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## Presidential Maladministration

MICHAEL SANT'AMBROGIO\*

### INTRODUCTION

Following her service in the Clinton administration, then-Professor Elena Kagan wrote, “[w]e live today in an era of presidential administration.”<sup>1</sup> Kagan argued that while Congress, the bureaucracy, and interest groups all continued to influence federal regulatory policy, the president had assumed a position of comparative primacy vis-à-vis these other actors.<sup>2</sup> Although some were troubled by strong presidential control over the discretion delegated to federal agencies by Congress,<sup>3</sup> Kagan maintained that the tools used by President Clinton to influence federal agencies would enhance the political accountability and effectiveness of regulatory policy.<sup>4</sup> Clinton’s increased use of formal directives to agency heads—which shaped their regulatory agendas, spurred them to action, and nudged them towards his preferred policies—and his public appropriation of regulatory decisions as an extension of his own policymaking goals rendered government policy more transparent and accountable.<sup>5</sup> By publicly asserting ownership of agency action, Clinton made clear who to credit or blame for government policy.<sup>6</sup> In addition, Kagan argued the president’s participation in regulatory agenda setting would improve the effectiveness and dynamism of federal agencies.<sup>7</sup> Agencies would be more likely to act expeditiously to solve national problems, and act in a way that was effective and rational.<sup>8</sup> Finally, a president seeking to grow his base would advance policies supported by the general public rather than parochial private interests, thus promoting democratic norms.<sup>9</sup> Although Kagan recognized that presidents would not always highlight their role in policymaking, and would sometimes serve narrow interests, Kagan posited that when presidential control was highly publicized, the resulting

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1. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2246 (2001).

2. *Id.* at 2246, 2317.

3. See, e.g., Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL’Y 227 (1998).

4. Kagan, *supra* note 1, at 2252.

5. *Id.* at 2249.

6. *Id.* at 2333.

7. *Id.* at 2339.

8. *Id.*

9. Kagan, *supra* note 1, at 2335, 2338-39.

government policy would be more representative of the broader electorate than policies shaped by Congress, the Judiciary, the bureaucracy, or interest groups.<sup>10</sup>

Presidents George W. Bush and Barack Obama largely followed the model of presidential administration established by President Clinton.<sup>11</sup> What about President Donald J. Trump? Even before he was elected, many thought candidate Trump's pronouncement that "I alone can fix" America and his strange fondness for foreign despots suggested he would be a strong proponent of a powerful chief executive.<sup>12</sup> Nor did such grandiose statements abate after he moved into the White House.<sup>13</sup> During just the past year, President Trump has declared that state governors "can't do anything without the approval of the president of the United States," that "[w]hen somebody's the president of the United States, the authority is total,"<sup>14</sup> and "Article II allows me to do whatever I want."<sup>15</sup> All of these statements are patently untrue as a matter of constitutional law.

Although President Trump has retained some key features of presidential control over regulatory policy established by his predecessors, he has gone much further in asserting the primacy of the president and undermining competing sources of influence—i.e., Congress, the bureaucracy, and the public.<sup>16</sup> He has done this by reducing public participation in rulemaking, sidelining agency career staff, undermining agency scientific and technical expertise, weakening congressional controls over agency leadership, and privileging the interests of regulated industries over congressional mandates and the broader public.<sup>17</sup> In some cases, the Trump administration has increased the transparency of policymaking, inasmuch as policies often come

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10. *Id.* at 2355-56.

11. Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43, 47-49, n.12 (2017) (noting how "President George W. Bush famously portrayed himself as 'the decider' atop the Executive Branch" and the Obama Administration "was no exception to the modern trend toward an 'administrative presidency'").

12. Alexander Burns, *Clinton's Portrayal of Trump as Dictator Aims at the Left and Right*, N.Y. TIMES (July 29, 2016), available at <https://www.nytimes.com/2016/07/30/us/politics/democrats-donald-trump.html>.

13. BETHANY A. DAVIS NOLL, ALEX DAWSON, DEREGULATION RUN AMOK: TRUMP-ERA REGULATORY SUSPENSIONS AND THE RULE OF LAW, INSTITUTE FOR POLICY INTEGRITY 1-2 (2018).

14. Peter Baker & Maggie Haberman, *Crisis Easing, Trump Leaps to Call Shots on Reopening Nation, Setting Up Standoff With Governors*, N.Y. TIMES (Apr. 14, 2020), available at <https://www.nytimes.com/2020/04/13/us/politics/trump-coronavirus-governors.html>.

15. *Transcript: ABC News' George Stephanopoulos' exclusive interview with President Trump*, ABC NEWS, (June 16, 2019 7:58PM), available at <https://www.abcnews.go.com/Politics/transcript-abc-news-george-stephanopoulos-exclusive-interview-president/story?id=63749144>.

16. Coglianese, *supra* note 11, at 49.

17. See discussion *infra* Parts II-IV.

directly from the president without the involvement of any other actors.<sup>18</sup> However, in other cases the origins of policy are more opaque because they are developed behind closed doors in collaboration with industry.<sup>19</sup> Crowding out other voices from regulatory decision-making has not only reduced democratic accountability, it has also undermined administrative effectiveness.<sup>20</sup> As a result, we are now living in a time of presidential maladministration.

### I. CONTINUITY WITH PAST ADMINISTRATIONS

President Trump has not re-invented the president's relationship with the regulatory state out of whole cloth.<sup>21</sup> The Trump administration has continued to use many of the tools developed by past administrations to supervise the administrative state and shape regulatory policy.<sup>22</sup> First, like past presidents, upon entering office President Trump directed federal agencies to suspend their work on regulatory initiatives that had their genesis during the prior administration.<sup>23</sup>

Second, President Trump has retained centralized review of regulatory proposals by the White House Office of Management and Budget (OMB) under President Clinton's Executive Order ("E.O.") No. 12,866.<sup>24</sup> Pursuant to E.O. 12,866, federal agencies must provide OMB with a list of all regulations under development or review and "the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter."<sup>25</sup> In addition, executive branch agencies must provide OMB with a cost-benefit analysis ("CBA") for any significant regulations before the agency may issue a notice of proposed rulemaking or final rule to the public.<sup>26</sup> The agency's CBA should include the costs of compliance as well as the expected public benefits, including the monetized value of benefits such as lives expected to be saved and injuries or

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18. Eric Niiler, *The EPA's Anti-Science 'Transparency' Rule Has a Long History*, WIRED (Nov. 13, 2019, 6:22 PM), available at <https://www.wired.com/story/the-epas-anti-science-transparency-rule-has-a-long-history/>.

19. See discussion *infra* Part III. A.

20. Kagan, *supra* note 1, at 2331.

21. Coglianese, *supra* note 11, at 48-49.

22. *Id.* at 49, n. 21.

23. See, e.g., Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 FED. REG. 7702-01, 7702 (Jan. 20, 2001) (executive order issued by President George W. Bush).

24. Susan E. Dudley, *Happy Birthday, Executive Order 12866!*, FORBES (Sept. 24, 2018 8:57AM), available at <https://www.forbes.com/sites/susandudley/2018/09/24/happy-birthday-executive-order-12866/#75b764123eef>.

25. Exec. Order No. 12,866 § 4(c), "Regulatory Planning and Review" 58 Fed. Reg. 51735 (Sept. 30, 1993).

26. *Id.* at § 6(c).

illnesses avoided.<sup>27</sup> OMB may return proposals to the agency for further consideration if it believes the benefits of the regulation do not justify its costs or the regulation is inconsistent with “applicable law, the President’s priorities, . . . or actions taken or planned by another agency.”<sup>28</sup> Thus, E.O. 12,866 provides a powerful tool for the White House to ensure that agencies use the discretion delegated to them by Congress in a cost-effective manner that is also consistent with the president’s policy objectives.<sup>29</sup> The executive order does not allow the president to shape regulations in a way that is inconsistent with the agency’s statutory mandate.<sup>30</sup> However, it does allow the White House to influence the considerable discretion delegated to agencies in many regulatory statutes.<sup>31</sup>

Third, Trump has continued to use directive authority to prompt agency action (particularly deregulatory action), to ask agencies to reconsider prior decisions, and to suggest how the president would like agencies to use their regulatory discretion.<sup>32</sup> A few high-profile examples, which I shall return to throughout this article, include his instructions to federal agencies to consider rescinding or amending: (1) the Waters of the United States (WOTUS) Rule, including narrowing the agency’s interpretation of “navigable waters” as used in the Clean Water Act;<sup>33</sup> (2) regulations that might burden the development of domestic oil, natural gas, coal, and nuclear energy resources, including the Obama administration’s Clean Power Plan;<sup>34</sup> and (3) the Obama administration’s fuel-efficiency standards for cars and light trucks.<sup>35</sup> President Trump publicly touted these deregulatory efforts, often signing executive orders in the White House Oval Office surrounded by supporters, members of Congress, the press, and workers from the regulated industries, therefore making the source of the subsequent regulatory moves highly transparent.<sup>36</sup>

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27. *Id.* at § 6(c)(ii).

28. *Id.* at § 2(b).

29. *Id.* at § 2(a).

30. Exec. Order No. 12,866, § 1(a)-(b), 58 Fed. Reg. 51735 (Sept. 30, 1993).

31. *Id.* at § 2(a).

32. Exec. Order No. 13,783 § 1(c), “Promoting Energy Independence and Economic Growth” 82 Fed. Reg. 16093 (Mar. 28, 2017).

33. Exec. Order No. 13,778, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule” 82 Fed. Reg. 12497 (2017) (suggesting the agency consider interpreting “navigable waters” in the Clean Water Act “in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006)”).

34. Exec. Order No. 13,783 § 4, 82 Fed. Reg. 16093 (Mar. 28, 2017).

35. Coral Davenport & Bill Vlasic, *Trump Using Detroit as Stage for Loosening Obama’s Fuel Economy Rules*, N.Y. TIMES (Mar. 15, 2017), available at <https://www.nytimes.com/2017/03/15/us/politics/trump-obama-fuel-economy-standards.html>.

36. *Id.*

President Trump's record appropriating the results of the regulatory work prompted by these directives, however, is more mixed.<sup>37</sup> For example, he did not take credit for the Environmental Protection Agency ("EPA") and Army Corp of Engineer's revised WOTUS Rule until three days after the final rule was published, when he met with the American Farm Bureau Federation's annual convention in Texas, a group that was sure to be pleased by the narrower interpretation of navigable waters.<sup>38</sup> During these three days the President's Twitter account was preoccupied with his impeachment and efforts to forge a new trade deal with China.<sup>39</sup> The EPA's final rule replacing the Obama Clean Power Plan was signed by EPA Administrator Andrew Wheeler before a public audience that included coal miners,<sup>40</sup> but not the President; although President Trump and the White House touted the administration's new Affordable Clean Energy ("ACE") Rule in subsequent statements.<sup>41</sup> President Trump did appropriate the new and lower fuel-efficiency standards on Twitter shortly after their publication,<sup>42</sup> but the rule was announced in a joint statement by EPA and the Department of Transportation (DOT) on March 31, 2020.<sup>43</sup> Perhaps he would have done more to publicly appropriate the final rule had it not been rushed to publication in the midst of the coronavirus crisis so that the lower standard would apply to model-year 2021 cars.<sup>44</sup> Of course, the president cannot sign these final rules, because Congress has given the authority to promulgate them to the heads of the agencies, not the president.<sup>45</sup> This may explain why President Trump is more inclined to sign executive orders directing agency action than to appear alongside his appointees acting upon his orders.

Although many have criticized these deregulatory moves on the merits, and President Trump seems to prefer executive orders over less formal exercises of directive authority used by his predecessors, these actions are no

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37. See *infra* notes 19-24 and accompanying text.

38. Coral Davenport, *Trump Removes Pollution Controls on Streams and Wetlands*, N.Y. TIMES (Jan. 22, 2020), available at <https://www.nytimes.com/2020/01/22/climate/trump-environment-water.html>.

39. See, Trump Twitter Archive, available at <http://www.trumptwitterarchive.com/archive>.

40. Umair Irfan, *Trump's EPA Just Replaced Obama's Signature Climate Policy with a Much Weaker Rule*, VOX (June 19, 2019 3:51PM), available at <https://www.vox.com/2019/6/19/18684054/climate-change-clean-power-plan-repeal-affordable-emissions>.

41. *President Donald J. Trump Is Ending the War on American Energy and Delivering a New Era of Energy Dominance*, THE WHITE HOUSE (Oct. 23, 2019), available at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-ending-war-american-energy-delivering-new-era-energy-dominance/>.

42. See, Trump Twitter Archive, available at <http://www.trumptwitterarchive.com/archive>.

43. *U.S. DOT and EPA Put Safety and American Families First with Final Rule on Economy Standards*, U.S. EPA NEWS RELEASE, (Mar. 31, 2020), available at <https://www.epa.gov/newsreleases/us-dot-and-epa-put-safety-and-american-families-first-final-rule-fuel-economy-standards>.

44. *Id.*

45. 5 U.S.C. § 301 (2020).

different in kind than President Clinton's direction that the Food and Drug Administration ("FDA") use its authority under the Food Drug & Cosmetic Act (FDCA) to take regulatory action "designed to stop sales and marketing of cigarettes and smokeless tobacco to children"<sup>46</sup> or President Obama's directions to DHS to prioritize certain deportations and institute the Deferred Action for Childhood Arrivals (DACA) program.<sup>47</sup> They easily fit into the model of presidential administration described by Kagan.<sup>48</sup>

## II. IGNORING PUBLIC VOICES IN REGULATORY DECISION-MAKING

Where Trump has parted ways with past administrations, particularly the Clinton and Obama administrations, is in undermining the influence of the public in policymaking while privileging the voices of a narrow slice of private interests.<sup>49</sup>

### A. *The Importance of Public Engagement with Agency Rulemaking*

Public engagement in rulemaking improves the quality, legitimacy, and accountability of agency decision-making.<sup>50</sup> Agencies need information from regulated industries, regulatory beneficiaries, technical experts, and citizens with situated knowledge of the field and understanding of regulatory problems and potential solutions, including their costs and benefits.<sup>51</sup> The notice-and-comment procedures for rulemaking under the Administrative Procedure Act ("APA") were designed in large part to provide agencies with the information they need to craft regulatory policy<sup>52</sup> and "ensure that agency

46. Kagan, *supra* note 1, at 2282-83 (quoting The President's News Conference, 2 PUB. PAPERS 1237 (Aug. 10, 1995)).

47. Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 16, 2012), available at <https://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html>. While President Obama announced the new policy, it was officially embodied in a Memorandum from Janet Napolitano, Sec'y of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

48. Kagan, *supra* note 1, at 2249.

49. See discussion *infra* Part II. B.

50. See generally MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING, FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (Nov. 19, 2018).

51. *Id.* See also STEPHEN BREYER, REGULATION AND ITS REFORM 109 (1982) ("The central problem of the standard-setting process and the most pressing task facing many agencies is gathering the information needed to write a sensible standard.").

52. See U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31 (1947) ("The objective [of notice and comment] should be to assure informed administrative action and adequate protection to private interests."); FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 6 (Senate Document No. 8, 77<sup>th</sup> Congress, First Session, 1941) (noting how the APA provide[s] for public participation in the rule making process).

regulations are tested via exposure to diverse public comment . . . .”<sup>53</sup> Without diverse public input, “an agency’s perspective . . . might not extend beyond the views of agency staff or client groups with whom the staff regularly consults.”<sup>54</sup> The public may identify problems or propose solutions the agency has not considered, highlight competing values, and identify unintended ambiguities or consequences of a proposal.<sup>55</sup> Regulated entities often have the most direct access to information about the practicality and costs of different regulatory approaches.<sup>56</sup> However, potential beneficiaries also may have first-hand knowledge regarding the problems agencies seek to address and the likely impact of alternative solutions.<sup>57</sup>

Public participation in agency rulemaking also enhances the democratic accountability and legitimacy of regulatory decisions.<sup>58</sup> In our democratic system agencies have an obligation to consider the public’s views when making discretionary decisions about how to implement their statutory mandates.<sup>59</sup> Agencies exercise immense policymaking authority without direct electoral checks.<sup>60</sup> Requiring agencies to consider and respond to public comments in a reasoned fashion improves the democratic legitimacy and accountability of agency action from a variety of perspectives.<sup>61</sup> The APA requires federal agencies to publish their proposals and give any interested member of the public the opportunity to comment with “data, views, and arguments . . . .”<sup>62</sup> Moreover, agencies are legally obligated to

53. *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

54. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 402-03 (1985).

55. *Id.*

56. See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, DUKE L. J. 1321, 1346 (2010).

57. See Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1202-03 (1982); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 452 (2007).

58. Nina A. Mendelson, *Rulemaking, Democracy and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343 (2011).

59. See *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) (“The essential purpose of according § 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.”); Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343 (2011) (“An agency’s public proposal of a rule and acceptance of public comment prior to issuing the final rule can help us view the agency decision as democratic and thus essentially self-legitimizing.”).

60. See JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY* 10 (1978) (“[C]riticism of the administrative agencies has been animated by a strong and persisting challenge to the basic legitimacy of the administrative process itself.”); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987 (1997) (“Like an intriguing but awkward family heirloom, the legitimacy problem is handed down from generation to generation of administrative law scholars.”).

61. Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, WASH. U. L. REV. (forthcoming 2021).

62. 5 U.S.C. § 553(b) (2020).



consider these comments and address salient issues raised by them in a reasoned fashion.<sup>63</sup>

*B. Favoring Regulated Industries Over the Broader Public*

During his first month in office President Trump issued Exec. Order No. 13,771, which dramatically narrows the interests that agencies must consider when proposing new regulations or modifying or rescinding existing regulations.<sup>64</sup> The executive order directs agencies to identify at least two existing regulations to be eliminated “for every one new regulation issued . . . .”<sup>65</sup> Moreover, “any new incremental costs associated with new regulations shall . . . be offset by the elimination of existing costs associated with at least two prior regulations.”<sup>66</sup> Finally, “the total incremental cost of all new regulations, including repealed regulations, . . . shall be no greater than zero” in fiscal year 2017 and no greater than an amount set by the Director of OMB in each fiscal year thereafter.<sup>67</sup>

It is hard to square E.O. 13,771 with E.O. 12,866 or the requirements of notice-and-comment rulemaking. While the APA requires agencies to consider the data, views, and arguments of any interested member of the public and E.O. 12,866 requires agencies to assess both the costs and the benefits of their regulatory proposals,<sup>68</sup> E.O. 13,771 directs agencies to consider only compliance costs. Irrespective of the benefits of a proposed rule, and however much they might exceed the costs, the agency should not promulgate the rule unless it can find two existing regulations to rescind that will offset those costs.<sup>69</sup> Thus, the focus of E.O. 13,771 is on only one side of the CBA that agencies must conduct under E.O. 12,866, and only a small slice of the public interests that agencies must consider under the APA.<sup>70</sup>

Moreover, the two-for-one provision is inherently arbitrary. Why repeal two rules for every one? Why not three? Rules come in a variety of shapes and sizes. Even after OMB clarified that the executive order applied only to significant regulatory actions as defined by E.O. 12,866, such regulatory actions may be more or less significant.<sup>71</sup> An agency might be able to offset

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63. See generally Lisa Schultz Bressman & Glen Staszewski, *Judicial Review of Agency Discretion*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 192 (Michael E. Herz et al. eds., 2d ed. 2015).

64. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

65. *Id.*

66. *Id.* at § 2(c).

67. *Id.* at §§ 2(b) & 3(d).

68. Exec. Order No. 12,866 §§ 1(b)(6) & 6(a), 58 Fed. Reg. 51735 (Sept. 30, 1993).

69. Exec. Order No. 13,771 § 2(c), 82 Fed. Reg. 9339 (Jan. 30, 2017).

70. *Id.*; Exec. Order No. 12,866 §§ 1(b)(6) & 6(a), 58 Fed. Reg. 51735 (Sept. 30, 1993).

71. Memorandum from Dominic J. Mancini, Acting Administrator Office of Information and Regulatory Affairs to Regulatory Policy Officers re: Guidance Implementing Executive Order 13,771, at 3, 8 (April 5, 2017). Although there are many criteria that might make a rule “[s]ignificant,” on is that it

the costs of a new regulation by rescinding a small part of a prior regulation or it may need more than two regulations to offset the new costs. Thus, if the goal is to cap or decrease compliance costs, the two-for-one rule is a poor fit. The regulatory caps set forth in E.O. 13,771 are a more rational means of achieving the goal of reducing compliance costs.

But seeking to limit compliance costs without regard to public benefits is itself an arbitrary way to make regulatory decisions, and inconsistent with agencies' place in our constitutional structure. Congress delegates regulatory decisions to agencies to promote public welfare.<sup>72</sup> Deciding whether to promulgate a regulation based on compliance costs alone, particularly incremental compliance costs, without regard to the regulation's benefits, is as arbitrary as deciding whether to promulgate a regulation based on the number of completely unrelated regulations that can be rescinded. It is also in tension with what Congress expects of agencies when it enacts regulatory statutes, as discussed more fully below in Part IV.

The administration's focus on compliance costs has had an impact. The administration has reported more than \$50 billion in regulatory cost savings through fiscal year 2019 as a result of actions taken to meet the requirements of 13,771.<sup>73</sup> In addition, the favor bestowed on regulated industries at the expense of a broader public can be seen in numerous regulatory decisions. The rushed fuel-efficiency rule would cost consumers more money at the gas pump than they would save when buying new cars.<sup>74</sup> "And, because the new auto pollution rule lacks the detailed technical analyses required by law, the regulations are unlikely to withstand court challenges."<sup>75</sup> Moreover, although the rule ostensibly would save the automakers billions of dollars in compliance costs,<sup>76</sup> given the likely legal entanglements and the potential for California to set its own standards, thereby creating two different regulatory regimes in the U.S., even some automakers have withdrawn their support for the rule.<sup>77</sup> Similarly, the reduction in industry compliance costs accomplished by the administration's ACE Plan, which replaced the Obama

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has "an annual effect on the economy of \$100 million or more . . ." Exec. Order No. 12,866 § 3(f)(1), 58 Fed. Reg. 51735 (Sept. 30, 1993). This would obviously include both regulations with an impact of \$100 million and regulations with an impact of \$1 trillion. Quite a range.

72. TODD GARVEY AND DANIEL J. SHEFFNER, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 8 (Congressional Research Service) (Dec. 19, 2018).

73. OFFICE OF INFORMATION AND REGULATORY AFFAIRS, *Regulatory Reform Results for Fiscal Year 2019*, available at <https://www.reginfo.gov/public/do/eAgendaEO13771>.

74. Coral Davenport, *Trump's Drive to Weaken Fuel Efficiency Rules May Lead to Dead End*, N.Y. TIMES, (Feb. 14, 2020), at A21.

75. *Id.*

76. *Id.*

77. Coral Davenport, *Trump to Deal Final Blow to Car Pollution Goals*, N.Y. TIMES, Mar 31, 2020, (Mar. 31, 2020), at A1.

Clean Power Plan, was dwarfed by the lost benefits to the public.<sup>78</sup> Indeed, many of the administration's deregulatory actions have been overturned by the courts due to its emphasis on costs while ignoring the benefits of the rules it seeks to rescind.<sup>79</sup>

### C. Limiting Opportunities for Public Participation

In addition to ignoring a broad swath of public interests in regulatory decision-making, the Trump administration has often neglected to even invite the public to comment on proposed regulatory actions, in violation of the notice-and-comment requirements of the APA, and generally limited opportunities for public participation in rulemaking.<sup>80</sup>

Soon after taking office, the Trump administration suspended the effective or compliance dates of dozens of regulations that had been finalized and published by the prior administration.<sup>81</sup> Once a final rule is promulgated, even if the effective or compliance date has not yet passed, any change to the rule constitutes an amendment, which must normally go through another round of notice and comment.<sup>82</sup> Yet the Trump administration routinely suspended the effective and compliance dates of final rules without any public input.<sup>83</sup> When agencies attempted to defend these suspensions in court, they invariably cited the desire to avoid compliance costs while the administration considered amending or repealing the rule, without any consideration of the forgone benefits expected to accrue.<sup>84</sup> In other cases, the administration has changed course so dramatically between a proposed and final rule that the public did not have a meaningful opportunity to comment

78. Jean Chemnick & Niina H. Farah, *Cost of ACE Could Eclipse Benefits by \$980M*, E&E NEWS (June 20, 2019), available at <https://www.eenews.net/stories/1060636039>.

79. See, e.g., *State v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1069 (N.D. Cal. 2018) (enjoining the suspension of a methane waste regulation due to the way it overcounted compliance costs and undercounted benefits); *State v. United States Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017) (“the Bureau entirely failed to consider the benefits of the Rule, such as decreased resource waste, air pollution, and enhanced public revenues”). See also KEITH B. BELTON & JOHN D. GRAHAM, TRUMP’S DEREGULATORY RECORD: AN ASSESSMENT AT THE TWO-YEAR MARK 31 (American Council for Capital Formation, Mar. 2019) (hereinafter, “ACCF Report”).

80. The APA requires federal agencies to publish their proposed rules in the Federal Register and give interested members of the public the opportunity to comment with “data, views, and arguments.” 5 U.S.C.S. § 553 (LexisNexis 2019). Agencies are legally obligated to consider these comments and address salient issues raised by them in a reasoned fashion. See Bressman & Staszewski, *supra* note 63, at 191.

81. NOLL & DAWSON, *supra* note 13, at 3.

82. See 5 U.S.C.S. § 551(5) (LexisNexis 2019) (“‘rule making’ means agency process for formulating, amending, or repealing a rule”); *Env’tl. Def. Fund v. Env’tl. Prot. Agency*, 716 F.2d 915, 920 (D.C. Cir. 1983).

83. NOLL & DAWSON, *supra* note 13, at 3-4; Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump’s Deregulatory Binge*, 12 HARV. L. & POL’Y REV. 13, 14 (2018).

84. NOLL & DAWSON, *supra* note 13, at 9 & n.152.

on the regulatory action.<sup>85</sup> Moreover, when courts have forced the administration to go back and publish rules for comment the final rules are often virtually unchanged, suggesting that the administration largely ignored the comments it received.<sup>86</sup>

Finally, the administration has forgone public participation in creating policies that would in turn restrict public participation in a plethora of other agency decisions. For example, on January 31, 2018, the Bureau of Land Management (“BLM”) issued an Instructional Memo, without using notice and comment, that would have “exclude[d] or sharply limit[ed] public participation in BLM oil and gas leasing decisions.”<sup>87</sup>

Focusing on compliance costs, ignoring or discounting regulatory benefits, and eschewing or limiting public participation in rulemaking, discounts a broad swath of public interests in regulatory decision-making and undermines the effectiveness and democratic legitimacy of the Trump administration’s regulatory decisions.

### III. DECONSTRUCTING THE ADMINISTRATIVE STATE

At the beginning of the Trump Presidency, White House strategist Stephen K. Bannon vowed to a group of conservative activists that the Trump administration was committed to the “deconstruction of the administrative state.”<sup>88</sup> Although Bannon did not last long in the White House,<sup>89</sup> the administration’s commitment to undermining the bureaucracy has not waned. Indeed, while Bannon’s remarks might be interpreted as merely advocating a traditional deregulatory agenda,<sup>90</sup> President Trump and his political appointees have launched an unprecedented assault on the agencies they are

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85. Center for Science in the Public Interest v. Perdue, No. CV-19-1004, Memorandum Op., Slip op. at 5 (D. Md., Apr. 13, 2020).

86. Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1676 (2019) (discussing the Religious Exemption and Moral Exemption Final Rules, which were “nearly identical” to the interim final rules held to be procedurally unlawful because they avoided notice and comment).

87. *W. Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204, 1231 (D. Idaho 2018); Glicksman & Hammond, *supra* note 86, at 1676.

88. See Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for “Deconstruction of the Administrative State,”* WASH. POST (Feb. 23, 2017), available at [https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643\\_story.html](https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html) [<https://perma.cc/8KJ3-5TRR>].

89. Maggie Haberman, Michael D. Shear and Glenn Thrush, *Bannon, Key Voice of Populist Right, Exits White House*, N.Y. TIMES (Aug. 19, 2017), at A1.

90. Bannon framed his comments in contrast to the pro-regulatory stance of Democrats: “The way the progressive left runs, is if they can’t get it passed, they’re just going to put in some sort of regulation in an agency. That’s all going to be deconstructed and I think that that’s why this regulatory thing is so important.” Max Fisher, *Bannon’s Vision for a “Deconstruction of the Administrative State,”* N.Y. TIMES (Feb. 25, 2017), at A13.

charged with leading, going well beyond anything prior deregulatory administrations have attempted.<sup>91</sup>

The Trump administration's war on the bureaucracy takes many forms, but the most significant front is the attack on career civil servants and agency expertise.<sup>92</sup> Career civil servants in the agencies are an important source (perhaps the most important source) of influence over regulatory policy.<sup>93</sup> In addition, experts outside the agencies, many of whom sit in academic institutions, are both an important public constituency and source of information and analysis for agencies.<sup>94</sup> Thus, these stakeholders are rivals for any president seeking to exert control over regulatory policy. But even if one believes that policy decisions are ultimately political judgments that should be made by a democratically accountable administration, scientific and technical expertise are critical to developing the evidentiary basis needed to make informed policy choices.

#### A. *Placing Regulated Industry in Charge of the Regulators*

President Trump has appointed numerous officials to lead agencies they have a history of fighting. The EPA in particular has been staffed with former opponents. Scott Pruitt, President Trump's first nominee to lead the EPA, sued the agency fourteen times as Attorney General of Oklahoma, including thirteen lawsuits with industry co-plaintiffs who contributed financially to Pruitt's political causes.<sup>95</sup> His defenders claimed Pruitt was not opposed to clean air and water; he just believed that states could do a better job protecting the environment.<sup>96</sup> Yet as Attorney General of Oklahoma, he eliminated the office's Environmental Protection Unit, settled a major environmental suit against poultry producers, who happened to be among his campaign donors, without seeking any meaningful remedies, and initiated few new environmental lawsuits.<sup>97</sup> Andrew Wheeler, President Trump's second nominee to lead the EPA after Scott Pruitt resigned in disgrace, was a former coal and chemical industry lobbyist who previously fought the EPA's

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91. BELTON AND GRAHAM, *supra* note 79, at 26.

92. For an excellent account of the Trump administration's attack on science and innovations over prior deregulatory administrations, see Thomas O. McGarity & Wendy E. Wagner, *Deregulation Using Stealth "Science" Strategies*, 68 DUKE L.J. 1719 (2019).

93. Kagan, *supra* note 1, at 2254, 2261-62.

94. See Sant' Ambrogio & Staszewski, *supra* note 61.

95. Eric Pooley, *Donald Trump's EPA Pick Imperils Science—And Earth*, TIME (Jan. 17, 2017), available at <https://time.com/4635162/scott-pruitt-science-denial/>; Eric Lipton & Coral Davenport, *Choice for E.P.A. a Frequent Ally of the Regulated*, N.Y. TIMES (Jan. 15, 2017), at A1.

96. Lipton & Davenport, *supra* note 95.

97. *Id.*

regulation of power plants.<sup>98</sup> While serving as Deputy Administrator and then Acting Administrator of the EPA, Wheeler continued the fight for his former clients, rolling back EPA regulations of the coal, oil, and chemical industry meant to protect the environment and public health.<sup>99</sup> President Trump's choice of Assistant Administrator of the EPA's Office of Water, David Ross, sued the EPA over its interpretation of WOTUS while assistant attorney general of Wyoming.<sup>100</sup>

But the pattern has not been confined to the EPA. President Trump nominated former Texas Governor Rick Perry to be Secretary of Energy, a department Perry vowed to eliminate as a presidential candidate (but famously could not name during a debate) and was surprised to discover had little to do with promoting the oil and gas industry.<sup>101</sup> President Trump's nominee to lead the Department of Education, Betsy DeVos, had a record of promoting for-profit schools, thought public schools were a "dead end," and protected failing charter schools in Michigan from public oversight meant to prevent them from expanding.<sup>102</sup> Like Perry, DeVos also seemed to know little about the responsibilities of the federal agency she was nominated to lead.<sup>103</sup>

Once confirmed, Trump's appointees tapped lobbyists for regulated industries to staff the top policy positions within their agencies. For example, Secretary of Agriculture Sonny Perdue, who himself had a background in the industry regulated by the Department of Agriculture ("USDA"), hired lobbyists for top positions in the Department, including Kailee Tkacz, a former lobbyist for the corn syrup industry who was appointed to advise the USDA on federal dietary guidelines.<sup>104</sup> She had no training in science, public health, or nutrition.<sup>105</sup>

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98. Ellie Kaufman, *Senate Confirms Former Coal Lobbyist Andrew Wheeler to lead EPA*, CNN (Feb. 28, 2019), available at <https://www.cnn.com/2019/02/28/politics/andrew-wheeler-confirmation/index.html>.

99. *Id.*

100. Patrick Crow, *Ross Appointed to Run EPA Water Office*, WATERWORLD; DRINKING WATER (Oct. 1, 2017), available at <https://www.waterworld.com/drinking-water/article/16191800/ross-appointed-to-run-epa-water-office>.

101. Coral Davenport & David E. Sanger, *Perry Seeks Cabinet Job He Initially Misconstrued*, N.Y. TIMES (Jan. 19, 2017), at A14.

102. Kate Zernike & Yamiche Alcindor, *DeVos's Education Hearing Erupts Into Partisan Debate*, N.Y. TIMES (Jan. 18, 2017), at A15.

103. Kate Zernike, *Nominee's Knowledge of Education Basics Is Open to Criticism*, N.Y. TIMES (Jan. 19, 2017), at A16.

104. Alex Kotch, *Corn Syrup Lobbyist Is Helping Set USDA Dietary Guidelines*, INTERNATIONAL BUSINESS TIMES (Feb. 2, 2018), available at <https://www.ibtimes.com/political-capital/corn-syrup-lobbyist-helping-set-usda-dietary-guidelines-2649307>.

105. Kotch, *supra* note 104. See also Michael LaForgia and Kenneth P. Vogel, *White House Lawyer Delivers For Ex-Patrons in Gun Industry*, N.Y. TIMES (July 14, 2020), at A1 (describing how a former gun industry lobbyist successfully overturned a ban on sales of firearm silencers to private foreign buyers, which had been enacted by the State Department to protect American troops abroad).

Placing industry advocates in charge of their regulators is not entirely novel for a deregulatory administration. Most federal agencies must balance the benefits of regulations in furtherance of their primary missions with the costs of compliance.<sup>106</sup> Deregulatory administrations argue that federal agencies have gone too far in the direction of their primary missions, such as clean air or safe workplaces, and ignored or downplayed the costs of complying with these regulations, such that they are not cost justified.<sup>107</sup> Nevertheless, the Trump administration seems to have given new meaning to the phrase, the fox guarding the hen house.<sup>108</sup>

### B. *Undermining Career Staff and Agency Expertise*

Once confirmed, these political appointees have sought not only to promote President Trump's deregulatory agenda, but also to undermine the capacity of their agencies to function effectively. First, the political leadership has often shut out career staff from important regulatory decision-making, instead inviting regulated industries or small groups of trusted personnel to formulate policy, whether or not they have the relevant expertise.<sup>109</sup> The EPA once again has been at the epicenter of these tactics. Under Pruitt and Wheeler, the EPA has relied on "work fed to it by trade associations representing the polluting industries that the agency regulates."<sup>110</sup> When the EPA and the Department of Transportation ("DOT") sought to develop a regulatory impact analysis to justify rolling back the existing vehicle emission standards, they relied on a small group in the DOT with limited experience in mathematical modeling.<sup>111</sup> Career staff were reportedly "completely locked out [of] doing any technical work on these documents . . . ."<sup>112</sup>

The administration has also subjected agency scientists to greater political oversight and pressured them to manipulate their scientific analysis to meet the administration's policy objectives. After members of the American Farm Bureau Federation and representatives of Dow Chemical

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106. See generally OFFICE OF MGMT. & BUDGET, 2018, 2019 and 2020 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT.

107. *President Trump's Historic Deregulation is Benefitting All Americans*, WHITE HOUSE (Oct. 21, 2019), available at <https://www.whitehouse.gov/briefings-statements/president-trumps-historic-deregulation-benefitting-americans/>.

108. See McGarity & Wagner, *supra* note 92.

109. See Richard L. Revesz, *Institutional Pathologies in the Regulatory State: What Scott Pruitt Taught Us About Regulatory Policy*, 34 J. LAND USE & ENVT. L. 211, 224 (2019); Davenport, *supra* note 74.

110. Revesz, *supra* note 109, at 224. These problems continued to exist after Pruitt resigned from EPA. *Id.* at 233–34.

111. See Davenport, *supra* note 74.

112. *Id.*

lobbied the EPA to deny a long-standing petition to ban the pesticide chlorpyrifos, which has been “linked to lower I.Q.s and developmental delays among agricultural workers and their children,” Administrator Pruitt’s chief of staff “scared” the agency’s career staff and instructed them to provide analysis to support the denial of the petition, including explaining why the agency had shifted its position.<sup>113</sup> Administrator Pruitt also reorganized the EPA so that the Office of Research and Development, the scientific research arm of the EPA, would report to a political appointee rather than the agency’s science advisor, “a significant departure from the historic insulation of EPA’s Office of Research and Development from political controls.”<sup>114</sup>

The influence of regulated industry in policy development reinforces the administration’s emphasis on reducing regulatory burdens over the public benefits of regulations.<sup>115</sup> To be sure, if a proposed rule is published for comment, the broader public will have an opportunity to weigh in on the rule, including public interest groups that support the agencies’ primary missions.<sup>116</sup> But as E. Donald Elliott has suggested, “[n]otice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.”<sup>117</sup> Moreover, there is a widespread perception that agencies are often unwilling to make significant changes to their policies once they have published a notice of proposed rulemaking (“NPRM”).<sup>118</sup> If they do make significant changes without additional opportunities for public comment, they risk judicial invalidation of the final rule.<sup>119</sup> Thus, the reliance on regulated industries to craft policy privileges the voice of a narrow slice of the public in rulemaking and makes it more difficult for a broader array of public interests to be heard.

In addition to sidelining their own career staff, the Trump administration has reduced the government’s access to advice from independent outside experts and scientists.<sup>120</sup> Many agencies use scientific advisory committees

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113. Eric Lipton & Roni Caryn Rabin, *In Memos, E.P.A. Vowed ‘New Day’*, N.Y. TIMES (Aug. 19, 2017), at A13.

114. McGarity & Wagner, *supra* note 92, at 1753-54.

115. H. Beales, et al., *Government Regulation: The Good, The Bad, & The Ugly*, REGULATORY TRANSPARENCY PROJECT (June 12, 2017), available at <https://regproject.org/wp-content/uploads/RTP-Regulatory-Process-Working-Group-Paper.pdf>.

116. TOM C. CLARK, U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26 (WM. W. GAUNT & SONS, INC. 1973) (1947).

117. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

118. See William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC. 576, 582 (2009) (“[T]here is a common perception among those who participate in and study the administrative process that rulemaking initiatives become increasingly difficult to stop or alter as they progress in their development.”).

119. Bressman & Staszewski, *supra* note 63, at 191.

120. UNION OF CONCERNED SCIENTISTS, ABANDONING SCIENCE ADVICE 2-3 (2019).



to identify regulatory problems, to obtain feedback on potential solutions, and to review drafts of proposed and final rules.<sup>121</sup> There are currently around 1,000 federal advisory committees, over 200 of which are “scientific or technical in nature.”<sup>122</sup> The members of these committees:

weigh evidence and debate issues ranging from the safety and effectiveness of new drugs to the best course of action for minimizing lead exposure from drinking water. These scientists and technical specialists, often serving without pay or receiving only modest stipends, provide an important vehicle for providing decisionmakers with robust, professional, and up-to-date scientific advice.<sup>123</sup>

A study conducted for the Administrative Conference of the United States concluded that federal advisory committees supply agencies with a high volume of quality information and “what is tantamount to free advice.”<sup>124</sup>

Yet the Trump administration has disbanded important scientific advisory committees,<sup>125</sup> reduced the influence of others,<sup>126</sup> and replaced dozens of committee members from the academy with scientists working for regulated industries.<sup>127</sup> Soon after taking office, Administrator Pruitt dismissed academic members of the EPA’s Board of Scientific Counselors and Science Advisory Board and replaced them with scientists who consulted for or worked directly for the fossil fuel and chemical industries.<sup>128</sup> Then in October 2017, Administrator Pruitt announced a new policy banning scientists from sitting on EPA advisory committees while receiving EPA grant funding.<sup>129</sup> Although justified as preventing conflicts of interest, the agency already had rules in place to prevent actual conflicts and the agency did not ban scientists working for regulated industries or states that sued the

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121. *Id.* at 3.

122. *Id.*

123. *Id.*

124. Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Governance*, 14 YALE J. ON REG. 451, 527 (1997).

125. McGarity & Wagner, *supra* note 92, at 1758 (discussing how “Interior Secretary Zinke allowed DOI’s Advisory Committee on Climate Change and Natural Resource Science to expire” and Acting EPA Administrator Andrew Wheeler “disbanded two large advisory panels that” assisted EPA with its review of scientific documents in connection with its five-year reviews of the National Ambient Air Quality Standards, “thereby depriving [EPA] of the particularized expertise that it needed to do its job”).

126. McGarity & Wagner, *supra* note 92, at 1750 (discussing Trump’s proposed budget “would . . . have reduced appropriations for the operating costs of EPA’s Science Advisory Board by 84 percent . . .”).

127. McGarity & Wagner, *supra* note 92, at 1760–61.

128. Coral Davenport, *E.P.A. Widens An Open Door For Businesses*, N.Y. TIMES (May 8, 2017), at A1; McGarity & Wagner, *supra* note 92, at 1760–61.

129. Warren Cornwall, *Trump’s EPA Has Blocked Agency Grantees from Serving on Science Advisory Panels* (Oct. 31, 2017), available at <https://www.sciencemag.org/news/2017/10/trump-s-epa-has-blocked-agency-grantees-serving-science-advisory-panels-here-what-it>.

EPA.<sup>130</sup> The rule bars “a large number of academic researchers . . . in fields ranging from toxicology to epidemiology” from providing their expertise to the EPA because “the agency is one of the largest funders of environmental research.”<sup>131</sup> Moreover, scientists who receive these “highly competitive federal grants” are likely to be “the ones most qualified to provide objective and transparent scientific advice to EPA” on the difficult scientific and technical questions it must answer as part of its regulatory decision-making.<sup>132</sup> The move is unprecedented.<sup>133</sup> Not surprisingly, the new policy was developed by politicians working with regulated industries, without any input from the agency’s career staff or scientists.<sup>134</sup>

In addition to limiting the expert advice available to EPA, Administrator Wheeler has proposed a rule that would limit the scientific research that would otherwise be available to the agency. The so-called “Strengthening Transparency in Regulatory Science Rule” would prohibit EPA from utilizing scientific studies unless the raw data (including confidential personal medical information) is publicly available and validated by a separate EPA Review.<sup>135</sup> “The measure would make it more difficult to enact new clean air and water rules because many studies detailing the links between pollution and disease rely on personal health information gathered under confidentiality agreements.”<sup>136</sup> Moreover, if applied retroactively, the rule would undermine the support for significant existing regulations based on groundbreaking epidemiological studies in which patients consented to the use of their medical information but not their names and other identifying information.<sup>137</sup> It is ironic that EPA seeks to limit the use of epidemiological studies in the midst of the worst epidemic since 1918.

The proposal would also require the agency to run alternative assumptions and models for every regulatory initiative and give “explicit consideration” to alternative risk assessment models proposed by private parties:

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130. Irfan, *supra* note 40; Cornwall, *supra* note 129; Hannah Northey & Sean Reilly, *Proposal to Ban EPA Grantees from Agency Science Advisory Boards Stirs Controversy*, SCIENCE MAGAZINE (Oct. 18, 2017), available at <https://www.sciencemag.org/news/2017/10/proposal-ban-epa-grantees-agency-science-advisory-boards-stirs-controversy>.

131. Lisa Friedman, *Pruitt Ousts Scientists From Panels At the E.P.A.*, N.Y. TIMES (Nov. 1, 2017), at A9.

132. See Northey & Reilly, *supra* note 130.

133. McGarity & Wagner, *supra* note 92, at 1762.

134. McGarity & Wagner, *supra* note 92, at 1765–66.

135. Lisa Friedman, *E.P.A. Plans Limit On Evidence Used For Health Rules*, N.Y. TIMES (Nov. 12, 2019), at A1.

136. *Id.* See also Niiler, *supra* note 18 (the rule had its genesis in proposed legislation that failed in the Senate).

137. Niiler, *supra* note 18.

By inundating the agency with dozens of models for a particular regulatory project and forcing EPA to extract and evaluate the dozens and often hundreds of underlying assumptions and algorithms buried in each model, private parties can slow the staff's progress to a crawl. Whatever signals might have been produced by several high quality, rigorously vetted agency models are at risk of being lost in the cacophonous noise of unlimited, unrestricted industry-created models.<sup>138</sup>

Finally, the Trump administration has limited the ability of career staff with scientific expertise to be heard inside and outside the agency. For example, the Department of the Interior ("DOI") gave dozens of career scientists and technical experts, including many climate scientists, fifteen days to accept reassignment to new jobs where their expertise was not needed or to retire from the agency.<sup>139</sup> The DOI also now requires "policy review" by upper-level officials of "news releases on scientific studies undertaken by the U.S. Geological Service ("USGS")."<sup>140</sup> And the USDA and the USGS have prohibited government scientists from presenting at nongovernmental conferences on disfavored topics, such as the contribution of climate change "to the spread of wildfires, information of obvious relevance to the public and decisionmakers attempting to deal with wildfires throughout the West."<sup>141</sup>

The administration's war on career civil servants and scientific expertise has had predictable effects. For example, the EPA's Scientific Advisory Board, a panel of forty-one scientists, including many appointed by the Trump administration, concluded that the new WOTUS Rule "ignores science 'by failing to acknowledge watershed systems'" and had "'no scientific justification' for excluding certain bodies of water from protection under the new regulations . . . ."<sup>142</sup> A study published in SCIENCE MAGAZINE concluded that the administration's 2018 cost-benefit analysis of the Obama fuel-efficiency standards it sought to replace had "fundamental flaws and inconsistenc[i]es, is at odds with basic economic theory and empirical studies, is misleading, and does not improve estimates of costs and benefits of fuel economy standards beyond those in the 2016 analysis."<sup>143</sup> Outside scientists have also criticized the methodology used to calculate the benefits

138. McGarity & Wagner, *supra* note 92, at 1732–33.

139. *Id.* at 1754–55; Dan Federman, *The Plot to Loot American's Wilderness: A Little-Known Bureaucrat Named James Cason Is Reshaping the Department of the Interior*, THE NATION (Nov. 16, 2017), available at <https://www.thenation.com/article/the-plot-to-sell-americas-wilderness>.

140. McGarity & Wagner, *supra* note 92, at 1725.

141. *Id.* at 1727 & n.19.

142. Davenport, *supra* note 38.

143. Antonio M. Bento et al., *Flawed Analyses of U.S. Auto Fuel Economy Standards*, 362 SCIENCE 1119 (Dec. 7, 2018), available at <https://science.sciencemag.org/content/362/6419/1119>.

of the administration's ACE Rule, which the administration promulgated to replace the Clean Power Plan.<sup>144</sup>

### C. *Running Against the Bureaucracy*

In undermining the agencies they oversee, President Trump's appointees take their cue from the President, who frequently attacks his own administration.<sup>145</sup> Running against unelected "bureaucrats" as an electoral candidate is nothing new.<sup>146</sup> In 1980, Ronald Reagan ran against "big government" on a platform calling for deregulation and cutting both taxes and government welfare subsidies.<sup>147</sup> During his second term Reagan famously remarked, "I've always felt the nine most terrifying words in the English language are: I'm from the Government, and I'm here to help."<sup>148</sup> Yet the context of these words is often forgotten. They were in fact a bit of self-deprecating humor prefacing President Reagan's announcement of measures his administration was taking to help farmers in distress:

In order to see farmers through these tough times, *our* administration has committed record amounts of assistance, spending more in this year alone than any previous administration spent during its entire tenure . . . . Earlier this month *we* announced *our* decisions on grain exports, and this morning *we* announced a drought assistance task force and, with regard to storage problems, the availability of price-support loans for all the grain in this year's crop. The message in all this is very simple: America's farmers should know that *our* commitment to helping them is unshakable. And as long as I am in Washington, their concerns are going to be heard and acted upon.<sup>149</sup>

Like Presidents Clinton and Obama, President Reagan "owned" the administrative state when he was marshalling the government on behalf of

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144. Jessica Wentz, *Four Important Points About EPA's Affordable Clean Energy Rule*, CLIMATE LAW BLOG (June 20, 2019), available at <http://blogs.law.columbia.edu/climatechange/2019/06/20/four-important-points-about-epas-affordable-clean-energy-rule/>; Lisa Friedman, *E.P.A.'s Reckoning Is a Rosier View Of Air Pollution*, N.Y. TIMES (May 21, 2019), at A1.

145. See, e.g., Ed Pilkington, *Trump is now Attacking his own Administration, including Jeff Sessions*, THE GUARDIAN (July 20, 2017), available at <https://www.theguardian.com/us-news/2017/jul/19/donald-trump-jeff-sessions-recusal>.

146. Republican Party Platform of 1980, available at <https://www.presidency.ucsb.edu/documents/republican-party-platform-1980>.

147. *Id.*

148. The President's News Conference, (Aug. 12, 1986), available at <https://www.reaganfoundation.org/media/128648/newsconference2.pdf>.

149. *Id.* (emphasis added).

Americans.<sup>150</sup> Indeed, the federal government grew significantly during the Reagan administration.<sup>151</sup>

President Trump not only ran against the government as a candidate, but since taking office he has frequently positioned himself as an outside observer of the government, even when he is presenting its efforts to help Americans.<sup>152</sup> Perhaps nothing illustrates the contrast as well as the President's daily Coronavirus Task Force Press Briefings. For example, on April 3, 2020, when the President announced the Center for Disease Control's ("CDC's") new guidance that Americans wear face masks to prevent the spread of Covid-19, President Trump began by reading in monotone from a written statement:

Today also the CDC is announcing additional steps Americans can take to defend against the transmission of the virus . . . . In light of these studies the CDC is advising the use of non-medical cloth face covering as an additional *voluntary* [emphasis in original] public health measure.<sup>153</sup>

At this point, the President looked up and spoke directly into the camera, implying these were now his own unprepared statements:

So it's voluntary. You don't have to do it. But *they* suggest it for a period of time. But, ah, this is *voluntary*. I don't think I'm going to be doing it. But you have a lot of ways you can look at it . . . .<sup>154</sup>

The President then returned to his prepared remarks, eyes glued to the paper, before once again looking up to say:

So with the masks it's going to be really a voluntary thing. You can do it. You don't have to do it. I'm choosing not to do it. But some people [raising his hands to suggest no opinion] may want to do it

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150. Kagan, *supra* note 1, at 2302 (2001); Juliet Eilperin, *Obama has vastly changed the face of the federal bureaucracy*, WASH. POST: POLITICS (Sept. 20, 2015), available at [https://www.washingtonpost.com/politics/obama-has-vastly-changed-the-face-of-the-federal-bureaucracy/2015/09/20/73ef803a-5631-11e5-abe9-27d53f250b11\\_story.html](https://www.washingtonpost.com/politics/obama-has-vastly-changed-the-face-of-the-federal-bureaucracy/2015/09/20/73ef803a-5631-11e5-abe9-27d53f250b11_story.html).

151. Alex Park, *These Charts Show How Ronald Reagan Actually Expanded the Federal Government*, MOTHER JONES (Dec. 30, 2014), available at <https://perma.cc/5PKD-9ZN5>.

152. Niall Stanage, *The Memo: Can Trump run as an outsider?*, THE HILL (June 20, 2019), available at <https://thehill.com/homenews/the-memo/449436-the-memo-can-trump-run-as-an-outsider>.

153. President Donald Trump, White House coronavirus task force briefing (Apr. 3, 2020), available at <https://www.youtube.com/watch?v=rYanQFMVK0>.

154. *Id.*

and that's okay. It may be good. Probably will. *They're* making a recommendation. It's only a recommendation. It's *voluntary*.<sup>155</sup>

This is a far cry from President Reagan's declaration of "*our* commitment" to helping farmers or what Kagan describes as President Clinton's appropriation of the bureaucracy as "*his* agencies; *he* was responsible for their actions[.]"<sup>156</sup>

Of course, this is a friendly version of Trump's relationship with the administrative state. At other times he has singled out both his own appointees and civil servants for ire when he believes they have not been sufficiently loyal to him.<sup>157</sup> And for some time the President has been tweeting his complaints about a "deep state" trying to undermine him.<sup>158</sup> This is not to suggest that President Trump never seeks to appropriate administrative action in the manner of his predecessors.<sup>159</sup> But like other presidents he is careful about the actions he claims as his own and the audiences to which he trumpets his administration's accomplishments. As Kagan acknowledged in *Presidential Administration*, presidential influence over regulatory policy only promotes democratic norms to the extent the president's appropriation is highly publicized.<sup>160</sup> Trumpeting administrative actions to loyal supporters does not promote transparency or democratic norms.

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155. *Id.* (emphasis on "voluntary" in the original; emphasis on "they" added); see also *C.D.C. Recommends Wearing Masks in Public; Trump Says, 'I'm Choosing Not to Do It'*, N.Y. TIMES (Apr. 3, 2020), available at <https://www.nytimes.com/2020/04/03/world/coronavirus-news-updates.html>. President Trump did not wear a mask in public until July 11, 2020. Jonathan Lemire, *Trump wears mask in public for first time during pandemic*, A.P. (July 11, 2020), available at <https://apnews.com/7651589ac439646e5cf873d021f1f4b6>.

156. Kagan, *supra* note 1, at 2302 (emphasis in original). See The President's News Conference, *supra* note 148.

157. See, e.g., George Packer, *How to Destroy a Government*, THE ATLANTIC (April 2020) (describing Trump's tweets attacking Acting FBI Director Andrew McCabe and Ambassador Masha Yovanovitch personally for perceived lack of loyalty); Elisha Fieldstadt, *Trump Attacks Jeff Sessions: 'I Don't Have an Attorney General'*, NBC.COM (Sept. 19, 2018), available at <https://www.nbcnews.com/politics/donald-trump/trump-attacks-jeff-sessions-i-don-t-have-attorney-general-n910986> (describing Trump's personal attacks against Attorney General Sessions after he recused himself from the Russia investigation); Zachary Fryer-Biggs, *Trump's attacks on Mueller's investigation are getting way more personal*, VOX (Apr 11, 2018), available at <https://www.vox.com/2018/4/11/17224268/trump-mueller-attacks-tweets-rosenstein-crazy> (describing Trump's attacks against Special Counsel Mueller and other DOJ officials).

158. See Trump Twitter Archive, available at <http://www.trumptwitterarchive.com/archive/deep%20state/ttff>.

159. See *supra* notes 19-24 and accompanying text.

160. Kagan, *supra* note 1, at 2332-33, 2339.

## IV. WEAKENING CONGRESSIONAL INFLUENCE OVER AGENCY POLICY

The third major rival to the president for control over regulatory policy is Congress.<sup>161</sup> Congress has a wide array of tools to shape administrative action, from the statutory mandates it enacts, to its appropriation of agency budgets, to various forms of oversight.<sup>162</sup> The Trump administration has weakened congressional influence in at least two ways: (1) by evading Senate confirmation of numerous leadership positions and (2) by directing the attention of agencies away from their primary statutory mandates.<sup>163</sup>

A. *Vacancies and Acting Positions*

Despite complaining that the “deep state” is plotting against him, President Trump has been slow to place his own people in charge of the administrative state.<sup>164</sup> Part of this is attributable to the logjams that now routinely plague the Senate confirmation process.<sup>165</sup> But Trump has also been slow in nominating executive branch officials.<sup>166</sup> By last count, of the 755 key positions requiring Senate confirmation, 138 have no nominee, 11 were announced but awaiting formal nomination by the President, 108 had been formally nominated, and 517 had been confirmed.<sup>167</sup>

Trump has explained his failure to nominate more officials to lead the agencies by maintaining that many of the positions are unnecessary:

That’s because I don’t need as many people . . . . I’m generally not going to make a lot of the appointments that would normally be—because you don’t need them. I mean, you look at some of these agencies, how massive they are, and it’s totally unnecessary. They have hundreds of thousands of people.<sup>168</sup>

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161. Hugh M. Hall Jr., *Responsibility of President and Congress for Regulatory Policy Development*, 26 LAW & CONTEMPORARY POLICY 261, 275-76 (1961).

162. Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 158 (2006).

163. See *infra* Part IV A, & B.

164. Keith B. Belton & John D. Graham, *Trump’s Deregulation Record: Is It Working?*, 71 ADMIN. L. REV. 803, 834 (2019).

165. *Id.*

166. Randall Lane, *Trump Unfiltered: The Full Transcript Of The President’s Interview With Forbes*, FORBES (Oct. 10, 2017), available at <https://www.forbes.com/sites/randalllane/2017/10/10/trump-unfiltered/#353a9c8d7a58>.

167. Partnership for Public Service, Political Appointee Tracker, <https://ourpublicservice.org/political-appointee-tracker/> (last visited July 5, 2020). More than 1,200 positions in the executive branch require Senate confirmation.

168. Lane, *supra* note 166.

This suggests either that Trump has no interest in using the bureaucracy to accomplish his goals,<sup>169</sup> which requires political appointees to marshal the administrative state in support of the president's objectives, or that he does not understand the different roles played by political appointees and career civil servants. It may also be a little bit of both.

While Trump has sent fewer nominees to the Senate for confirmation, he has made greater use of acting heads of executive branch agencies than his predecessors.<sup>170</sup> By one estimate, "more than a fifth of Trump's presidency has seen departments run by acting heads."<sup>171</sup> Without a Senate-confirmed leader, the work of the agency or department may slow to a halt:

[T]he career staff of a leaderless regulatory unit may simply be told that there will be no new regulations (including new deregulations) considered until the administration has appointed leadership to the unit . . . . Thus, the pace of new regulations under Trump may be slow in part because the White House was slow in putting the Trump team into place.<sup>172</sup>

Trump has used acting officials in part out of necessity, as he awaits Senate confirmation of his nominees.<sup>173</sup> But it also seems to be partly by choice. He has said that he likes "acting [positions] because I can move so quickly . . . . It gives me more flexibility."<sup>174</sup> The President can place acting officials into their positions quickly and avoid long, drawn-out confirmation battles.<sup>175</sup>

These "acting" officials are particularly vulnerable to removal.<sup>176</sup> Although most political appointees in the executive branch serve at the pleasure of the president, removing such an official normally means the president must consider the difficulties of obtaining Senate confirmation of a replacement.<sup>177</sup> The President need not worry about the costs of an additional

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169. See, e.g., Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 978 (2009) ("a deregulatory president may prefer vacancies to appointees, forcing lack of regulation and enforcement because there are no senior officials in place").

170. Philip Bump, *Trump Relies on Acting Cabinet Officials More Than Most Presidents. It's not an Accident*, THE WASHINGTON POST (Apr. 8, 2019), available at <https://www.washingtonpost.com/politics/2019/04/08/trump-relies-acting-cabinet-officials-more-than-most-presidents-its-not-an-accident/>.

171. *Id.*

172. ACCF Report at 20.

173. See Bump, *supra* note 170.

174. *Id.*

175. *Id.*

176. See Peter Baker, *Trump's Efforts to Remove the Disloyal Heightens Unease Across His Administration*, N.Y. TIMES (Feb. 22, 2020), available at <https://www.nytimes.com/2020/02/22/us/politics/trump-disloyalty-turnover.html>.

177. *Id.*



Senate confirmation when the official he removes has not been confirmed.<sup>178</sup> Moreover, to the extent the President is willing to staff the senior leadership of the bureaucracy with officials who have not been confirmed, then even Senate-confirmed appointees are at greater risk of removal.<sup>179</sup> Indeed, there has been far more turnover during the Trump administration of both senior officials in the White House and agency leadership than during previous administrations.<sup>180</sup>

Avoiding the Senate confirmation process reduces congressional control over the administrative state.<sup>181</sup> The Senate can use the confirmation process to extract promises from both the nominees and the President.<sup>182</sup> It is also more difficult to confirm choices who might lack the necessary experience or espouse extreme views.<sup>183</sup> President Trump has encountered some long delays in the Senate due to nominees that even the Republican-controlled Senate deemed inappropriate for the positions.<sup>184</sup> Acting leaders truly derive all their support and power from the president and typically have no independent base of support.<sup>185</sup> Not in the agencies, and often not in Congress.<sup>186</sup> One is hard pressed to find an appointee in the Trump administration with the independent political base of a Colin Powell or a Hillary Clinton.

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178. *Id.*

179. *Id.*

180. Kathryn Dunn Tenpas, *Tracking Turnover in the Trump Administration*, BROOKINGS (June 2020), available at <https://www.brookings.edu/research/tracking-turnover-in-the-trump-administration/>.

181. See Beermann, *supra* note 162, at 136-37 (describing congressional influence over “who the President chooses for appointments,” particularly “[w]ith regard to less senior positions,” using “thinly-veiled or implicit threats of withholding the cooperation that the executive branch needs from Congress . . .” in other areas).

182. *Id.* (describing congressional influence over “who the President chooses for appointments,” particularly “[w]ith regard to less senior positions,” using “thinly-veiled or implicit threats of withholding the cooperation that the executive branch needs from Congress . . .” in other areas); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523, 1551 (2013) (“With the reduction of congressional control over federal regulatory decisionmaking, Congress has turned to confirmations as a vehicle to influence agency policy and operations.”). See also Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 ADMIN. L. REV. 259, 285 (2017) (finding that “the Senate engages in more frequent oversight of agencies whose leaders are Senate-confirmed appointees”).

183. See Turley, *supra* note 182, at 1551.

184. See, e.g., Mihir Zaveri, Trump’s NOAA Pick, Barry Myers, Asks to Withdraw Nomination, N.Y. TIMES (Nov. 21, 2019) (discussing how Barry Lee Myers’ nomination to lead the National Oceanic and Atmospheric Administration (NOAA) stalled in the Senate for more than two years due to perceived conflicts of interest arising from his family’s private weather forecasting company that relies largely on data from NOAA, leaving NOAA without a Senate-confirmed leader for the longest period since the agency was created in 1970). See also MICHAEL LEWIS, THE FIFTH RISK 190 (2016) (discussing how Myers’ business relied on NOAA data and he sought to prevent the agency from sharing its data with the public).

185. See O’Connell, *supra* note 169, at 944-45.

186. *Id.*

### B. *Undermining Statutory Mandates*

Finally, as mentioned in Part I, in addition to privileging the interests of a narrow slice of the public, E.O. 13,771 also undermines congressional control over the regulatory state. Congressional legislation establishes agencies' broad mandates and not infrequently imposes mandatory rulemaking obligations on agencies.<sup>187</sup> If Congress has required an agency to promulgate a specific regulation, the agency can hardly decline to do so because it cannot find two existing regulations to repeal.<sup>188</sup> Nor can an agency rescind two existing regulations required by statute merely because the agency seeks to promulgate another.<sup>189</sup> Of course, like most executive orders that seek to control regulatory agencies, E.O. 13,771 includes a boilerplate disclaimer that “[n]othing in this order shall be construed to impair or otherwise affect . . . the authority granted by law to an executive department or agency, or the head thereof . . . .”<sup>190</sup> But even leaving aside mandatory rulemaking obligations, it is hard to imagine how the 2-for-1 rule would be consistent with an agency's rulemaking authority.<sup>191</sup> Even when Congress grants agencies broad discretion in promulgating rules, the agency must still exercise this discretion by applying its statutory mandate to the facts of the regulatory environment in which it operates.<sup>192</sup> If an existing regulation is a valid exercise of its authority based on the facts found, unless the facts have changed, it is hard to see how the rule should be repealed merely because the agency has decided that its statutory mandate requires the promulgation of what might be a completely unrelated rule. Thus, the disclaimer of E.O. 13,771 threatens to swallow the entire 2-for-1 rule.

To be sure, at least in my own view, presidents may direct agencies to consider factors not specifically addressed by Congress in its legislation. Thus, although the imposition of CBA on executive agencies by President Reagan was initially controversial because, among other reasons, it was not explicitly prescribed by Congress, and in some cases Congress has provided agencies with more explicit guidance on how they should consider costs and benefits, CBA has always been part of pragmatic regulatory decision-making.<sup>193</sup> There are a few statutes that prohibit any consideration of costs

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187. GARVEY & SHEFFNER, *supra* note 72, at 1.

188. Beermann, *supra* note 162, at 77-78.

189. TED GAYER, ET AL., EVALUATING THE TRUMP ADMINISTRATION'S REGULATORY REFORM PROGRAM 12 (2017).

190. Exec. Order No. 13,771 § 5(a)(i), 82 Fed. Reg. 9339 (Jan. 30, 2017).

191. GAYER, *supra* note 189.

192. *Id.*

193. Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 448 (2008) (discussing the use of CBA as an analytical tool in the 1938 Flood Control Act).

for specific decisions,<sup>194</sup> but Congress typically instructs agencies to consider the impact on the economy when pursuing their statutory mandates. Thus, while there may be a few cases in which CBA under E.O. 12,866 may not, consistent with an agency's mandate, be *the*, or even *a* deciding factor in an agency's final rule, it generally does not pose a threat to the relationship between Congress and the agencies. Rather, when done well, regulatory analysis under E.O. 12,866 can bring transparency, consistency, and analytical rigor to the CBA that has long been a staple of administrative decision-making. The 2-for-1 rule, in contrast, threatens a broad array of statutory mandates.

Thus, while prior executive orders to some extent encroached on Congress's relationship to the agencies, E.O. 12,771 essentially says that federal agencies should not consider the primary missions assigned to them by Congress. This is an executive order different in kind from those that preceded it.

#### V. THE DEATH OF OUR DELIBERATIVE REPUBLIC?

The Framers of the U.S. Constitution divided the federal government into three branches with distinct powers and responsibilities not only to avoid the concentration of government power, but also to foster robust deliberation concerning the public good before the implementation of new government policies.<sup>195</sup> They designed the national legislature to encourage reasoned deliberation about the public good among “public-spirited” political representatives with different perspectives and opinions.<sup>196</sup> Bicameralism and presentment would require three institutions with different political constituencies and outlooks to engage in the process of creating new law, providing a voice to a wide variety of different interests.<sup>197</sup> Moreover, the “‘representative’ . . . character of elected officials encourage[d] reason-giving in” deliberations over the public good because elected officials could not merely cite their constituencies as requiring them to vote a certain way.<sup>198</sup> This debate among elected officials was expected in turn to improve the people's understanding of their own true interests and prompt further input from the public, “creating a deliberative dialectic between the people and

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194. See, e.g., *Whitman v. American Trucking*, 531 U.S. 457 (2001) (discussing the setting of National Ambient Air Quality Standards under the Clean Air Act).

195. Michael Sant'Ambrogio, *Standing in the Shadow of Popular Sovereignty*, 95 B.U. L. REV. 1869, 1887, 1890 (2015).

196. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 305 (1988); *THE FEDERALIST* NO. 73, at 381 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

197. U.S. CONST., art. I, 7, cl. 2.

198. Sant'Ambrogio, *supra* note 195, at 1891.

their representatives.”<sup>199</sup> In this way, the Framers distinguished their new republican form of government from a “pure democracy,” in which elected officials were bound by the mandates of their constituencies.<sup>200</sup>

Today, broad congressional delegations of regulatory authority have shifted the locus of much policymaking to federal agencies. But this does not alleviate the need for reasoned deliberation regarding government policy based on input from all relevant interests and accurate information. Without a meaningful role for Congress, agency experts, and the public in regulatory governance, strong presidential control is nothing more than an elected presidential dictatorship. The president may sometimes face re-election, but in the meantime the governmental system cannot be called a republican form of government. Even if a president were able to claim the support of a majority of citizens, democracy would mean little if an electoral victory entitled the president to run roughshod over minority, let alone majoritarian public interests. Our republican system rejects the idea that government policy flows directly from elections.<sup>201</sup>

To be sure, the president has an important role to play in shaping regulatory policy.<sup>202</sup> The Framers themselves recognized the president’s unique democratic character given his political accountability to the national electorate (even when the electorate was much narrower).<sup>203</sup> Moreover, the president indisputably has a constitutional responsibility for overseeing the executive branch under the Take Care clause, even if the shape and extent of that oversight is highly contested.<sup>204</sup> Furthermore, when the president appropriates regulatory policies, they are likely to receive more public attention.<sup>205</sup> But on a practical level, the president is unlikely to be able or inclined to supervise the vast majority of rules promulgated by federal agencies in any meaningful way.<sup>206</sup> For government to function effectively, it cannot depend on the president alone for policy direction.

In addition, even if the president could supervise every policy initiative of the federal bureaucracy, there are limits to how much democratic

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199. Sant'Ambrogio, *supra* note 195, at 1890; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN L. REV. 29, 47 (1985).

200. THE FEDERALIST NO. 10, at 46 (James Madison) (George W. Carey & James McClellan eds., 2001).

201. *Id.*; THE FEDERALIST NO. 71, at 362 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

202. See Hall, *supra* note 161, at 261.

203. THE FEDERALIST NO. 73, *supra* note 126, at 371-72 (Alexander Hamilton).

204. See Sant'Ambrogio, *supra* note 125, at 1901-02.

205. See Hall, *supra* note 161, at 268.

206. “From FY 2006 through FY 2015, [f]ederal agencies published 36,289 final rules in the *Federal Register*.” OFFICE OF MGMT. & BUDGET, 2016 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 7 (2016).

legitimacy any single political representative can provide regulatory actions given the diverse interests and perspectives of the American public.<sup>207</sup> Few agency regulations are the subject of electoral campaigns, and voters choose national candidates for a variety of reasons unrelated to their policy proposals. Moreover, democracy does not end with elections in our republican form of government.<sup>208</sup> Democratic accountability requires government officials to render a justifiable account of what they are doing on behalf of the public based on the “republican idea . . . [that] the business of government is public business.”<sup>209</sup> The relevant public is not only the electorate as a whole, much less the constituents of a prevailing party suggested by majoritarian politics. The government does not merely owe a duty of account to “We the People” as a disembodied, collective whole or the majorities that elected it. Rather, the duty of account by government “is owed to persons individually, to persons arrayed in ragged and sometimes ad hoc sub-sets of ‘the people,’ as well as to ‘the people’ itself as a notionally and occasionally unified entity.”<sup>210</sup> In other words, federal agencies are accountable to all members of the public who are affected by their decisions.

The Trump administration has gone beyond merely enhancing presidential influence over regulatory policy and sought to undermine rival voices and interests in regulatory decision-making. Rather than fostering a deliberative process in which all interests are considered, the administration has focused agencies on the concerns of regulated industries over those of Congress and the broader public, limited opportunities for public engagement in regulatory decision-making beyond a narrow slice of stakeholders, undermined the scientific and technical expertise critical to rational policymaking, and weakened congressional control over agency leadership. The privileging of a narrow slice of interests in government policy is at odds with the Framers’ conception of a deliberative republic.

It is also not effective. The deadly results are on full view in the midst of the Nation’s greatest challenge since the Second World War. Ignoring the advice of experts and the science of infectious diseases, President Trump was slow to take the novel coronavirus seriously.<sup>211</sup> When he finally recognized

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207. Farina, *supra* note 60, at 988 (“[S]trong presidentialism . . . is premised upon a fundamentally untenable conception of the consent of the governed. The ‘will of the people,’ as invoked in that effort, is artificially bounded in time, homogenized, shorn of ambiguities—in short, fabricated.”); Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 867-72 (2012) (criticizing the presidential control model as “deeply problematic”).

208. See Sant’Ambrogio, *supra* note 195, at 1883-84 (discussing the relationship between the people and the federal government established by the Constitution).

209. Jeremy Waldron, *Accountability: Fundamental to Democracy*, 19 (N.Y. Univ. Sch. Of Law, Working Paper No. 14-13, 2014).

210. *Id.* at 16.

211. Eric Lipton et al., *Despite Timely Alerts, Trump Was Slow to Act*, N.Y. TIMES (April 12, 2020), at A1.

the threat it posed to the Nation, he was either unwilling or unable to use the levers of power available to the president to mount an effective and coordinated federal response.<sup>212</sup> Moreover, the numerous unfilled executive branch jobs and high turnover have left the government ill equipped to handle the public health crisis or its economic consequences.<sup>213</sup> Regardless of who wins the White House in November, we will be living with the consequences of presidential maladministration for a long time.

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212. Michael D. Shear et al, *Passing Off Virus Burden, White House Fueled Crisis*, N.Y. TIMES (July 19, 2020), at A1 (describing how the White House abdicated its responsibility for leading a national response to the novel coronavirus).

213. Jennifer Steinhauer & Zolan Kanno-Youngs, *Under Trump, Unfilled Posts Hinder Action*, N.Y. TIMES (Mar. 27, 2020), at A1.