INDECONSTRUCTIBLE: THE TRIUMPH OF THE ENVIRONMENTAL “ADMINISTRATIVE STATE”

Stephen M. Johnson*

INTRODUCTION

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

While the President can use a variety of tools, including the appointment power, budget power, treaty power, and executive orders, to influence the manner in which the EPA and other agencies interpret and enforce laws,³ the President has very little power to unilaterally “deconstruct the administrative state.” The “administrative state” is a creation of Congress,⁴ and the President can only “deconstruct” it with the full cooperation of Congress. While the current Congress appears willing to change some of the procedures that administrative agencies must follow when taking action⁵ and to overturn some agency actions with which Congress disagrees,⁶ it does not appear willing to eliminate agencies or significantly reduce or eliminate their powers. The

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* Walter F. George Professor of Law, Mercer University Law School. B.S., J.D. Villanova University, LL.M. George Washington University School of Law.


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


6. See infra Part IV.A.
Constitution, the Administrative Procedures Act, and the statutes that create administrative agencies and give them their power all create a complex system of checks and balances to ensure that the President has very little power to deconstruct the administrative state on his own. The “administrative state” was born in the Progressive era of the 19th century and was considerably expanded during the New Deal era in the middle of the 20th century. After a century and a quarter of fortification, the “administrative state” is not likely to “go gently into that dark night.”

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

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

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

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8. See infra notes 39-50, and accompanying text.
13. See infra notes 44-48, and accompanying text.
of Americans believe that stricter environmental laws and regulations are worth the cost, that alternative energy development should be given priority over fossil fuel development, and that the EPA’s powers should be preserved or expanded, as opposed to being reduced. Public opposition to the President’s plan to curtail federal environmental protection was clearly demonstrated by dramatic increases in fundraising for environmental organizations after the President’s election and by the hundreds of thousands of Americans who joined in protest marches in the months immediately following the President’s inauguration. During that same time period, when federal agencies


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


19. On April 22, 2017, a March for Science was held in Washington, D.C., with more than 600 satellite marches being held in every state in the United States, as well as cities on every continent except Antarctica. See Ben Guarino, Every Continent, and One Time Lord, Turned out for the March for Science, Wash. Post, Apr. 24, 2017, http://tiny.cc/x43yly (last visited June 21, 2017). While the marches were “not partisan” according to organizers, they were motivated, in part, by the attacks that the Trump Administration has leveled on the use of science in regulation. See Wynne Davis, Saturday's
sought public input on plans to eliminate environmental regulations\(^{20}\) or abolish national monuments,\(^{21}\) hundreds of thousands of Americans voiced their strong opposition in public comments.\(^ {22}\) Citizens also voiced their support for the EPA, environmental protection, and environmental regulation at town meetings held by legislators.\(^ {23}\) Since legislators do not want to be viewed as “anti-environment” and anticipate that they may be voted out of office if they act too aggressively,\(^ {24}\) they are unlikely to repeal or significantly amend the federal environmental laws to reduce or eliminate the powers of federal agencies, States, or citizens. Even if a majority of the Senate were to align with the President to support such legislation against the popular will of the people, there is likely a sufficient minority of the Senate that would oppose such legislation and could block it through filibuster.\(^ {25}\) For the time being, therefore, it seems unlikely that Congress and the President will be able to work together to pass legislation to significantly reduces or eliminates federal environmental regulation or federal agencies’ powers.

While Congress and the President are not working together to

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\(^{25}\) Because the Senate Rules normally allow for unlimited debate on legislation, a minority of the Senate can prevent the Senate from passing legislation by “filibustering” - continuing to debate the legislation and preventing the Senate from voting on the legislation. See U.S. Senate, *Filibuster and Cloture*, https://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm (last visited June 21, 2017). The only way to end a filibuster is to invoke “cloture”, which allows the Senate to limit consideration of a pending matter to an additional 30 hours of debate. See Sen. Comm. on Rules & Admin, Standing Rules of the Senate, S. Doc. No. 113-18, at R. XXII, P 2 (2013). Sixty votes are required to invoke cloture. Id. Consequently, as long as 41 Senators oppose legislation, they have the power, through the filibuster, to prevent the Senate from voting to enact the legislation, even though a majority of the Senate may support the legislation.
fundamentally deconstruct the administrative state, both Congress and the President took steps in the first months of the Trump Administration to weaken federal environmental regulation. For reasons outlined in this article, however, the long-term effect of those measures will be far less significant than the “deconstruction of the administrative state.”

Within the first few months of the new administration, Congress took a few steps to overturn environmental regulations and to make it more difficult for agencies to adopt new regulations. In light of the lack of public support for environmental deregulation, however, Congress took these steps in ways designed to limit public involvement and transparency. First, Congress repealed several recently finalized environmental regulations through a streamlined legislative process authorized by the Congressional Review Act of 1996.26 Then, legislators proposed bills that would change the procedures that agencies are required to use to adopt new rules.27 While the proposed administrative process changes might appear convoluted and impenetrable to the public, they are designed to significantly complicate the process for adopting new rules.28

The deregulatory efforts of Congress were significantly less aggressive than the efforts of the President, who, within his first few months in office, took several bold steps under his appointment power, budget power, treaty power, and other executive powers to attempt to demoralize and weaken EPA and the U.S. Department of Interior (“DOI”) and to roll back environmental protections. The President appointed climate change skeptics and anti-regulatory proponents to both agencies, all of whom fundamentally disagreed with many of the policies adopted by the agencies to which they were appointed.29 The President then proposed to cut the budget of the EPA by one-third;30 he issued a series of Executive Orders and directives that required the agencies to stop issuing new regulations31 and to review and revise or repeal many existing regulations;32 and he required the DOI to review and propose revision or abolition of dozens of national monuments.33

27. See infra Part III.B.
28. Id. Ironically, if enacted, the additional procedural requirements could complicate the President’s deregulatory efforts to eliminate existing rules. See supra notes 214-216, 241, and accompanying text.
29. See infra Part I.
30. See infra Part II.
31. See infra Part III.A. (discussing Executive Order 13,771 and the President’s January 20, 2017 Memorandum to Heads of Executive Agencies and Departments).
32. See infra Part IV.B. (discussing Executive Orders 13,777, 13,778, and 13,783).
Armed with significant enforcement discretion, the new EPA Administrator can also “deregulate” by choosing to not aggressively enforce environmental laws or regulations. Finally, the President announced an intention to withdraw from the international agreement to address climate change.

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

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


34. See infra Part V.


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

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

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

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

40. See infra notes 96, 101, and accompanying text.
41. See infra Part IV.B.
42. See infra notes 191-216, and accompanying text.
46. See infra notes 97-99, 185-186, and accompanying text.
47. 5 U.S.C. § 553(e) (2012).
agencies are not enforcing their laws, States and local governments can enforce their own laws to protect the environment.

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

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

I. THE PRESIDENT’S APPOINTMENT AND REMOVAL POWER

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

49. See infra Part IV.B.
50. See supra notes 44-45, and accompanying text.
“officers.” For environmental law, the appointment power is significant because the federal environmental statutes grant very broad discretion to environmental agencies to determine how stringently to set regulatory standards and how to enforce those standards. While the statutes may require an agency to set standards and to consider certain factors when setting standards, there are usually a range of ways that the agency could set the standard to meet the legal requirements, with some of the options being more stringent and costly than others. Similarly, statutes rarely require agencies to bring enforcement actions whenever there is a violation of the law. Instead, they authorize the agencies to bring enforcement actions and allow the agency to determine how to allocate enforcement resources in the most efficient manner. Consequently, the laws that are currently on the books could be interpreted and applied in widely different ways, depending on who is directing the agency’s exercise of discretion. In addition to appointing the EPA Administrator and the DOI Secretary, the President has the power to appoint many other high-level agency officials.

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

53. See infra Part V.
54. See, Wendy Wagner, William West, Thomas McGarity, and Lisa Peters, Dynamic Rulemaking 92 N.Y.U. L. REV. 183, 196 (2017) (noting that the President has authority to appoint almost 700 officials across the Executive Branch); David E. Lewis, The Contemporary Presidency: The Personnel Process in the Modern Presidency, 42 PRESIDENTIAL STUD. Q. 577, 578–79 (2012); Anne Joseph O’Connell, Agency Rulemaking and Political Transitions, 105 NW. U. L. REV. 471, 484-485 (2011) [hereinafter “O’Connell, Agency Rulemaking”]. Over the last several Administrations, the lower level positions are being filled very slowly. Id. at 532. Only 64% of the positions requiring Senate confirmation were filled during the first year of President Obama’s first Administration. Id. While the delay in filling those positions could delay agency actions that might impose burdens on the regulated community, it could also delay important deregulatory policy changes and regulatory repeal.
55. See U.S. CONST., art. II, §2, cl. 2.
56. See William G. Dauster, The Senate in Transition or How I Learned to Stop Worrying and Love the Nuclear Option, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 631, 632 (2016). The rules were changed by
approve a Cabinet officer. Additionally, since the majority of the public is unlikely to recognize how influential the appointment of an agency secretary or administrator may be, a Senator is not likely to fear the same level of public disapproval when the Senator votes to approve the appointment of the official as they would if they were voting to repeal major portions of the federal environmental laws.

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


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

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

While the EPA Administrator and the Secretary of the Interior can exercise substantial influence in shaping the content of regulations and the level of enforcement of federal laws and regulations, they can have significant influence on the decision making process and public involvement in the decision making process regarding environmental policy in more subtle ways without engaging in rulemaking or adjudication. For instance, both the EPA Administrator Pruitt and the Secretary of the Interior Zinke acted, early in their tenures, to remove scientists from advisory boards and to suspend or eliminate scientific advisory boards, sending a clear message that they planned to de-emphasize science in decision making.\textsuperscript{63} The “politicalization” of science at the agencies was not surprising in light of reports that the President,
during the transition period prior to his inauguration, asked the Department of Energy to provide the names of any scientists who attended conferences addressing climate change.64

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

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

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64. See Victoria McGrane, *Trump Cracked down on Environmental Agencies, and the Internet Fought Back*, BOS. GLOBE, Jan. 25, 2017, http://tiny.cc/rd4ly (last visited June 21, 2017). The agency refused to comply and the President’s spokesman subsequently indicated that the request was not authorized by the President. Id.

65. See McGrane, supra note 64. See also Michael Biesecker and John Flesher, *President Trump Institutes Media Blackout at EPA*, BOS. GLOBE, Jan. 24, 2017, https://www.bostonglobe.com/news/politics/2017/01/24/trump-bans-epa-employees-from-updating-public-website-social-media/Amr90pkwvaC2zxK9pwyK/story.html (last visited June 21, 2017). Despite the orders, a twitter account for the Badlands National Monument (within the Interior Department) posted several tweets about climate change and an “alternative” twitter account claiming to be run by National Park Service employees continued to post tweets about climate change and environmental issues that were at variance with the positions of the new Administration. See McGrane, supra note 64.

66. See McGrane, supra note 64. See also Juliet Eilperin, *The EPA Just Buried its Climate Change Website for Kids*, WASH. POST, May 6, 2017, http://tiny.cc/se4ly (last visited June 21, 2017); Brian Kahn, *The EPA’s Obama-Era Snapshot is Missing Information*, Climate Central, May 5, 2017, http://www.climatecentral.org/news/epa-obama-website-snapshot-missing-information-21420 (last visited June 21, 2017). The White House removed all of the climate change information from its website shortly after President Trump was inaugurated and the EPA removed its website of climate change resources for students in April. See Eilperin, supra; Kahn, supra. The City of Chicago posted the previous EPA material on its website and Chicago Mayor Rahm Emanuel indicated that the city would be “developing tools so that the city and the public as a whole can easily save, archive and preserve open data from public data portals, such as the EPA site.” See Eilperin, supra. Environmental advocates had anticipated that the new Administration would remove significant amounts of environmental information from the web when it took over, so many groups, including the Environmental Data and Governance Initiative, worked to archive agency information and websites during the transition period before President Trump’s inauguration. See Evan Halper, *At Trump’s EPA, Going to Work Can Be an Act of Defiance*, L.A. TIMES, Apr. 4, 2017, http://tiny.cc/ij4ly (last visited June 21, 2017).

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

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

II. THE PRESIDENT’S BUDGET POWER

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

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


70. See Barkow, supra note 69, at 42. See also Michelle D. Christensen, The Executive Budget Process: An Overview, Cong. Res. Serv. Rept. No. R42633, July 27, 2012, at 2. OMB is the successor to the Bureau of the Budget, which was created as part of the Treasury Department by the Budget and Accounting Act of 1921, supra note 69. The powers of the Bureau were transferred to the President in 1970, who transferred them to OMB. See Exec. Order No. 11,541, 3 C.F.R. 10,737 (Supp. 1970).
and the President can exert significant influence over agencies’ policies and priorities by drastically reducing or refusing to request funding for various programs.\textsuperscript{71} Through the OMB, the President also limits the content of communications that agencies can have with Congress regarding the budget process.\textsuperscript{72} The OMB also oversees agencies’ expenditure of funds after Congress allocates the funds to agencies.\textsuperscript{73} The OMB’s reach extends beyond budgeting, however, and agencies must clear all legislative proposals, as well as communications with Congress regarding legislation, through the OMB.\textsuperscript{74}

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

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


72. See Christiansen, \textit{supra} note 70, at 5.

73. See Huq, \textit{supra} note 69, at 28.


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

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

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


78. See Letzter, supra note 77.


80. See Letzter, supra note 77.

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

82. See Letzter, supra note 77.
“brownfields” (former waste disposal sites), and programs to restore water quality and the environment in the Great Lakes and the Chesapeake Bay. If Congress had adopted a budget that was similar to that proposed by the President, the EPA could have suffered severe long-term harm due to the loss of thousands of dedicated employees and their expertise and institutional memory. In addition, even if the eliminated programs could have been re-established in a future administration, it would take significant resources to rebuild that framework in the future, and the harm to the environment and public health caused by the elimination of the programs in the interim could be dramatic.

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

84. See Whitman, supra note 77. The proposed budget would reduce funding for the Great Lakes Restoration Initiative by 90%, from $300 million to $10 million and would eliminate funding for the Chesapeake Bay Program. Id.
85. See Siciliano, supra note 79; Lamarque, supra note 83.
86. See Letzter, supra note 77; Siciliano, supra note 79; Lamarque, supra note 83. Pruitt indicated to state and local government leaders that it was important to preserve funding for brownfields, Superfund, drinking water and other state grant programs. See Brady Dennis, Here’s One Part of the EPA That the Agency’s New Leader Wants to Protect, WASH. POST, Mar. 2, 2017, http://tiny.cc/dh4yly (last visited June 21, 2017).
III. THE POWER OF THE PRESIDENT AND CONGRESS TO LIMIT THE ADOPTION OF NEW RULES

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

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

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

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

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

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

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


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

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

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

96. See Chu & Garvey, supra note 91, at 1 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952); Chamber of Commerce v. Reich, 74 F.3d 1322, 1332-1339 (D.C. Cir. 1996). Indeed, the Executive Order explicitly limits its reach, indicating in Section 2(a) that agencies must identify two regulations to be repealed when proposing a new regulation “unless prohibited by law” and in Section 2(c) that agencies shall offset the costs of the new regulation “to the extent permitted by law” by the elimination of existing costs associated with at least two prior regulations. See Exec. Order No.
environmental laws require the EPA to adopt regulations addressing particular issues and to review or revise those regulations on a periodic basis. In addition, the APA authorizes any person to petition an agency to issue, amend, or repeal regulations, and several of the environmental laws explicitly authorize citizens to petition agencies to make, amend, or repeal rules, so agencies may be forced to adopt rules or explain in a rational manner why they are not going to adopt rules in response to citizen petitions. Agencies that do not adopt rules required by law or that fail to respond to citizen petitions for rulemaking in rational ways will likely face lawsuits. Accordingly, the Executive Order will not completely stop the EPA or other agencies from adopting rules. The Executive Order authorizes agencies to adopt rules required by law without simultaneously complying with the offset requirements of the Order, but the OMB guidance on the order makes it clear that agencies are expected to offset the costs of the new rule with appropriate repeals of other rules “as soon as practicable thereafter.”

Thus, the Executive Order could have a longer-term deregulatory impact by forcing an agency to repeal existing rules in order to adopt new rules that are required by law.

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

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

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

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

100. See OIRA Guidance on Executive Order 13,771, supra note 92, Part VI, Q 33.
because it will only last as long as the President is in office. A subsequent Administration could easily repeal Executive Orders limiting rulemaking and could encourage agencies to greatly expand their rulemaking efforts.\footnote{101}

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

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

Once an agency has adopted a final rule, the agency can only change the rule through a subsequent notice and comment rulemaking.\footnote{107} When
an agency delays the effective date of a rule that has been finalized, therefore, it could face legal challenges. A President can probably justify a temporary delay of the effective date of a rule that has been finalized without going through traditional notice and comment rulemaking by relying on the “good cause” exception in the APA, which allows agencies to bypass the notice and comment procedures required for rulemaking when the agency “for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” That exception, however, is a very limited exception, and would not likely justify delay of the effective dates of rules for a more substantial period of time. Alternatively, the Executive Branch might argue that the delay is justified by Section 10(d) of the APA, which authorizes an agency, “when justice so requires,” to postpone the effective date of agency actions, pending judicial review. In order to justify delay under Section 705,

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

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

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

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

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

however, an agency must satisfy the four-part test that applies to a request for a preliminary injunction.\footnote{114} Regardless of which approach the Executive Branch relies upon, to the extent that the President asserts that the delay is necessary to review the fact, law, and policy questions raised by rules, the White House should be able to conclude that review within sixty days. If, after that time, agencies feel that they need more time to review the regulations, they should conduct notice and comment rulemaking to delay the effective date.\footnote{115} Similarly, if they conclude that the regulations that were finalized by the prior Administration should be repealed or modified, they need to begin the notice and comment process to repeal or modify them.\footnote{116}

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

\textbf{B. Congress’ Power to Limit the Adoption of New Rules}

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

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

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

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

\footnote{116} See infra notes 188-190, and accompanying text.

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

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

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

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

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

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

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

124. The House bill replaces *Chevron* and *Auer* deference with de novo review by courts of agency interpretations of law and regulations. See H.R. 5, supra note 117, §202. The Senate bill replaces *Auer* deference for agency interpretations of agency regulations with the deference accorded to agencies under *Skidmore v. Swift*, 323 U.S. 134 (1944), but does not change the level of deference courts accord to agency interpretations of statutes that they are charged with administering. See S. 951, supra note 117, §4. In *Skidmore*, the Supreme Court held that when determining whether to defer to agency’s decisions, courts should consider the thoroughness of the agency’s consideration, the formality of procedures used by the agency, the validity of the agency’s reasoning, the consistency of the agency’s interpretation, whether the interpretation is longstanding or contemporaneous, and the agency’s level of
Another bill that passed the House and is pending in the Senate, the Regulatory Integrity Act of 2017,125 would require agencies to create a docket for regulatory actions (including the issuance of guidance documents, policy statements, directives, and adjudication, as well as rulemaking)126 and to include, in the docket, every public communication (including written or verbal statements, blog posts, videos, audio recordings, and other social media messages)127 about the action issued by the agency,128 within 24 hours after the communication takes place.129

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

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

126. Id. § 307(a)(1).
127. Id. § 307(a)(2).
128. Id. §307(b)(1)(B).
129. Id. § 307(b)(2). The bill also includes prohibitions on agency solicitation of public input during rulemaking that are similar to those in the Regulatory Accountability Act. Id. §307(c).
130. See William Funk, Requiring Formal Rulemaking Is a Thinly Veiled Attempt to Halt Regulation, The Regulatory Review, May 18, 2017, https://www.theregulareview.org/2017/05/18/funk-formal-rulemaking-halt-regulation/ (last visited June 21, 2017) (arguing that the judicial, trial-like procedures of formal rulemaking are fundamentally at odds with the nature of the legislative decision-making process that epitomizes rulemaking and asserting that the proposal is designed to increase the cost of rulemaking and retard regulatory, but not deregulatory, efforts); Richard J. Pierce, Jr., A Good Effort, With One Glaring Flaw, The Regulatory Review, May 8, 2017, https://www.theregulareview.org/2017/05/08/pierce-good-effort-glaring-flaw/ (last visited June 21, 2017) (also noting that the judicial type formal hearing procedures included in the proposed legislation are useful for the determination of adjudicative facts, but serve no purpose when agencies are finding legislative facts in rulemaking proceedings). See also Daniel E. Walters, Ditch the Flawed Legislative Proposal to Police Agency Communications, The Regulatory Review, May 10, 2017, https://www.theregulareview.org/2017/05/10/walters-proposal-agency-communications/ (last visited June 21, 2017) (criticizing the communications prohibitions in the Regulatory Accountability Act, which are similar to the prohibitions in the Regulatory Integrity Act).
132. Id. §§ 801-802.
133. However, all of the bills passed the House and several were reported out of committee in the Senate. See U.S. Senate Committee on Homeland Security and Government Affairs, Senate Homeland
filibuster in the Senate, and the corresponding requirement for a supermajority to enact legislation, has prevented Congress from adopting broader provisions to derail environmental and other regulation. Even if Congress succeeds in enacting legislation that imposes additional burdens on agency rulemaking, it will have succeeded because it adopted limits on agency rulemaking that were largely unnoticed by the general public, rather than because it mounted a direct assault on environmental rules and the administrative state.

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

A. Congress’ Power to Revise or Repeal Existing Rules

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

The Congressional Review Act (“CRA”) was enacted in 1996134 as a tool to provide Congress with more control over administrative agency rulemaking after the Supreme Court invalidated the “legislative veto” process that Congress had routinely included in agency legislation as a check on rulemaking.135 The CRA requires agencies to notify Congress when they adopt “major rules,”136 and the Act delays the effective date of those rules for sixty days to allow Congress to review the rules and to decide whether to take action to overturn the rules.137 If Congress

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

137. Id. §801(a)(3).
objects to a rule adopted by the agency, the CRA creates a streamlined legislative process that Congress can use to revoke the agency’s rule through a joint resolution of disapproval. The CRA also includes several features limiting the ability of a Congressional minority to block the resolution of disapproval. Significantly, the Act prohibits the use of filibuster in the Senate, limits the power of any party to keep the resolution in committees, and prohibits amendments and limits debate on the Senate floor. The net effect of those procedures is to reduce the transparency of the process and to reduce deliberation on the legislation. Ultimately, if the joint resolution is passed by both houses of Congress and signed by the President, the agency’s rule is revoked and, per the legislation, the agency may not adopt a new rule that is substantially similar to the revoked rule unless Congress passes a new law authorizing the agency to do so. The Act is limited, however, in that it only allows Congress to revoke, and not to modify, a rule through the streamlined procedures. Thus, if a majority of Congress supports part of the rule, but oppose other parts, they cannot simply revoke the portion that they do not support.

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

138. Id.
141. If a committee has not reported out a disapproval resolution within 20 days after a “major rule” is submitted to Congress, as few as 30 Senators can bring the resolution to the Senate floor by a petition. See 5 U.S.C. §802(c) (2012). In addition, when a disapproval resolution is sent from the House to the Senate or from the Senate to the House, it cannot be referred to a committee in the receiving chamber. Id. §802(f)(1).
142. Id. §802(d). The law limits debate on the resolution to 10 hours, equally divided between supporters and opponents. Id.
143. Id. §801(b).
144. Id. § 802(a). Since the resolution that passes each chamber will be identical, there is also no conference report for the resolution. See 142 Cong. Rec. 8199 (1996) (statement of Sens. Nickles, Reid and Stevens).
145. See 122 HARV. L. REV. at 2169.
Within the first few months after President Trump’s inauguration, Congress successfully passed, and the President signed, 13 joint resolutions revoking rules under the CRA.\textsuperscript{149} Several of the resolutions targeted environmental rules, including a “stream protection” rule from the DOI designed to protect water quality from coal mining pollution;\textsuperscript{150} a land use planning rule from the DOI designed to increase public involvement in, transparency of, and efficiency of, planning for uses of public lands;\textsuperscript{151} and a rule from the DOI that addressed protection of endangered and threatened species on National Wildlife Refuges in Alaska.\textsuperscript{152}

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

\begin{footnotesize}  
\footnotetext{148}{See Harvey, \textit{supra} note 146, Grunwald, \textit{supra} note 147. See also Center for Progressive Reform, \textit{CRA By the Numbers}, http://www.progressivereform.org/CRA_numbers.cfm (last visited June 21, 2017).}  
\footnotetext{149}{See Center for Progressive Reform, \textit{supra} note 148. By early April, the 11 disapproval resolutions that the President had signed into law were “the only substantive bills” he had signed at that time. See Grunwald, \textit{supra} note 147. The only disapproval resolution that did \textit{not} pass both chambers of Congress was a resolution that would have repealed a rule limiting methane emissions from drilling operations on public lands. See Juliet Eilperin & Chelsea Harvey, \textit{Senate Unexpectedly Rejects Bid to Repeal a Key Obama-era Environmental Regulation}, WASH. POST, May 10, 2017, http://tiny.cc/2i4yly (last visited June 21, 2017). The resolution was rejected in the Senate by a vote of 51-49. \textit{Id.}}  
\footnotetext{150}{See Pub. L. No. 115-5, 115th Cong., 1st Sess. (2017).}  
\footnotetext{151}{See Pub. L. No. 115-12, 115th Cong., 1st Sess. (2017).}  
\footnotetext{152}{See Pub. L. No. 115-20, 115th Cong., 1st Sess. (2017).}  
\footnotetext{153}{See Center for Progressive Reform, \textit{supra} note 148. The Center for Progressive Reform notes that “financial disclosure data reveal that the lead sponsors of [the] CRA resolutions have received significant campaign contributions from the . . . industries that would most directly benefit from the regulatory rollbacks that the resolutions would accomplish.” \textit{Id.}}  
\footnotetext{154}{See Grunwald, \textit{supra} note 147.}\end{footnotesize}
day comment period.155

Critics also complain that the revoked rules were generally authorized by legislation that was enacted with broad bi-partisan support and that Congress was using “back door” procedures156 to revoke the rules because it would not be possible to revoke them through a transparent deliberative process where the public was fully aware of what Congress was doing.157

Although Congress successfully used the CRA to revoke 13 agency rules adopted in the last few months of 2016, the reach of the law is ultimately limited. As noted above, it only authorizes Congress to use the streamlined process to revoke a rule for a limited period of time after the rule has been adopted.158 The time period for Congress to act and to revoke rules adopted during the last Presidential Administration expired in May 2017.159 If Congress passes any more resolutions under the CRA during the next four years, they will be resolutions to overturn rules adopted by the new Administration, so the President will likely be willing to veto the resolutions. Congress is, however, attempting to increase its power under the CRA by proposing legislation, the Midnight Rules Relief Act of 2017,160 that would allow Congress to reach back further in time to revoke agency rules and to revoke multiple agency

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

156. See Grunwald, supra note 147.

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

158. A disapproval resolution must be submitted in the House or Senate within 60 days after Congress receives the rule for Congress in order for Congress to consider the resolution under the streamlined provisions of the CRA. See 5 U.S.C. §802(a) (2012). For rules that are submitted to Congress during the final sixty days of a Congressional session (which also corresponds, occasionally, to the end of a Presidential Administration), disapproval resolutions may be submitted within 75 legislative days after the next session of Congress convenes. Id. § 801(d)(1). As long as the process begins within the time provided by the CRA, Congress can pass a joint resolution that revokes a rule that has already taken effect. See Richard S. Beth, Disapproval of Regulations by Congress, Procedure under the Congressional Review Act, Cong. Res. Serv. No. 7-5700, Oct. 10, 2001, http://www.au.af.mil/au/awc/awcgate/crs/r131160.pdf (last visited June 21, 2017). If Congress enacts a resolution disapproving a rule that has already taken effect, the rule “shall be treated as though [it] had never taken effect.” See 5 U.S.C. §801(f) (2012).


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

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

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

1. Executive Order 13,777

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

161. Id. §2(a).
163. See Beerman, supra note 102, at 983, 1000-1001.
166. See Exec. Order 13,777, supra note 164, §1.
appoint a Regulatory Reform Officer for the agency\textsuperscript{167} and to create a Regulatory Reform Task Force to evaluate existing regulations and to make recommendations regarding the repeal, replacement, or modification of regulations.\textsuperscript{168} In particular, the Order requires agencies to identify regulations that “eliminate jobs, or inhibit job creation” or “impose costs that exceed benefits.”\textsuperscript{169} The Order requires each task force to seek input from entities significantly affected by federal regulations and, within 90 days, to prepare a report for the agency head identifying the regulations for repeal, replacement, or modification.\textsuperscript{170}

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

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

\textsuperscript{167} Id. §2.
\textsuperscript{168} Id. §3.
\textsuperscript{169} Id. The Order also requires agencies to identify regulations that “are outdated, unnecessary, or ineffective” or “create serious inconsistency or otherwise interfere with regulatory reform initiatives and policies.” Id.
\textsuperscript{170} Id.
\textsuperscript{171} See Wagner, et. al, supra note 54, at 186; Beerman, supra note 102, at 948, 982.
\textsuperscript{172} See 5 U.S.C. §610(b) (2012).
\textsuperscript{173} See Wagner, et al., supra note 54, at 190. Professors Wagner and her associates reviewed 183 rules across three agencies over a forty year period and found that 73% of the rules were revised at least once and often multiple times over the study period. Id. at 201-202. They also found that only about 1% of the rule revisions resulted from formal retrospective review required by an Executive Order or statute. Id. at 217.
\textsuperscript{174} Id. at 228. The study conducted by Professors Wagner and her associates found that regulated industries were among the most important motivators for rule adjustments, and that industries prompted revisions through petitions, informal communications with agencies and threats of litigation. Id.
\textsuperscript{175} See Dennis, EPA Asked the Public About Which Regulations to Gut, supra note 22.
\textsuperscript{176} See Memorandum from E. Scott Pruitt to Acting Deputy Administrator, General Counsel, Assistant Administrators, Inspector General, Chief Financial Officer, Chief of Staff, Associate
notice in the Federal Register seeking public comments regarding “regulations that may be appropriate for repeal, replacement or modification.” As noted earlier, the broad public support for environmental protection was demonstrated by the hundreds of thousands of comments that were submitted to the agency, urging the agency to not repeal, replace, or modify any of the environmental regulations.

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


178. See supra note 22.
rules that may be repealed pursuant to the Executive Order will likely have been adopted following long processes involving substantial participation by the public and the regulated entities, as well as, in many cases, scientific advisory boards or other advisory boards; the rules will either have survived or avoided legal challenges. Further, the rules will have survived both the past formal and informal review processes. Thus, if there are a significant number of regulations that need to be repealed, replaced, or modified pursuant to the Executive Order, the motivation for the changes will likely be based on political factors, rather than on scientific or technical expertise.

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

First, as noted earlier, many environmental regulations are mandated by federal law. While the agency may have some discretion in the manner in which the regulations are formulated, the agency may not have the discretion to simply repeal those regulations. To the extent that the EPA or any other agency attempts to repeal such regulations, they would likely be sued and the repeal of the rules would be invalidated. However, many other environmental regulations are not mandated by federal law or, even if the agencies are required to adopt regulations, the environmental statutes provide the agencies with broad discretion regarding the manner in which those regulations are drafted. For those

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

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

186. Id.

187. See supra note 52. See also O’Connell, Agency Rulemaking, supra note 54, at 482-483.
regulations, however, the White House faces substantial obstacles in its deregulatory quest. The biggest obstacle to the President is that the agency must normally use the notice and comment rulemaking process if it wishes to repeal, replace, or modify a regulation that was adopted through notice and comment rulemaking.\textsuperscript{188} The President’s “two for one” Executive Order explicitly acknowledges that repeals of existing agency regulations must follow the procedures of the APA.\textsuperscript{189} While agencies might rely on the “good cause” exception to the notice and comment procedures to justify temporarily delaying the effective date of rules for review by the new Administration, as discussed above, it is unlikely that they could rely on the exception to justify repealing or modifying existing rules without going through the normal notice and comment process.\textsuperscript{190}

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

\textsuperscript{189} See Exec. Order. No. 13,771, supra note 92, §2(c).

\textsuperscript{190} While it is impossible to state categorically in the abstract that none of the revisions would be eligible for the “good cause” exception, the exception applies when an agency finds that the notice and comment process would be “impracticable, unnecessary or contrary to the public interest” and the exception is interpreted narrowly. See supra note 111. The notice and comment process may be “impracticable” when “due and timely execution of [an agency’s] functions would be impeded by” the process. See U.S. Dep’t of Justice, \textit{Attorney General’s Manual on the Administrative Procedure Act} 30 (1947) [hereinafter Attorney General’s Manual]. The process may be “unnecessary” when the agency action is “a minor rule or amendment in which the public is not particularly interested,” id. at 31, or makes changes that are “technical, uncontroversial, and have little or no impact on regulated entities.” See Rosenhouse, supra note 111, §§ 6-9. Finally, the process may be contrary to the public interest when “the interest of the public would be defeated by any requirement of advance notice.” See Attorney General’s Manual, supra at 31. Professors Michael Asimov and Ronald Levin suggest that the “public interest” aspect of the exception is best applied when an agency must act “to meet a serious health or safety problem, or some other risk of irreparable harm…” See Michael Asimow & Ronald M. Levin, \textit{STATE AND FEDERAL ADMINISTRATIVE LAW} 308-09 (3d ed. 2009). In general, the “good cause” exception primarily applies when agencies are dealing with “emergencies and typographical errors, plus the occasional situation in which advance notice would be counterproductive.” See Kristin E. Hickman, \textit{Coloring Outside the Lines: Examining Treasury’s (Lack Of) Compliance with Administrative Procedure Act Rulemaking Requirements}, 82 \textit{NOTRE DAME L. REV.} 1727, 1782 (2007). In light of the publicity surrounding the Administration’s bold statements regarding deconstruction of the administrative state, it is likely that most of the rules targeted for revision would not relate to emergencies typographical errors or the occasional situation in which advance notice would be counterproductive. Due to the likelihood of litigation to challenge repeals in accordance with the Executive Order, the Administration will likely avoid relying on the “good cause” exception to dispense with “notice and comment” rulemaking for rule repeals or revisions except in very limited situations.
Notice and comment rulemaking presents several impediments to the President’s deregulatory agenda. First and foremost, the process is time consuming and resource intensive. Scholars have repeatedly asserted that the rulemaking process has become ossified and that it could take agencies five years or more to adopt major rules through the process. Several factors are blamed for ossification, including (1) executive branch requirements for OMB review and approval of rules, requirements for agencies to evaluate and report on the costs and benefits of rules and the impacts of rules on takings, federalism, small businesses, children’s health, and other topics; (2) legislatively imposed analytical and procedural requirements under the Small Business Regulatory Enforcement Fairness Act, the Information Quality Act, the Paperwork Reduction Act, and other laws; and


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

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

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

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


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

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

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

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

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

204. See Nielsen, supra note 191, at 10; Johnson, Ossification’s Demise?, supra note 67, at 103.
205. See McGarity, Some Thoughts, supra note 191, at 108.
206. See Nielsen, supra note 191, at 10-11 (discussing the Portland Cement doctrine, created by the D.C. Circuit to require agencies to disclose data on which a rule is based as part of the notice of proposed rulemaking, in order to ensure that the public has an “opportunity to comment” on the data, per the requirements of the APA, 5 U.S.C. § 553(c)); Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973).
207. See Nielsen, supra note 191, at 11-12 (discussing the judicial interpretation of the “notice” and “comment” requirements of the APA, 5 U.S.C. § 553(b) & (c), as mandating that a final rule must be a “logical outgrowth” of the proposed rule).
208. See, e.g., United States v. Nova Scotia Food Products Corp., 588 F.2d 240, 252-253 (2d Cir. 1977). See also Nielsen, supra note 191, at 11 (discussing the judicial interpretation of the “concise general statement” requirement of the APA, 5 U.S.C. § 553(c), as a requirement that agencies respond to all material or significant comments that they receive); McGarity, Some Thoughts, supra note 191, at 108. This requirement is becoming more onerous for agencies in the e-rulemaking era, as some rulemakings have generated hundreds of thousands of comments that must be reviewed. See, e.g., Eric Lipton & Coral Davenport, Critics Hear E.P.A.’s Voice in ‘Public Comments’, N.Y. TIMES, May 19, 2015, http://www.nytimes.com/2015/05/19/us/critics-hear-epas-voice-in-public-comments.html (last visited June 21, 2017) (noting that the EPA received more than 1 million comments on its 2015 rulemaking to define “waters of the United States” under the Clean Water Act).
209. See Nielsen, supra note 191, at 12 (discussing the impact of “hard look” judicial review on agency decisionmaking in notice and comment rulemaking).
211. See Johnson, Ossification’s Demise?, supra note 67, at 101-102; William D. Ruckelshaus, Environmental Negotiation: A New Way of Winning, Address to Conservation Foundation’s Second
studies have found that agency rules are invalidated in 30-50% of the cases in which they are challenged.\textsuperscript{212} In order to maximize their chance of success in the inevitable litigation, agencies spend more time preparing rules to ensure compliance with the applicable laws.

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

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

\begin{thebibliography}{99}
\item National Conference on Environmental Dispute Resolution (Oct. 1, 1984), cited in Lawrence Susskind & Gerard McMahon, The Theory and Practice of Negotiated Rulemaking, \textit{3 Yale J. on Reg.} 133, 134 (1985). More specifically, Ruckleshaus indicated that 80% of the agency’s major rules were challenged. \textit{Id.} In a study of EPA rules finalized between 2001 and 2005, the author of this article found that 75% of the EPA’s “economically significant” rules were challenged. See Johnson, \textit{Ossification’s Demise?}, supra note 67, at 104.
\item See supra note 119.
\item See supra note 118.
\item See supra note 119, 126-129, and accompanying text.
\end{thebibliography}
deregulatory agenda to repeal and revise existing regulations.

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

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

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

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


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

221. See Brand X, 545 U.S. at 981; State Farm, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part); National Association of Home Builders v. EPA, 683 F.3d 1032, 1043 (D.C. Cir. 2012). As Justice Rehnquist stated in his concurring and dissenting opinion in State Farm, “[a] change in administration . . . is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.” See State Farm, 463 U.S. at 59.
regulations by explaining how and why the weighing of priorities within their discretion under the law has changed, so that they now are interpreting and applying the law in a different manner, and they must demonstrate that their new interpretation is within the discretionary authority granted to them by law. Although agencies’ decisions may be influenced by purely political reasons, “hard look” review forces agencies to justify their actions on technocratic, statutory, or scientific bases.222

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

The courts and many academics, including Professor Mark


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

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

224. See Watts, supra note 222, at 8-9. She recognizes that distinguishing between acceptable and unacceptable political influences may be difficult, but suggests that it might be appropriate for agencies to rely on political influences when they are designed to advance the public interest and public values, rather than merely caving in to interest group pressure. Id. at 8-9, 53. As examples, she suggests that it would be appropriate for an agency to rely on a pro-choice statement by a President to support a regulatory decision that advances that pro-choice agenda, but it would be inappropriate for the agency to make the same decision simply because the President received substantial financial support from pro-choice organizations during the Presidential campaign and directed the agency to make the decision to reward the organizations for their support. Id. at 8-9.
Seidenfeld, disagree. Professor Seidenfeld argues that it is normal and appropriate for agencies to be motivated to act by political factors, including raw or partisan political factors, but agencies must be able to articulate expert-driven (scientific, technical, or other) rationales for their decision. He suggests that “hard look” review separates value judgments from objective decision making and he asserts that courts appropriately refuse to consider political factors as justifications for agency action under “hard look” review.

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

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

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

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

228. See, e.g., State of Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (court relied on campaign and press statements to find that the purpose of the travel ban in the Executive Order was discriminatory); County of Santa Clara v. Trump, No. 17-cv-00574-WHO, 2017 U.S. Dist. LEXIS 62871 (N.D. Ca. Apr. 25, 2017) (court relied on statements made by the President to the press to find, for purposes of resolving the standing issue, that the Executive Order would likely be applied in a broader manner than the Executive Branch, in legal arguments to the court, was asserting it would be applied); Hawai‘i v. Trump, No. 17-00050 DKW-KSC, 2017 U.S. Dist. LEXIS 36935 (D. Haw., Mar. 25, 2017) (court relied on campaign statements and other statements made by the President to the press to find that the purpose of the travel ban in the Executive Order was discriminatory).
the decision and will not, generally, attribute other rationales to the agency’s action that are not provided by the agency.\textsuperscript{229}

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

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

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

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

\textsuperscript{232} \textit{Id.}
In repealing and revising rules in response to Executive Order 13,777, agencies must also be vigilant to remain open to public comment on the repeal or revision, as there may be public perceptions that the agencies have entered the rulemaking with marching orders from the White House and are merely going through the procedural motions to repeal or revise the rules of prior Administrations. A series of decisions in the U.S. Court of Appeals for the District of Columbia Circuit has held that an agency does not provide an “opportunity for comment” on proposed rules as required by the APA if the agency does not remain “openn-minded” about the issues raised and engage with the comments submitted during the comment period. The “opportunity for comment” must be a meaningful opportunity for comment. At the same time, however, courts have rarely struck down agency rules on the grounds that evidence demonstrated that the agency had an “unalterably closed mind” during the rulemaking.

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

233. See supra note 218.


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

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


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

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

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

\textsuperscript{240} See National Cable & Telecommunications Ass’n v. Brand X Internet Services, 545 U.S. 967 (2005).
\textsuperscript{241} See supra note 124.
\textsuperscript{242} See 80 Fed. Reg. 37,054 (June 29, 2015).
\textsuperscript{243} See Exec. Order No. 13,778, supra note 165, §2(a).
\textsuperscript{244} Id. §2(b).
\textsuperscript{245} Id. §3.
concerning litigation relating to the rule.\textsuperscript{246} On the same day that the order was signed, the agencies signed a notice of intent to review and rescind or revise the rule.\textsuperscript{247} The Attorney General asked the Supreme Court, which was reviewing a jurisdictional question central to the numerous lawsuits that have been filed challenging the rule, to hold the case in abeyance while the agencies review and rescind or revise the rule, but the Court denied the government’s request.\textsuperscript{248}

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

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

\textsuperscript{246} Id. §2(c).
\textsuperscript{247} See 82 Fed. Reg. 12,532 (Mar. 6, 2017).
\textsuperscript{249} See Exec. Order No. 13,783, supra note 165, §4.
\textsuperscript{250} Id. §4(d).
\textsuperscript{251} Id. §§ 6-7. The Order also rescinds several Executive actions taken by President Obama and the White House Council on Environmental Quality to address climate change. Id. §3.
\textsuperscript{252} See Exec. Order No. 13,792, supra note 165, §2.
\textsuperscript{253} Id. §1.
\textsuperscript{254} Id. §§2(d)-(e).
State lawmakers who argued that former Presidents have used the law too aggressively to protect federal lands from development by private interests, and who hoped that the review would lead to the removal of the protections from large portions of those lands.\textsuperscript{255} Shortly after the President issued the Order, the Secretary of the Interior released a list of 27 National Monuments that would be reviewed by the Department and posted a notice in the Federal Register seeking public comment on the Monuments included on the list.\textsuperscript{256}

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

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


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

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

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

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

267. See Beerman, supra note 102, at 1000-1001, 1003-1004 (discussing the contours and limits of such a challenge in the abstract, as opposed to applied to the WOTUS rule).
268. See supra notes 234-236, and accompanying text. See also Beerman, supra note 102, at 1001.
270. Both rules were challenged shortly after they were initially adopted and the Supreme Court took the unusual step of issuing a stay of the Clean Power Plan rule pending resolution of the challenges to the rule in the D.C. Circuit. See West Virginia v. EPA, 136 S.Ct. 1000 (U.S. 2016). After the President issued Executive Order 13,783, the Attorney General asked the D.C. Circuit to stay the challenges to the rules addressed in the order, and the court granted the government’s request, but only agreed to hold the challenge to the Clean Power Plan in abeyance for 60 days. See West Virginia v. Environmental Protection Agency, No. 15-1365 (D.C. Cir. Apr. 28, 2017), http://www.environmentallawandpolicy.com/wp-content/uploads/sites/186/2017/04/CPP-Abeyance.pdf (last visited June 21, 2017). The Court ordered the EPA to file status reports every 30 days and required the parties to file supplemental briefs to address whether the case should be remanded to the EPA
with the WOTUS rule, the process to repeal or revise the rules targeted by Executive Order 13,778 could take the entire length of the President’s Administration to complete and will likely be tied up in litigation for years after they are completed. In some respects, this is a win for the Administration because the rules targeted in both Executive Orders will not be enforced in the interim. In other respects, however, if the Administration is ultimately successful in making such drastic changes to the rules so quickly after adopting the rules in 2015 and courts uphold those changes, the agencies may be able to make an equally extreme course correction when a new Administration takes office. In that case, the deregulatory success of the Administration could be as ephemeral as the streams that will be left unprotected by the Administration’s amendment of the WOTUS rule.

The Administration could face more fundamental legal challenges in the implementation of Executive Order 13,792 regarding the Antiquities Act. Supporters of the Order anticipate that it will lead to actions by the President to abolish or reduce the size of national monuments. However, while the Antiquities Act authorizes the President to create national monuments, it does not provide the President with any express authority to abolish or revoke national monument designations. Congress has the power, under the Property Clause of the Constitution, “to dispose of and make all needful rules and regulations” respecting federal lands. While Congress, in the Antiquities Act, delegated to the President the power to impose limits on land use to protect federal lands by designating them as national monuments, only Congress can abolish or revoke national monument instead of held in abeyance. Id. If the case is remanded to the EPA, the challenge in the D.C. Circuit would be resolved, so the Supreme Court’s stay would be lifted and the rules would take effect.

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

272. See supra note 255.


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

276. Congress can delegate power to the President as long as it establishes an intelligible principle to guide the Executive’s exercise of discretion. See J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).
designations.277 The President might have authority to reduce the size of national monuments, but the extent of that authority has never been tested in court.278 If the President decides to abolish or reduce the size of national monuments after the review required by the Executive Order, the Administration will surely face legal challenges, as there appears to be very little public support for the elimination or reduction of


Professor Squillace and his co-authors argue that there is additional support for the limitation of the President’s power in that the text, structure and legislative history of the Federal Land Policy and Management Act (“FLPMA”) , adopted after the Antiquities Act, clearly demonstrate that Congress did not intend to authorize the President to abolish national monuments. See Squillace, et al, supra note 274, at 3. John Yoo and Todd Gaziano argue, to the contrary, that the President has implied powers to revoke national monument designation, based on the President’s constitutional Executive Power. See John Yoo and Todd Gaziano, American Enterprise Institute, Presidential Authority to Revoke or Reduce National Monument Designations, 13, Mar. 2017, https://www.aei.org/wp-content/uploads/2017/03/Presidential-Authority-to-Revoke-or-Reduce-National-Monument-Designations.pdf (last visited June 21, 2017).

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

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

Critics of recent National Monument designations argue that the Antiquities Act was never intended to authorize the President to protect such large amounts of federal land from development. See Sean Hecht, Politicians and Commentators who Criticize Recent national Monuments are Making Up Their Own Version of History, Legal Planet, May 8, 2017, http://legal-planet.org/2017/05/08/politicians-and-commentators-who-criticize-recent-national-monuments-are-making-up-their-own-version-of-history/ (last visited June 21, 2017). However, many of the first monuments designated by Presidents under the Antiquities Act, covered more than a million acres, including the Glacier Bay National Monument (more than 1 million acres), designated by President Coolidge in 1925 and the Death Valley National Monument (1.6 million acres), designated by President Hoover in 1933. Id. The Supreme Court upheld the President’s authority to designate the 800,000 acre Grand Canyon National Monument in Cameron v. United States, 252 U.S. 450 (1920).
protection for those lands.\textsuperscript{279} The DOI received more than 100,000 comments in response to its request for public input on the review of the national monuments and 96\% of the submissions expressed support for the current designations, with only 3\% expressing opposition.\textsuperscript{280}

V. The Power of the Executive Branch to Not Enforce the Law

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


\textsuperscript{280} Id.

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

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

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

\textsuperscript{284} See Heckler, 470 U.S. at 834-835. See also Campbell, supra note 281, at 570.

\textsuperscript{285} See Heckler, 470 U.S. at 838. See also Campbell, supra note 281, at 574-575.

\textsuperscript{286} See Kim, supra note 36, at 103-104; Barkow, supra note 282, at 1133-1134. Congress does, however, occasionally oversee agency enforcement discretion by limiting the discretion through riders to prohibit the use of funding to enforce various policies. See Campbell, supra note 281, at 576.
Accordingly, the Executive Branch can effectively deregulate by simply refusing to bring enforcement actions against persons who violate the environmental laws or specific provisions of the environmental laws or by imposing very minor sanctions on persons who violate the environmental laws. While the Executive Branch might articulate this strategy in a directive to enforcement staff, it can avoid most external oversight by courts, Congress, and the public if it avoids memorializing the strategy in written documents and opts to provide oral directives or to require approval of enforcement activity by a limited group of decision-makers who are aware of the strategy.

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

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

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

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


291. See supra note 44. For instance, forty seven States have taken over authority to administer the Clean Water Act Section 402 permitting program. See U.S. Environmental Protection Agency, NPDES State Program Information: State Program Authority, https://www.epa.gov/npdes/npdes-state-program-information (last visited June 21, 2017). One of the
States that have taken over the permitting programs generally have primary enforcement authority. As a result, even if the federal government wanted to deregulate by choosing to not enforce the laws or regulations, it would be limited, to some degree, because States with delegated programs might choose to enforce the law anyway.

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

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

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

292. See supra note 44.

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


295. Id.


297. See Steven Mufson, These Titans of Industry Just Broke with Trump’s Decision to Exit the Paris Accords, WASH. POST, June 1, 2017, https://www.washingtonpost.com/news/energy-environment/wp/2017/06/01/these-titans-of-industry-just-broke-with-trumps-decision-to-exit-the-paris-accords/?utm_term=.77746e870de3 (last visited June 21, 2017). Thirty states joined a statement condemning the decision to withdraw from the Paris agreement and expressed their intention to continue to take steps to reduce greenhouse gas emissions in the state beyond those required by federal law. Id.
Even if the Executive Branch takes steps to deregulate through non-enforcement of environmental laws, those steps are ultimately temporary and can be reversed when there is a change in Administration. Regulated entities recognize that simple fact, which is why they are another impediment to the Executive Branch’s attempts to deregulate through non-enforcement of the law. While regulated entities frequently favor deregulation, they also favor stable regulation.\(^298\) When rules are adopted through notice and comment rulemaking, they are generally stable because the process to repeal and revise is time-consuming and resource intensive.\(^299\) Although ossification of the rulemaking process is frequently criticized, it benefits regulated entities by providing assurance that they can make longer-term plans against that stable regulatory structure.\(^300\) Thus, if an Administration chooses to not enforce regulations, but does not act to repeal those regulations, regulated entities likely understand that the regulations could be enforced again as soon as a new Administration takes office. Accordingly, regulated entities are unlikely to make changes to their operations or business plans to avoid complying with existing, but unenforced, regulations, unless it is possible to reverse those changes without significant cost in the future when a new Administration chooses to enforce them. Just as States pledged to continue efforts to address climate change despite President Trump’s deregulatory actions, billionaire philanthropist Michael Bloomberg pledged to donate $15 million to cover the United States’ commitments under the Paris agreement, and businesses have committed to go beyond compliance

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299. See supra notes 191-213.

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

VI. CONCLUSION

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


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

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

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