

It is true that even after the Trump administration's aggressive use of rollback tools, a president would not need to propose a rule in the first term and finalize it in the second term. In fact, as discussed above,[457] presidents might not want to do that, preferring instead to work on the proposed rule in the first term but publish the proposal only after the reelection. But it is nonetheless the case that modern presidents have had a general perspective on regulations, which the electorate can evaluate. For example, since the 1980s, Republicans have embraced an anti-regulatory party platform and have attributed pro-regulatory designs to their Democratic opponents.[458] Thus, even if a particular legislative proposal is not visible to the electorate when a president runs for reelection, the president's general approach to regulatory issues is likely to be well understood.

Thus, we may be moving towards an arrangement where a single majority would be sufficient to impose requirements through legislation, but successive majorities are necessary when the president is using the Executive Branch to make policy through regulation. If multiple-vote requirements are designed to promote legitimacy, stability, and quality, as the constitutional amendment literature suggests, it is relevant to ask whether these goals are also served in the regulatory context. This Section looks at these requirements and undertakes that analysis.

1. State and Foreign Provisions

Currently, fourteen states[459] and at least one territory[460] require two sessions of a legislature, and generally an intervening

457. See *supra* Part III.A.3.

458. *See* Soren Jordan et al., *The President, Polarization and the Party Platforms, 1944–2012*, 12 FORUM 169, 180 (2014), http://www.auburn.edu/~scj0014/Downloads/JordanWebbWood.pdf [https://perma.cc/2BGA-VL7E].

459. *See* Dinan, *supra* note 49, at 11 (listing the number of states that have certain requirements to ratify legislatively suggested constitutional amendments).

460. *See* AM. SAM. CONST. art. V, § 3 (showing the necessary requirements to ratify legislatively suggested constitutional amendments).

election, to ratify legislatively suggested constitutional amendments.[461] Of these, the most common scheme requires a simple majority vote by both chambers of the state legislature, another vote by both chambers in a subsequent session, and then a majority vote by the people in a general election.[462] But there are variations. For example, Delaware does not require a vote by the people, but does require two-thirds votes in both chambers two times, with the second vote happening after an intervening general election.[463] South Carolina inverts the order: first it requires two-thirds approval in both chambers, then popular ratification, and after that a simple majority vote in both chambers.[464] Other states offer an option: amending Hawaii's constitution requires a two-thirds vote in both houses in one session, or a simple majority in both houses in two successive sessions.[465] In that constitution, a stable majority can substitute for a perhaps fleeting supermajority.

Provisions of this sort have also existed outside of the United States. Constitutional amendment provisions in many European countries have requirements for multiple votes,[466] generally separated by intervening elections.[467] Some have called for the dis-

461. *See, e.g.*, N.Y. CONST. art. XIX, § 1 (requiring a vote on a previously approved Constitutional amendment after the next general election); VA. CONST. art. XII, § 1 (outlining a similar process). Of the U.S. states with multiple-vote processes for constitutional amendments, three do not require intervening elections. *See* HAW. CONST. art. XVII, § 3; MASS. CONST. art. XLVIII, pt. IV, §§ 4–5; N.J. CONST. art. IX, para. 1.

462. Dinan, *supra* note 49, 11–12.

463. DEL. CONST. art. XVI, § 1.

464. S.C. CONST. art. XVI, § 1.

465. HAW. CONST art. XVII, § 3.

466. *See, e.g.*, CONST. OF LUX. ch. XI, art. 114 (requiring two successive votes with an interval of at least three months); 1975 SYNTAGMA [SYN.] [CONSTITUTION] 2, art. 110 (Greece); CONST. OF NOR. ch. F, art. 121; REGERINGSFORMEN [RF] [CONSTITUTION] 8:14 (Nor.) (requiring succeeding elections between votes and stipulating at least nine months between the first submission of the amendment and the next elections); *see also* European Commission for Democracy Through Law (Venice Commission), *Study No. 469/2008, Report on Constitutional Amendments*, (2010) http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)001-e [https://perma.cc/N4Q6-WP4E] (listing other countries with similar measures).

467. *See, e.g.*, GRUNDLOVEN [GRL] [CONSTITUTION] pt. X, § 88 (Den.) (dissolving parliament and triggering new elections if an amendment is passed); 1975 SYNTAGMA [SYN.] [CONSTITUTION] 2, art. 110 (Greece) (requiring an intervening election before final approval of an amendment).

solution of the legislature after a successful vote, so that the electorate can express its view of the change and newly elected representatives who can consider the amendment again.[468] Variations exist beyond Europe too. Azerbaijan and Eritrea require successive votes in their national assemblies, without the need for intervening general elections.[469] Ghana has required two successive votes with a supermajority in Parliament for amendments having to do with fundamental rights and freedoms.[470] Nicaragua requires two votes for partial changes to the constitution, while large, substantive changes need a full constitutional convention.[471]

2. Justifications

Multiple-vote requirements are generally justified in terms of legitimacy, stability, and quality. This Subsection discusses each justification and then addresses whether those justifications apply to the requirement that a president be reelected before being able to put in place long-lasting regulatory policy.

a. Legitimacy

Multiple-vote requirements help improve the democratic legitimacy of the proposed amendment by ensuring that the amendments "approximate the will of the people as a whole" as much as possible.[472] For example, the Swedish procedure is designed to ensure that there is "time for reflection" and the opportunity for the people "to express their views" about any potential changes, thus ensuring that anything that passes has received

468. *See, e.g.*, GRUNDLOVEN [GRL] [CONSTITUTION] pt. X, § 88 (Den.) (dissolving parliament and triggering new elections if an amendment is passed); CONST. OF ICE. § VII, art. 79 (providing that Parliament "shall immediately be dissolved" after amendment proposals pass). In Luxembourg, the first legislature did not vote on the proposal at all: after the legislature "declare[d] the need to amend any constitutional provision it specifies," the parliament "automatically dissolve[d]" without a vote and only the second assembly votes on the proposed amendment. CONST. OF LUX. § 114(1)–(2) (2002).

469. *See* CONST. OF AZER., ch. XII, art. 156, § II; CONST. OF ERIT., ch. VII, art. 59.

470. *See* CONST. OF GHANA, art. 290–91 (1979).

471. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] tit. X, ch. III, art. 192–94, LA GACETA, DIARIO OFICIAL [L.G.] 18 Feb. 2014 (Nicar.); *see also* Renaldy J. Gutierrez, *Democracy and the Rule of Law: Myth or Reality?*, 47 DUQ. L. REV. 803, 807 n.10 (2009) (discussing the Nicaraguan Constitution).

472. Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535, 539–40, 571–72 (1995).

"broad support."[473] In this way, multiple votes help guard against an "unrepresentative majority" capturing the amendment process.[474] And the requirements promote legitimacy by preventing "self-dealing that would either benefit incumbent political actors or disadvantage their adversaries."[475] In addition, in the case of the provisions that dissolve the legislature shortly after the first vote,[476] the provisions can help focus the electorate's attention on this issue, before other matters take attention away from the electorate.

Multiple-vote requirements are also sometimes driven by a desire to increase the visibility and vetting of salient and important decisions. Most significantly, provisions that require the legislature to be dissolved after the first constitutional amendment vote are designed to ensure that the attention of the electorate is focused on the amendment.[477]

But the trend towards requiring a president to be reelected for a significant proportion of her regulatory measures to have lasting power does not serve legitimacy concerns. Courts, commentators, and practitioners have long debated the "democratic legitimacy of administrative power."[478] Critics have argued that agencies lack democratic legitimacy when they engage in "agency burrowing" and attempt to entrench their policies so that a future president of the opposing party cannot easily change them.[479] This literature has been premised in part on the

473. Magnus Isberg, *Introduction* to THE CONSTITUTION OF SWEDEN, THE FUNDAMENTAL LAWS AND THE RIKSDAG ACT, at 9 (2016), http://www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf [https://perma.cc/A4KA-PEFJ].

474. Richard Albert, *Amending Constitutional Amendment Rules*, 13 INT'L J. CONST. L. 655, 678–81 (2015); *see also* Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1593 (2010).

475. Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 955 (2014).

476. GRUNDLOVEN [GRL] [CONSTITUTION] pt. X, § 88 (Den.); CONST. OF ICE. § VII, art. 79; CONST. OF LUX. § 114(1)–(2) (2002).

477. *See* GRUNDLOVEN [GRL] [CONSTITUTION] pt. X, § 88 (Den.); CONST. OF ICE. § VII, art. 79; CONST. OF LUX. § 114(1)–(2) (2002).

478. Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN L. REV. 605, 607 (2016). *But see* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. (forthcoming 2019) (manuscript at 41) (arguing that it is "long past time to retire this line of reasoning").

479. *See* Mendelson, *supra* note 10, at 566–67.

view that, compared to legislation, regulatory policymaking exhibits a lack of transparency and accountability.[480]

But the way in which regulations are promulgated and legislation is enacted these days does not support the view that regulatory policymaking exhibits a lack of transparency and accountability.[481] Starting in the 1960s and 1970s and accelerating through the 1980s until now, courts have imposed significant requirements on agencies, to the point that agencies now conduct their work as "quasi-legislatures," working to build a record and to represent the interests of the varied stakeholders affected by their decisions.[482] To fulfill this vision, courts have required increased participation in the process, through multiple doctrines. For example, courts made it easier to meet standing requirements so that stakeholders could enforce their right to participate in the process and implemented the "hard look" doctrine designed to ensure that agencies addressed all the important issues raised.[483] These procedures have helped create accountability and have served as a predictable set of constraints on agency overreach, waste, and abuse.[484] Relatedly, the "hard look" doctrine reinforces the view that agency decisions are best made by experts who have more experience with a topic than the other branches of government, which in turn helps increase their legitimacy as policymakers.[485] As an example, during the Obama

480. Kagan, *supra* note 11, at 2263–64; Metzger, *supra* note 13, at 31.

481. *See* Bagley, *supra* note 478, at 46–47 (arguing that it is not "obvious that agencies are less democratic than Congress" and explaining that agencies likely have an "edge over an often-dysfunctional Congress"); *cf*. Metzger, *supra* note 13, at 7 (explaining that the administrative state has several features that are "essential for the accountable, constrained, and effective exercise of executive power").

482. *See* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 510 (1985).

483. *See id.* at 510–11.

484. Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2056–58 (2011); Jacob E. Gersen & Anne J. O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 1170 (2008); Mendelson, *supra* note 10, at 652. *But see* Bagley, *supra* note 478, at 57 ("Administrative law matters much less to an agency's legitimacy than lawyers like to believe."); Mendelson, *supra* note 10, at 572 (describing ways that agencies often "escape procedural discipline").

485. *See* Kagan, *supra* note 11, at 2270 ("[The hard look] requirements both express a vision of an expert-driven, technocratic administration and attempt to force that vision on the agencies."); *see also* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 865 (1984) (finding that agency expertise justified deference).

administration, EPA's decision to issue the Clean Power Plan involved several years of study as well as EPA's review of millions of public comments, all with the understanding that the rule would eventually undergo judicial review and that every step in the analysis would be carefully scrutinized.[486]

Legislation, in comparison, which is enacted by directly elected representatives, may deserve significant respect because it reflects the will of the people and allows different parties to "come together" transparently and devise "common schemes."[487] Under the traditional rules of "regular order," Congress may approximate this idea because, under those rules, to pass legislation requires consideration in committee, public hearings coordinated between the two parties, markups, floor consideration, and public debates, all of which fosters consensus-building.[488] But nowadays, legislation coming out of Congress has not come anywhere near to the "regular order" ideal, deserving of dignity as described by Jeremy Waldron.[489] Rather, as described above,[490] to pass legislation, the majority party has had to resort to tactics that ignored the minority viewpoint and eschewed any attempt at consensus-building.[491] Given this change, regulations should no longer be necessarily viewed as deserving of less dignity than legislation.

Another possibility is that regulatory policymaking is less salient to the electorate and so there should be a requirement that a president is reelected before her regulations can have staying power. But these days there is little to support a thesis that regulatory policymaking is not sufficiently visible to the electorate.

Regulations are increasingly salient to the electorate and so any concerns along this front do not justify the use of aggressive rollback tools. Though presidential elections focus on a wide range of domestic and foreign policy issues and on many aspects

486. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,707 (Oct. 23, 2015) (explaining that the agency published the proposal and supplemental proposal for comment and that it received more than four million comments).

487. JEREMY WALDRON, THE DIGNITY OF LEGISLATION 2 (1999).

488. *See* Ron Elving, *What Is the 'Regular Order' John McCain Longs to Return to on Health Care?*, NPR (July 26, 2017), https://www.npr.org/2017/07/26/539358654/what-is-the-regular-order-john-mccain-longs-to-return-to-on-health-care [https://perma.cc/KCU8-9GVV].

489. WALDRON, *supra* note 487, at 2.

490. *See supra* text accompanying notes 267–76.

491. See *supra* Part II.A.

of the candidates' values and style, regulatory policymaking plans have played a prominent role in recent elections. President Clinton took "ownership of administrative actions" repeatedly.[492] And regulations have played important roles in elections since then. For example, whether to promulgate regulations to address the financial industry problems that led to the 2008 financial crisis was a major theme of the 2008 election.[493] In the 2012 election, presidential candidate Mitt Romney made rolling back Obama's "job-killing" regulations a centerpiece of his campaign.[494] Regulatory responses to environmental challenges was a big theme of the 2012 presidential election season.[495] In the 2016 election season, Donald Trump made ending the so-called "war on coal" a big feature of his campaign.[496] Indeed, with presidents opting to use the administrative state to make policy, the transparency and visibility of their signature regulations has been greatly enhanced.[497]

Of course, that saliency may be one reason to believe that the aggressive rollback tools increase legitimacy. In the case of the rules that were issued during the last year or two of a presidency, which are the subject of this Article, it is possible to construct an argument that an electorate that choses a president of

492. *See* Kagan, *supra* note 11, at 2300.

493. *See Transcript of Second McCain, Obama Debate*, CNN (Oct. 7, 2008), http://www.cnn.com/2008/POLITICS/10/07/presidential.debate.transcript/ [https://perma.cc/2PD5-ARWT] (recording Obama's explanation, in response to the first question of the night, that the lack of regulatory oversight helped cause the financial crisis).

494. Justin Sink, *Romney Ad Vows "Obama Era of Big Government" Ends on "Day One*,*"* HILL (May 24, 2012), https://thehill.com/video/campaign/229289-romney-continues-hammering-day-one-theme-in-new-commercial [https://perma.cc/XE7Q-T6Y2].

495. *See* Elizabeth Shogren, *On the Campaign Trail, Regulations Dominate the Environmental Debate*, NPR, (Oct. 14, 2012), https://www.npr.org/sections/itsallpolitics/2012/10/14/162811669/on-the-campaign-trail-regulations-dominate-the-environmental-debate [https://perma.cc/DZ6Y-BLXB]; *see also* Justin Sink, *New Romney Ads Rip Obama on Coal Energy*, HILL (Sept. 19, 2012), https://thehill.com/video/campaign/250269-romney-ads-rip-obama-on-coal [https://perma.cc/ATH6-V6MG].

496. *See* Coral Davenport, *Donald Trump, in Pittsburgh, Pledges to Boost Both Coal and Gas*, N.Y. TIMES (Sept. 22, 2016), https://www.nytimes.com/2016/09/23/us/politics/donald-trump-fracking.html [https://perma.cc/T5UL-DSPS].

497. Kagan, *supra* note 11, at 2332 (writing that the "visibility" and "personality" of the Presidency "all render the office peculiarly apt to exercise power in ways that the public can identify and evaluate").

the different party may be doing so precisely because that electorate wants to see those rules rolled back. Seen this way, winning reelection would help ensure legitimacy of those regulations. And if the president is not reelected, it may not be that concerning if rollbacks are part of the next president's agenda after an inter-party transition. The problem with this theory is that the aggressive rollback tools are available to the successor president whether or not the incumbent was reelected. Take Obama and Trump as an example. Obama had a clear track record of calling for climate action, and he was reelected.[498] And yet Trump was able to use aggressive rollback tools to cut into Obama's climate-related rules. Seen from this perspective, the emerging reelection requirement feeds into electorate fickleness and may threaten stability in ways which are discussed further below.

In sum, over the last several decades, regulatory policy and legislation have moved in different directions. The former has acquired more indicia of legitimacy, and the latter has shed many of the ones it had.

b. Stability

Multiple-vote requirements are also used to promote more long-term stability and guard against a "momentary majority."[499] Many multiple-vote requirements in U.S. states were designed to ensure that constitutional changes were not brought about by only a temporary majority.[500] For example, when Wisconsin changed its state constitutional amendment process from supermajority to multiple votes, one Wisconsin newspaper explained the reason as to put changes "beyond the reach of any sudden ebullition of feeling, prompted by whatever motive."[501]

498. *See* THE CANDIDATES ON CLIMATE AND ENERGY: A GUIDE TO THE KEY POLICY POSITIONS OF PRESIDENT OBAMA AND GOVERNOR ROMNEY (Apr. 3, 2012), https://www.c2es.org/document/the-candidates-on-climate-and-energy-a-guide-to-the-key-policy-positions-of-president-obama-and-governor-romney/ [https://perma.cc/8DW9-LQ86].

499. Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 22 (2010).

500. David E. Kyvig, Book Review, 18 LAW & HIST. REV. 228, 229 (2000) (reviewing MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA (1997)).

501. Joseph A. Ranney, *Wisconsin's Constitutional Amendment Habit: A Disease or a Cure?*, 90 MARQ. L. REV. 667, 673 (2007).

These provisions limit momentary majoritarianism and promote stability by requiring voters to show approval over extended periods.[502] The resulting delays produced by requirements for multiple votes help stem impulsiveness by raising the political costs of an amendment.[503] "[R]epeated and sustained majorities . . . help demonstrate durable rather than transient support" for changes.[504] And the requirement that politicians shepherd an amendment through that process helps lower the incentives to act on "temporary spikes in their popularity."[505] In sum, multiple-vote procedures may be well-suited to protect against moments of intense, but passing, political pressure.

The requirements for multiple votes can also be thought of as applications to the public sphere of cooling-off periods found in other areas of the law, which also are thought to benefit increased stability. Those types of periods are present in provisions involving consumer protection (e.g., mandatory, non-waivable cancellation periods for certain purchases), public safety (e.g., waiting periods to buy a gun), and family law (e.g., delays between issuance of a license and marriage).[506] Forcing people to wait can give them time to reflect and allow them to make more informed decisions[507] or decisions that are more likely to serve their "true" preferences, thus potentially leading to fewer changes over time.[508] Such provisions can be particularly helpful to individuals who might otherwise make poor decisions due to problems of self-control.[509]

502. *See* Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1429 (2007).

503. Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985, 1989 (2003).

504. Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438, 503 (2018).

505. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 228 (2013).

506. Russell Korobkin, *Libertarian Welfarism*, 97 CALIF. L. REV. 1651, 1664 (2009).

507. Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1240–43 (2003).

508. Mario J. Rizzo & Douglas Glen Whitman, *The Knowledge Problem of New Paternalism*, 2009 B.Y.U. L. Rev. 905, 916.

509. Oskari Juurikkala, *The Behavioral Paradox: Why Investor Irrationality Calls for Lighter and Simpler Financial Regulation*, 18 FORDHAM J. CORP. & FIN. L. 33, 57 (2012).

But the goal of stability does not justify the changes in the Executive Branch's ability to meet significant policy goals through lasting regulatory policymaking. There is no doubt that stability can be a salutary feature of regulatory policymaking. Regulated entities often need to make substantial investments in order to comply with the regulatory requirements.[510] With too much regulatory vacillation, companies may put off investment decisions until the uncertainty is resolved.[511] Similarly, the back and forth caused by polarized regulatory decision-making can have welfare consequences by creating uncertainty and weakening trust in regulations.[512]

A presidential reelection might be seen as evidence of greater stability in the preferences for the regulation. With reelection, it may be possible to conclude that the electorate approves of the regulation and would be pleased to see it stay in place. But it is debatable whether the forces unleashed by the Trump administration and described in this Article promote regulatory stability overall. Before the Trump administration's aggressive rollback strategies, all regulations were more stable, because, as discussed above, the traditional rollback strategies mainly centered around stop-work orders, which applied only to regulations promulgated very late in the outgoing president's term, and regulatory repeals and replacements, which were relatively rare.[513] Now future presidents are likely to attempt to roll back a much bigger set of regulations, regardless of whether they were promulgated by a one-term or two-term president. If more regulations can be more easily rolled back by a new administration, a firm may either hold off on investing or face a chance

510. *See* Nielson, *supra* note 22, at 131.

511. *See* Ben. S. Bernanke, *Irreversibility, Uncertainty and Cyclical Investment*, 98 Q. J. ECON. 85 (1983) (analyzing uncertainty as it relates to economic processes); Alfred A. Marcus & Allen M. Kaufman, *Why It Is Difficult to Implement Industrial Policies: Lessons from the Synfuels Experience*, 28 CAL. MGMT. REV. 98, 102–03 (1986); Robert S. Pindyck, *Irreversibility, Uncertainty, and Investment*, 29 J. ECON. LITERATURE 1110 (1991) (developing Bernanke's model further); B. Yang et al., *Management of Uncertainty Through Postponement*, 42 INT'L J. PRODUCT RES. 1049, 1053–59 (2004) (explaining the economic costs of uncertainty in product development and proposing solutions).

512. *See* Nielson, *supra* note 22, at 131 ("If [Trump] wishes for his regulatory initiatives to have staying power (and so to encourage robust participation by regulated parties), he would be well served by going through the full rulemaking process.").

513. *See supra* text accompanying notes 19–22.

that its compliance investments could become unproductive.[514] In sum, given the destabilizing impact that rollback tools can have, a move towards a regime that is defined as a result of the aggressive use of these tools cannot be normatively justified on stability grounds.

c. Quality

The two-vote requirements can also lead to higher-quality amendments. In discussing New York's prior amendment procedure requiring multiple votes, Judge Cardozo noted the need to protect "against hasty or ill-considered changes, the fruit of ignorance or passion."[515] Similarly, the Swedish procedure ensures that constitutional amendments are "hedged about with onerous formalities, necessary to deter ill-considered experiments."[516]

And the empirical literature, though limited, suggests that the difficulty of passing an amendment under a multiple-vote requirement does not render it impossible to pass the amendments but that it instead may indeed help ensure that the resulting amendments are of a higher quality. The evidence shows that two-vote requirements for simple majorities, absolute majorities, and three-fifths majorities have a relatively small effect on whether an amendment passes, while a two-vote requirement for a high supermajority imposes a higher barrier.[517] Garnering a

514. *See* David Reid, *Here's Why Automakers Won't Want Trump's Plan to Freeze Efficiency Rules*, CNBC (May 11, 2018), https://www.cnbc.com/2018/05/11/auto-makers-dont-want-trumps-plan-to-freeze-fuel-efficiency-rules.html [https://perma.cc/H2P5-6ANA]; David Roberts, *The Power Sector Craves Stability. Trump Has Brought it Chaos*, VOX (Mar. 9, 2018), https://www.vox.com/energy-and-environment/2018/3/9/17099240/powersector-trump-regulatory-certainty [https://perma.cc/3Q9H-KLXR]. *See generally* Saiyid, *supra* note 230 (describing industry opposition to changes in mercury air emission rules).

515. Browne v. City of New York, 149 N.E. 211, 213–14 (N.Y. 1925).

516. *See supra* note 473.

517. *See* FRANK P. GRAD & ROBERT F. WILLIAMS, 2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 70–71 (2006) ("There seems to be no relationship . . . between the requirement of a special majority or of dual legislative passage and the frequency of amendment."); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 256 (Sanford Levinson ed., 1995) [hereinafter Lutz, *Toward a Theory*]; *see also* Donald S. Lutz, *Patterns in the Amending of American State Constitutions*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 24, 40–41 (G. Alan Tarr ed., 1996) [hereinafter Lutz, *Patterns*] (discussing the same data).

simple majority twice (the most common procedure) is easier, or at least statistically more common, than getting a supermajority of any kind once.[518] And states "with more onerous procedures" have been able to improve the quality of amendments and thus the possibility of passage.[519] Those states have approved amendments at "rates that are as great or greater than those with less onerous procedures" and have higher success rates at the referendum stage.[520]

An argument could similarly be made that the threat of rollbacks will lead to higher quality regulations. The desire to issue rules that are lasting and can withstand the more aggressive use of rollback tools, as described in this Article, may lead to more robust and "disciplined" regulatory activity than would otherwise be the case.[521] For example, a president who is reelected could take the first term to formulate a rule, which would be proposed only after a successful reelection, leading to a potentially stronger policy. On the other hand, with delay comes the potential for additional costs and more delay, if new information comes to light through the delay and must be addressed.

Moreover, though it is impossible to pinpoint just one cause for the sloppiness, the threat of rollbacks and desire to get rules out quickly may worsen the quality of agency decisionmaking across the board. As an example, many of the rules issued under the Trump administration in the early days of the administration have been so careless that they have been reversed.[522] Thus, given the risk that rollback tools will cause agencies to act more quickly and more sloppily, it is unlikely that the rollback tools can be normatively justified on quality grounds.

518. *See* Lutz, *Toward a Theory, supra* note 517, at 255.

519. Bruce Cain, Sara Ferejohn, Margarita Najar & Mary Walther, *Constitutional Change: Is It Too Easy to Amend Our State Constitution?*, *in* CONSTITUTIONAL REFORM IN CALIFORNIA 273, 276 (Bruce E. Cain & Roger G. Noll eds. 1995).

520. *Id.*; *see also* Lutz, *Patterns*, *supra* note 517, at 40.

521. *See* Mendelson, *supra* note 10, at 660–61.

522. *See supra* notes 187–99; *see also* Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019), https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html [https://perma.cc/XEW7-AFKG?type=image] (explaining that the failure to follow the APA has slowed the administration's agenda).

B. WHAT NOW?

Given that the reconceptualization that is afoot is largely unjustified, the question becomes: what can be done? But broader policy proposals to reform the world of regulatory rollbacks are beyond the scope of this Article. Instead, this Article's intent is to shine a light on the shifts occurring in regulatory policymaking and to describe the ways that the shift will fundamentally change presidential strategies. Here we can answer only the question of what happens now. What to do about it, must await.

As this Article has shown, the question of what happens now can be answered by reference to those changing presidential strategies, discussed above.[523] Adopting those strategies should allow future presidents to continue to make use of regulatory policymaking even as the threat of rollbacks remains. In that context, it is important to recognize that as an adjunct to these strategies, presidents could be pushed more towards "unorthodox lawmaking and unorthodox rulemaking."[524]

Another implication is that this new form of "regulatory gridlock" could lead policymakers to turn back to legislation. But gridlock still exists in the legislative arena and as long as the legislative filibuster remains, legislation will remain a poor option. Without the legislative filibuster, if the president's party has even a bare majority in Congress, she would not need to use regulations to accomplish her policies, because legislation would be a realistic option.[525] But as long as the majority party in the Senate holds that majority by only a small margin, it would be hard to imagine the Senate voting to eliminate the filibuster. Indeed, there are bound to be at least a few outlier Senators who will want to keep the filibuster in place either because they are not as firmly aligned with the party's ideology or because they believe in the institutional importance of keeping rules that promote consensus building.[526] Even if a party gains control of the Senate by a large margin, there may still be enough Senators

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523. *See supra* Part III.

524. Gluck et al., *supra* note 46, at 1865.

525. *See supra* Part II.A.

526. For example, Senator John McCain famously refused to vote to repeal Obama's health care bill because Republicans had not followed regular order in putting the bill together. Dylan Scott, *I'll Never Forget Watching John McCain Vote Down Obamacare Repeal*, VOX (Aug. 27, 2018), https://www.vox.com/policy-and-politics/2018/8/25/17782664/john-mccain-legacy-obamacare-repeal-thumbs-down [https://perma.cc/CE7Y-CNPW].

who would recognize that the majority might be fleeting[527] and that the elimination of the filibuster might not serve the party's long-term goals.[528]

The usefulness of the rollback tools would also change if there was a radical alteration in arbitrary and capricious review under the APA. With shifts in the courts towards more conservative judges under President Trump,[529] there are two plausible, though we believe unlikely, alternatives which push in opposite directions. On the one hand, more conservative judges may look for ways to loosen the requirements on agencies sufficiently to allow Trump-controlled agencies more leeway than they currently have. As a result, it could get easier to issue regulations more quickly in the president's first term as well as to suspend regulations without providing an explanation as required under the law as it currently stands.[530] But on the other hand, some commentators believe that the courts might eliminate various deference doctrines for agencies in order to favor legislative primacy, making it harder to engage in regulatory policymaking.[531] But the changes would need to be quite dramatic to affect the arguments developed in this Article.[532]

527. Between 2008 and 2010, the Senate had close to sixty Democratic senators, but the Democratic majority slipped to fifty-three in 2010. *Election 2010*, N.Y. TIMES, https://www.nytimes.com/elections/2010/results/senate.html [https://perma.cc/SP4N-48TN]; Jennifer M. Granholm, *Debunking the Myth: Obama's Two-Year Supermajority*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/jennifer-m-granholm/debunking-the-myth-obamas_b_1929869.html [https://perma.cc/KAL3-5W9D].

528. If the political parties move closer together, as discussed in Part II.A, the impact of the filibuster may be diminished.

529. *See* Matthew Weber et al., *Courting Change*, REUTERS (July 25, 2019), https://graphics.reuters.com/TRUMP-EFFECT-COURTS/010080E30TG/index.html [https://perma.cc/355R-ZDPZ].

530. *See* Charles Cameron, *Courts to the Rescue?*, BOS. REV. (Aug. 20, 2018), http://bostonreview.net/law-justice/charles-cameron-courts-rescue [https://perma.cc/46QM-A52F] (discussing the possibility that "empowered conservatives could uphold almost anything from a Trump agency as lawful").

531. *See* William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1369 (2018) (describing the possibility for this shift); Metzger, *supra* note 13, at 4 (describing academic and judicial "anti-administrativism").

532. *See* Metzger, *supra* note 13, at 15 ("[T]he current political attack seems unlikely to dramatically transform the administrative state.").

CONCLUSION

As this Article has shown, the Trump administration has used three relatively unknown tools—disapprovals under the Congressional Review Act, abeyances in pending litigation, and suspensions—to launch a much broader attack on his predecessor's regulatory legacy than any previous president.

Now that the Trump administration has shown the success of using these tools, it is likely that future administrations following inter-party transitions will also seriously consider using them. And because the background norms of the regulatory state are likely to remain in place for the foreseeable future, the changes that the Trump administration's assault on President Obama's regulations will bring to regulatory policymaking are significant. This Article explores the characteristics of this transformation by looking both at electoral impact and regulatory impacts. One conclusion this Article makes is that a future president may need to be reelected to have a real hope of making significant policy that sticks.

The resulting impact on the ability of the Executive Branch to make policy through regulation is significant and will lead to a reconceptualization of the Executive Branch. In this way, low visibility actions, not apparent to the vast bulk of the American people or even to all experts in regulatory policy, like Congressional Review Act disapprovals, abeyances, and suspensions, will lead to important changes in regulatory strategies and to a significant reconceptualization of the Executive Branch. Despite the lack of normative support, these changes are likely here to stay.