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# “SLASH AND BURN” IN THE U.S. CONGRESS AND THE TRUMP ADMINISTRATION: PERMANENT DAMAGE OR SHORT-TERM SETBACK?

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## Abstract

Since his election, Donald Trump has introduced significant measures undermining existing administrative law doctrines in ways that could restructure policy-making procedures. These deregulatory actions, taken through executive orders or presidential appointments, have increasingly diminished the technocratic expertise needed to implement public policies and could have potential far-reaching impacts on the federal administration. The legislative branch was also involved. Before the 2018 election ended Republican control, the House passed two statutory initiatives – the Regulation from the Executive in Need of Scrutiny (REINS) and the Regulatory Accountability Act (RAA) – that would have had similar consequences if they had been enacted into law. This article evaluates both short-term and long-term effects in terms of transparency and democratic/constitutional balance.

## Keywords

REINS, RAA, Congress, Trump’s Presidency, transparency, rulemaking procedures, expertise.

## Résumé

— *La « politique de la terre brûlée » au Congrès et la présidence Trump : dommages permanents ou recul temporaire ? – Depuis son élection, Donald Trump a été à l’origine de mesures importantes qui ont porté atteinte aux doctrines de droit administratif relatives aux procédures décisionnelles au point de modifier profondément l’élaboration des politiques publiques. Ces mesures de libéralisation, prises par le biais d’ordonnances ou de nominations présidentielles, ont de plus en plus réduit l’expertise technocratique nécessaire à la mise en œuvre des politiques publiques. Elles pourraient avoir un impact profond sur l’administration fédérale. Le pouvoir législatif est aussi impliqué dans ces changements. Avant que les élections de 2018 ne mettent fin à la mainmise républicaine sur le Congrès, la Chambre des représentants adopta deux initiatives – le règlement sur la surveillance de l’exécutif (Executive in Need of Scrutiny [REINS]) et la loi sur la redevabilité réglementaire (Regulatory Accountability Act [RAA]) – qui auraient eu des conséquences similaires si elles avaient été transformées en lois. Le présent article évalue les conséquences à court et à long terme en matière de transparence et d’équilibre démocratique/constitutionnel de cette évolution.*

## Mots-clefs

REINS, RAA, Congrès, présidence Trump, transparence, procédures réglementaires, expertise.

Tax cuts to one side, the Trump administration has had little success in passing its agenda through Congress. However, those legislative failures should not blind one to the substantial damage done to the public administration, especially inside regulatory authorities. The administration's concerted efforts to undermine federal government programs, with the exception of security and defence, have made few headlines, but the result will be a hollowing out of government capacity that will not be easy to reverse. In addition, Republican members of Congress have proposed major statutory changes that would transform executive branch rulemaking procedures if passed into law. The US system of checks and balances – broad delegations to the executive, constrained by the democratic safeguards of public participation and reason-giving – is under threat from both the White House and some members of Congress. Judges in the federal courts have pushed back against administration efforts to ignore legal constraints<sup>1</sup>, but the Trump administration and the Republican-controlled Senate are appointing sympathetic judges to the federal judiciary who could overturn key administrative law precedents. However, although the Supreme Court has added two Trump-nominated justices, the shift will take time as sitting judges on the lower courts gradually retire<sup>2</sup>. In the meantime, the President, his appointees, and allies in Congress are working to undermine existing administrative law doctrines in ways that could restructure policymaking procedures and the role of the courts. Some current initiatives are grounded in principled beliefs about the best public policy responses to complex modern problems, but others arise from opposition to government per se and from a kneejerk attraction to the free market.

The United States is a “common law” country with a history of British rule, but unlike most other polities in that tradition, it is not a parliamentary democracy. Instead, the United States has a presidential system with a separation of powers between the legislature and the executive. The US constitutional structure is close to the French model, except that the US lacks a prime minister. Its regulatory statutes allow substantive delegation to the executive, and they mandate rulemaking and adjudicative procedures inside cabinet departments and independent agencies. Rulemaking procedures, most importantly the notice and comment rulemaking provisions of the Administrative Procedure Act (APA) of 1946 §553, aim to increase the transparency and public accountability of regulatory policymaking<sup>3</sup>. Unlike the provisions governing adjudication, these portions of the statute do not primarily protect individual rights against state overreaching; rather they enhance the democratic legitimacy of policymaking inside of the executive in a modern regulatory state that relies on technocratic expertise to make policy. However, these statutory provisions have no strong anchor

1. New York University Law School, Institute for Policy Integrity, reports that as of July 26, 2019, the Trump administration had won only 3 of 43 administrative law cases decided by the federal courts since it took office in January 2017, <https://policyintegrity.org/deregulation-roundup>.

2. President Trump has the potential to fill a record number of vacancies: an anticipated 38 percent of the federal judiciary, compared with the 31 percent appointed by Clinton and 29 percent appointed by Obama. Senior judges make up a much greater share of today's judiciary (24 percent) than under Obama (15 percent) and his predecessors (10 percent or less). See Josh Katz, *Older Judges and Vacant Seats Give Trump Huge Power to Shape American Courts*, *N.Y. Times*, February 14, 2017 (available at <https://www.nytimes.com/interactive/2017/02/14/upshot/trump-poised-to-transform-american-courts.html>). Aggregate statistics may also overstate the impact of Trump's nominations. Russell Wheeler calculates that, even if Trump and his allies fill all current and expected vacancies, those nominated by Republican presidents would constitute outright majorities on only four federal courts of appeals. This would leave seven courts of appeals with a majority nominated by Democratic presidents and two courts of appeals evenly split. See Russell Wheeler, *Trump has reshaped the judiciary but not as much as you might think*, The Brookings Inst., August 27, 2018 (available at <https://www.brookings.edu/blog/fixgov/2018/08/27/trump-has-reshaped-the-judiciary-but-not-as-much-as-you-might-think/>).

3. US Administrative Procedure Act (APA), 5 U.S.C. §§551-559, 701-706.

in the written constitutional text, which was largely drafted before the rise of the modern regulatory/welfare state. Hence, even though some commentators label the APA a “landmark” or “super” statute” with quasi-constitutional stature (Ackerman, 2007; Eskridge and Ferejohn, 2010), it is, in fact, vulnerable to repeal and amendment like any other statute.

Why was a statute that constrains the executive passed in the first place? Stefanie Egidy, James Fowkes and I argue in *Due Process of Lawmaking* (Rose-Ackerman, Egidy, Fowkes 2015, 31-102) that the US separation of powers system gives the legislature an incentive to hold both the president and the independent regulatory commissions to account. Because different political parties may control the executive and one or both houses of Congress, the legislature may seek to oversee executive actions through procedural controls and judicial review, rather than micro-manage the executive’s substantive decisions itself. The risk for legislators, of course, is that US judges trained in the common law will build on the statutory language to further their own views. The interplay between judicial decisions and legislative action, however, ameliorates that risk. Unless constitutional values are at stake, the Congress and the President can override judicial decisions by amending statutes. (Congress can even act alone if it can muster two-thirds majorities in each house). Thus, if the system works well, the judiciary helps to control the bureaucracy and the presidency in the interest of the elected legislature, and, ultimately, the citizens. However, if it works poorly, the judiciary can stray quite far from congressional goals and interfere with effective administration, limited only by the threat of legislative overrides.

At present, however, the threat to settled administrative law principles is coming from executive itself and from legislative initiatives that reveal the fragility of the existing system of administrative law and delegated policymaking. The executive has moved quite far to upset the status quo. Legislative initiatives are unlikely to pass both houses in the short run, but they remain on the agenda of Republican lawmakers. The U.S. Constitution barely mentions the public administration. However, the courts have upheld the constitutionality of the federal regulatory statutes. Independent agencies, not under a cabinet officer’s supervision, have operated with judicial approval since the creation of the Interstate Commerce Commission in 1887. Although the courts have held that some statutory innovations violate the separation of powers, they have permitted others to stand<sup>4</sup>. Of course, court decisions permit but do not require the creation of regulatory agencies and administrative law statutes. The due process provisions of the Constitution create affirmative procedural duties, but these apply to adjudications, not policymaking in the executive. Furthermore, if a statute leaves room for interpretation by those who implement it, officials in the executive branch and in the independent agencies can set priorities that undermine statutory purposes. Such efforts may eventually be struck down by the federal courts, but even so, administrators have a good deal of leeway. Furthermore, the legislature can starve an agency of the budget needed to implement the law and include explicit language in budget bills setting priorities for the executive that may contravene the original purpose of a law. To understand the current challenges and their potential far-reaching impacts, one needs to consider both statutory initiatives in Congress and actions by the executive branch in the Executive Office of the President and the cabinet departments.

4. Compare, for example, *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the independent counsel statute) with *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down a statute as a violation of the separation of powers).

## STATUTORY INITIATIVES

Before the 2018 election returned the House to Democratic Party control, the Republican majority passed and referred to the Senate two bills that would have undermined America's system of regulatory government. This attempted revolution took aim at the APA, which has provided a workable framework since the end of World War II. Under the APA, as developed by the courts and subsequent statutes, Congress responds to market failures and social problems by setting out broad principles, but it does not resolve all questions of implementation – both because it lacks expertise and because it cannot respond quickly to changed conditions.

Under the direction of the political appointees at the head of departments and agencies, the APA requires the civil service to combine its own professionalism with outside expertise and to engage in meaningful public participation. Before issuing a rule with the force of law, officials must engage in a notice and comment process that provides for public notice and an open-ended hearing. The agency cannot restrict who can submit materials. After considering the public's objections, along with comments from the affected industry and others, the agency must justify its final rule with a public statement of reasons. Interested parties can challenge the rule in the courts – with judges reviewing rules in a way that takes the agencies' expertise and political legitimacy into account<sup>5</sup>.

This system is by no means perfect, and there are many proposals to fine-tune its operation<sup>6</sup>, but the bills supported by House Republicans in 115<sup>th</sup> Congress in 2017 would have destroyed the essential value of the rulemaking process. The Regulations from the Executive in Need of Scrutiny (REINS) Act introduced into Congress by Representative Doug Collins on January 03, 2017 would require that major rules with the force of law, issued by cabinet departments and agencies, cannot go into effect unless explicitly approved by a joint resolution of Congress that is signed by the president<sup>7</sup>. Its statement of purpose says that the act will result in a “legislative branch that is truly accountable to the American people for the laws imposed upon them”. Supporters state that the Act will restore balance and democratic accountability, but the real effect will be to bring rulemaking to a virtual halt. It poses as an effort to reduce bureaucracy and increase public accountability, but it

5. US Administrative Procedure Act (APA), 5 U.S.C. §§551-559, 701-706.

6. Some of these critiques and proposals are discussed in Rose-Ackerman, *et al.* (2015) p. 74-93, 98-101. Modern technology is raising new possibilities and hazards. Thus, broad-gauged public input is increasingly feasible using the internet, but so are fake comments generated by computer programs. Thus, the public comments on the Federal Communications Commission's proposed rule to end “net neutrality” were contaminated with thousands of computer-generated comments supporting both sides of the issue. (The final rule ended net neutrality.) See Grimaldi and Overberg (2017) for an investigative report on the Federal Communication Commission (FCC) and other agencies.

7. The version introduced in the Senate by Senator Rand Paul, eventually with 39 co-sponsors, is a slight modification of the House version. The texts are at: S. 21 <https://www.congress.gov/bill/115th-congress/senate-bill/21/text>, and H.R. 26, 115<sup>th</sup> Cong. (2017) <https://www.congress.gov/bill/115th-congress/house-bill/26/text>. In these bills, a major rule is one “that the Office of Management and Budget finds has resulted in or is likely to result in an annual effect on the economy of \$100 million or more; a major increase in costs of prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; OR significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets” (5 USC §804(2)). This definition is taken from the Congressional Review Act under which rules go into effect *unless* Congress passes a joint resolution of disapproval that is signed by the President. Minor rules under REINS would go into effect unless disapproved by a joint resolution. There are exceptions to the requirements for emergencies and threats, for rules dealing with national security and criminal law and budgetary matters. Rules affecting hunting, fishing and camping are exempt, suggesting that at least one lobby group benefits from federal rules.

will do just the reverse. Each major regulation would be considered under an expedited procedure in Congress with limited debate, and if it does not win a majority in each House, the rule dies and can't be reconsidered or reissued in the near future.

REINS is a parody of the democratic process that overlooks the value of expertise and of an open process that accepts input from a range of groups and individuals and produces a publicly reasoned outcome. The proposed statute undermines arguments for delegation based on the value of expertise and the limited time available to legislators. Under REINS's expedited process, most legislators are unlikely to read the (often voluminous) rules before voting on them, and few members of Congress will have the staff support needed to assess the long-term impact of their votes. Although lobbyists will have access to Members, ordinary constituents will likely be left in the dark. As the Senate Committee Minority Report states: “The REINS Act would replace the current system's reliance on science, expertise and public process in developing rules with Congress' partisan considerations and the potential influence of industry lobbyists. ...Members of Congress simply do not have the technical and scientific expertise that agencies possess...”<sup>8</sup>. Faced with such arbitrary second guessing, agencies may decide to abandon rulemaking altogether in favour of case-by-case adjudications that are likely less fair, less well-grounded in expertise, and less transparent<sup>9</sup>.

The more extreme version of REINS that passed the House has a draconian sunset provision requiring Congress, over time, to enact all existing rules as statutory provisions – a recipe for gridlock. New rules that impose costs must be balanced by the repeal of existing rules imposing the same or greater costs. This provision, echoing President Trump's Executive Order 13771 from January 2017, is called “regulatory cut-go”. It is a revival of old proposals for a Regulatory Budget, and has the obvious flaw that the overall benefits of rules and their distributive impacts are not part of the calculation. Furthermore, under the House bill, Congress must review ten per cent of existing rules each year over the next decade. They would be void unless approved<sup>10</sup>. These provisions place an impossible burden on those members of Congress who take their jobs seriously. An enormous number of rules would likely fail to gain approval. They will lapse even if they are essential to the implementation of crucial programs with broad public support.

In January 2019 a group of Republican Senators reintroduced a version of REINS, and it was referred to a committee where it now has 41 co-sponsors<sup>11</sup>. However, even if it passes the Senate, it is very unlikely to pass the House. Unlike the Senate, the House is not a continuing body so that bills passed in one Congress by the House have to be re-enacted by the new Congress if still pending in the Senate when the new Congress convenes.

The second bill that passed the House before the change in party control is the Regulatory Accountability Act (RAA) introduced in the Senate on April 26 2017. If enacted into law, it would have made the rulemaking process more procedurally difficult, and it limits judicial deference to agencies' statutory interpretations and their use of delegated powers. It would

8. Senate Committee on Homeland Security and Governmental Affairs, *Regulations in Need of Scrutiny Act of 2017*, Report together with Minority Views, October 16, 2017, VII. Minority Views, p. 12. The full report is at: <https://www.congress.gov/congressional-report/115th-congress/senate-report/169/1?overview=closed>

9. The Minority Report, *id.*, at p. 11-12, states: “One practical effect of REINS would be to discourage agencies from taking on major rulemakings in the first place and could grind the entire rulemaking process to a halt if they choose to pursue rulemaking”.

10. H.R. 26, 115<sup>th</sup> Cong. (2107) <https://www.congress.gov/bill/115th-congress/house-bill/26/text>, §§ 808, 809

11. The text of the bill, S. 92, 116<sup>th</sup> Congress (2019-2020) is at <https://www.congress.gov/bill/116th-congress/senate-bill/92> It was referred to the Committee on Homeland Security and Governmental Affairs.

have been only slightly less destructive than REINS if enacted into law<sup>12</sup>. Responding to some criticisms of the House version, the Senate bill was amended and had two Democratic co-sponsors out of eight. Yet, it retained some of the most restrictive aspects of the House bill<sup>13</sup>. The Senate bill replaced the concise notice and comment provisions of the APA, which take up less than a page of the US Code, with detailed requirements imposing a very high burden of proof on agencies that enact rules, including burdensome fact-finding and cost/benefit analyses even for rules that do not aim to correct market failures. It essentially would have codified into law the provisions of Executive Order 12866 from October 1993 that requires executive department to perform cost/benefit analyses for major rules that are then evaluated by the Office of Information and Regulatory Affairs (OIRA) in the White House. The bill imposed a very high burden of proof on government entities that seeks to promulgate rules with the force of law in any field. In addition, given the high bar on rulemaking in the RAA, the drafters appear worried that agencies would turn to “guidance documents”. These are documents that articulate the enforcement priorities of the agency and help to guide the choices of regulated entities. The bill makes clear that such documents have no legal status. The RAA appears to have less support than REINS, even among Republicans. It had not been reintroduced in the Senate by mid-2019.

There is a deep tension at the heart of the RAA. The bill seeks to revive “formal rulemaking” with its court-like procedures – procedures permitted under the APA but that have become all but a dead letter. Under the RAA interested parties could petition for oral hearings covering technical matters that would use judicialized procedures, requiring cross-examination and “on the record” decisions. At first glance, those trained in law might support such court-like procedures, but their superficial appeal is misleading. Adversarial judicial procedures are a poor way to judge the truth value of technical material. In science, there are no “parties” in the sense of a court case, but rather debates over the quality of evidence and standards of proof based on scientific, not legal, norms. The agency’s expert personnel ought to be involved in that debate, not pose as neutral observers of a “trial” that produces a record of the arguments pro and con submitted by advocates for each “side” – both documents and oral testimony. Of course, the agency should justify the content of its rules in legal and policy terms, as it now must do under the reason-giving requirements of the APA. The aim of this portion of the RAA seems to be to make it especially difficult to issue rules whenever there is controversy over the facts. Yet, the proposed judicialized response fits awkwardly with calls for use of the scientific method and seems to misunderstand the nature of scientific truth.

The RAA would also prevent the agency from communicating with the public concerning the value of its proposed rule, unless it does so “impartially”. That term is not defined, but it seems to mean that the agency must give “equal time” to opponents. At the same time, well-funded industry groups can mount their own advocacy campaigns using resources not available to civil society groups or the agency itself. Furthermore, after weighing the pros and cons of alternative policies, the professionals in the bureaucracy are likely to believe that they have settled on the best and most realistic response to their statutory mandates. Others may disagree, but they should be able to explain why they drafted the rule as they did.

12. RAA is at H.R. 5, 115<sup>th</sup> Cong. (2017) at: <https://www.congress.gov/bill/115th-congress/house-bill/5>

13. The Senate version introduced as an amendment in the form of a substitute is at <https://www.congress.gov/bill/115th-congress/senate-bill/951/text?r=18>

The RAA would tighten judicial review, with the courts required to apply a “substantial evidence” test in reviewing “high impact rules” with over a billion dollars of effect annually. That test is generally seen as more stringent than the more usual “arbitrary and capricious” test. The Senate bill cuts back on the Supreme Court’s *Chevron* opinion that counsels judges to defer to an agency’s “reasonable interpretation” of a statute if the legislation is silent<sup>14</sup>. It also expands the scope of review to include compliance with the Information Quality Act, a vaguely worded statute that requires Federal agencies to maximize “the quality, objectivity, utility, and integrity of information” that it disseminates<sup>15</sup>. It puts judges in the position of evaluating technical information far from their expertise and tilts the task of statutory interpretation further toward the judiciary. A likely result would be the ineffective implementation of statutory mandates. Once again, as with REINS, the result could well be less rulemaking and more use of case-by-case adjudication in agencies that seek to comply with their substantive policy mandates, not just evade statutory responsibilities.

The overall result of these bills, if enacted into law<sup>16</sup>, would be to paralyze the executive branch and the independent agencies. Of course, President Trump might veto a bill such as REINS because it limits policymaking in the executive branch. However, because these bills all have a deregulatory and an anti-regulatory valence, they might obtain his signature. After all, President Harry Truman signed the Administrative Procedure Act in 1946 even though it imposed costs on the executive<sup>17</sup>. President Trump would, however, discover that both REINS and RAA would have a deeply constricting effect, and they give an opening to those who simply want to stop government in its tracks whatever benefits are lost in the process. Going forward, the prospects for passage of any of these acts is very low, but the Supreme Court may help along those with a deregulatory agenda.

## ACTIONS BY THE TRUMP ADMINISTRATION

In his first deregulatory actions in early 2017, President Trump enacted into law joint resolutions passed by the Republican Congress that voided 14 rules promulgated near the end of the Obama administration. Those actions were permitted under the Congressional Review Act (CRA) of 1996 that permits such repeals within a short time period after the promulgation of a rule<sup>18</sup>. The CRA had only been used once before to void a rule during

14. *Chevron, U.S. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

15. 114 Stat. 2763-154, Public Law 106-554-Appendix C, section 515.

16. Ndlr : à la date du 1<sup>er</sup> août 2019, ces deux projets de loi n’avaient pas été adoptés. Rappelons que pour avoir force de loi, le texte adopté doit être signé par le Président.

17. Studies of the passage of the APA in 1946 contrast its fate with the earlier Walter-Logan bill of 1939-1940. The latter, supported by conservative Republican opponents of the President was vetoed by President Roosevelt. The APA passed by a voice vote. McNollgast (1999) argue that the APA obtained broad support because both Republicans and Democrats obtained part of what they wanted. The Democrats’ concerns were borne out later in 1946 when they lost control of the House, and by Truman’s narrow victory in 1948. Grisinger (2012) argues that many of the practices eventually codified in the APA were already in use in various parts of the bureaucracy, but rulemaking practices were not subject to judicial review before the passage of the APA.

18. *Congressional Review Act [CRA]*, 5 U.S.C. §§801-808. The law is a response to *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), in which the Supreme Court held that legislative vetoes of executive action were unconstitutional. Under the CRA all rules must be submitted to the Government Accountability Office (GAO). For major rules with over \$100 million of annual economic effects (or other major economic consequences) Congress can pass a joint resolution of disapproval if it acts within 60 days of receiving the report from the GAO. If the resolution is signed by the president, the rule is void.

George W. Bush's first months in office<sup>19</sup>. The time limits for the Republican-controlled Congress ran out in May 2017; another 18 eligible rules were not repealed under the time limit, including one that failed in a floor vote<sup>20</sup>.

With the CRA process behind it, the Administration has moved on its own to limit regulations. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has taken the lead. This oversight body, staffed mostly by economists and lawyers, reviews major draft regulations using cost/benefit criteria. Its precursor was established by executive order during the administration of President Jimmy Carter and strengthened by President Ronald Reagan with a mandate to review the costs and benefits of executive branch regulations. Subsequent presidents of both parties have maintained the office, with modifications. EO 12866, issued by President Clinton, remains in force. OIRA has no statutory basis and could be abolished by presidential order, but it has become an established entity, and its head must be confirmed by the Senate. As Wiener and Alemanno (2017, 338) state: "OIRA is a politically accountable body that exercises technocratic review of regulatory power delegated by Congress to the federal agencies"<sup>21</sup>. It serves both political and technocratic purposes.

A bill titled the Independent Agency Regulatory Analysis Act of 2019 was introduced in the Senate in March 2019, but with only four co-sponsors. It would allow the President to extend White House regulatory oversight to independent agencies<sup>22</sup>. Perhaps even Republicans are wary of extending presidential oversight to these agencies.

However, even without legal entrenchment, President Trump has enhanced OIRA's oversight role. Soon after taking office he issued EO 13771 on Reducing Regulation and Controlling Regulatory Costs that requires executive departments and agencies to repeal two rules for every new one they propose<sup>23</sup>. Under the EO, the costs of new regulations must be balanced by the cost savings from the eliminated rules. The EO contains many ambiguities, which were only partly cleared up by a subsequent guidance document, but, like the similar provision in REINS, its fundamental weakness is the complete lack of interest in the social benefits of new or existing regulations. At least, President Trump's first head of OIRA, Naomi Rao, asked agencies to flag rules with large net benefits when they prepare their regulatory agendas for the next fiscal year<sup>24</sup>, but together with reduced agency budgets, the EO will keep officials busy cutting back on rules, rather than responding to substantive regulatory challenges.

In spite of the fanfare of attention to the cost savings from regulatory cutbacks not much has actually happened. In late 2017 a press release touted major savings, announcing a ratio of 22 to 1 for repeals versus the promulgation of new rules (67 repeals to 3 new

19. Pub. L. 107-5, March 20, 2001, repealing a Department of Labor rule dealing with ergonomics.

20. Eric Lipton and Jasmine C. Lee, "Which Obama Rules Are Being Reversed in the Trump Era?" *The New York Times*, May 18, 2017. [https://www.nytimes.com/interactive/2017/05/01/us/politics/trump-obama-regulations-reversed.html?\\_r=0](https://www.nytimes.com/interactive/2017/05/01/us/politics/trump-obama-regulations-reversed.html?_r=0). Application of the CRA still requires the executive to regulate in the contested areas by rules or adjudications. Of course, the Congress and the President could simply amend statutes to make rulemaking unnecessary.

21. For more background, Wiener and Alemanno (2017) compares OIRA with the EU's Impact Assessment Board.

22. The text of the bill, S. 869, 116<sup>th</sup> Congress (2019-2020) is at: <https://www.congress.gov/bill/116th-congress/senate-bill/869/cosponsors>. It repeats a bill introduced in the Senate during the previous Congress.

23. Issued on January 30, 2017, available at: <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/> An interim guidance document was issued on February 2, 2017

24. The text of the letter, sent on August 18, 2017, is here: [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/2017\\_fall\\_agenda\\_data\\_call\\_08242017.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/2017_fall_agenda_data_call_08242017.pdf)

rules). The present value of cost savings was reported as \$8.1 billion. However, the document did not stress the fact that in fiscal 2017 seventy-three percent of the saving was from a decision not to pursue a single change in the Federal Acquisition Regulations (FAR)<sup>25</sup>. A search of the FAR website suggests that the claimed “deregulation” was a proposed rule that would have favored sustainable choices in procurement, such as recycled products and renewable energy, but the rule had only been proposed in January 2017, and its costs had not yet been borne by anyone<sup>26</sup>. The benefits were, of course, ignored. The repeal of rules with real effects on people’s lives will start to take effect in the next fiscal year. Even some business lobbyists are becoming alarmed (Bolen 2017).

The White House has left many posts unfilled and headed a number of government departments and agencies with individuals who have little sympathy for their agencies’ missions. After the 2017 Presidential inauguration, there were about 1,200 posts to be confirmed by the Senate after nomination by the President, and President Trump has left many vacant, at least in part, because he and his cabinet picks are not eager to facilitate government action. Neil Bradley, the chief policy officer at the U.S. Chamber of Commerce official worried that, in spite of business support for regulatory rollbacks, the 2017 regulatory slowdown will mean the “necessary regulations” will not be promulgated “Now we’re in the second phase”, he argues, where the agencies have to do their work (Bolen 2017). Not only can new rules not be enacted; in addition, existing rules cannot be repealed or replaced without going through the notice and comment process.

Furthermore, even when individuals are confirmed for high-level positions, they are often appointees who are opposed to the basic missions of the agencies that they head or manage. The most dramatic examples were Scott Pruitt, the Administrator of the Environmental Protection Agency (EPA) between February 17, 2017 and July 6, 2018, and Ryan Zinke, the Secretary of the Interior (March 1, 2017-January 2, 2019), whose department manages public lands and natural resources. Administrator Pruitt acted to centralize decision-making in Washington and to consult with states, businesses and those affected by federal regulations with no mention of environmental advocacy groups or the public (Dabbs 2017). He sought to overturn existing rules and to delay or cancel ongoing rulemakings (Leven and Kern 2017). Of particular important is the Clean Water or WOTUS (Waters of the United States) rule promulgated by the Obama administration. After numerous court challenges, the EPA finally repealed the rule on September 12, 2019<sup>27</sup>. Secretary Zinke, whose department manages federal lands and National Parks, has emphasized using federal resources as profit centers, deemphasizing conservation and habitat preservation (Traywick 2017). The civil service cannot do much to push back even though they have civil service protections and cannot simply be fired. They can be assigned trivial and humiliating tasks not commensurate with their training and experience. As a result many have headed for the exit<sup>28</sup>. However, both Pruitt and Zinke have now left their positions under clouds related

25. OIRA, Regulatory Reform: Two-for-One Status Report and regulatory Cost Caps, [https://www.reginfo.gov/public/pdf/eo13771/FINAL\\_TOPLINE\\_All\\_20171207.pdf](https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_All_20171207.pdf)

26. <https://www.federalregister.gov/documents/2017/01/18/2017-00480/federal-acquisition-regulation-sustainable-acquisition>

27. For an overview of legal developments in the Trump era see American Bar Association, Section of Civil Rights and Social Justice, and the Environmental Law Institute (2017).

28. An overview of the situation inside the agency is Coral Davenport and Eric Lipton, “Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say”, *New York Times*, August 11, 2017. <https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html>. On the Department of the Interior see; Darryl Fears, “Whistleblower Resigns – Keeping My Voice More Important Than Keeping My Job”, *Washington Post*, October 6, 2017, [https://www.washingtonpost.com/news/energy-environment/wp/2017/10/04/whistleblower-resigns-keeping-my-voice-more-important-than-keeping-my-job/?utm\\_term=.584aa9fce511](https://www.washingtonpost.com/news/energy-environment/wp/2017/10/04/whistleblower-resigns-keeping-my-voice-more-important-than-keeping-my-job/?utm_term=.584aa9fce511)

to conflicts of interest and misuse of expense accounts, but their replacements are equally antagonistic to their agencies' missions<sup>29</sup>.

The exit of experienced staff will exacerbate a long-term negative trend affecting the civil service. Its members are aging with a wave of retirements taking place and with little effort being made to recruit a new cadre of committed public servants (Light 2008). The decline of the civil service is partly the result of budget cutbacks and partly because of increased contracting out of public service responsibilities to the private sector. Sometimes contracting out can be a desirable strategy for tasks with proven private-sector counterparts, but over the long haul, it can hollow out the civil service making it unable to respond competently to new programs and challenges. In *Valuing Bureaucracy* (2017), Paul Verkuil sounds the alarm and makes the case for reinvigorating the professional civil service. His argument has promoted a lively debate between those advocating reform and those who argue that his position is no longer tenable given the recent history of underinvestment in the civil service<sup>30</sup>.

In addition to personnel changes, the Trump administration is pursuing an aggressive deregulatory agenda. However, if the administration wishes to repeal a rule issued through the notice and comment rulemaking procedures of the APA, the repeal must itself go through notice and comment, which takes time<sup>31</sup>. However, for rules on the books, enforcement can be lax. Budget cuts can help; the administration, for example, requested substantial budget cuts for the EPA. Other strategies are reduced inspections and limited reporting requirements, so that neither the agency nor the public can monitor compliance. Some environmental statutes permit the award of attorneys' fees to private parties that bring successful (or partially successful) suits to induce firms and the agency to comply with environmental laws. Fee shifting is one-sided; the government cannot collect from the plaintiffs if it prevails<sup>32</sup>. Those provisions aim to encourage public-interest litigation, however, such suits are not possible unless the plaintiff can obtain government data on which to base claims, and the Trump administration is making that difficult.

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All presidents, try to bend the bureaucracy to their will and try to enact policies that they favor (e.g, Kagan 2001). However, that effort has been particularly aggressive in the Trump administration. The hollowing out of regulatory capacity is occurring largely out of the headlines. Environmental and health and safety advocacy groups are pushing back, but lacking the dramatic appeal of major disasters and amid the drumbeat of other news,

29. "EPA Chief Scott Pruitt Resigns under a Cloud of Ethics Scandals", *New York Times* July 5, 2017, <https://www.nytimes.com/2018/07/05/climate/scott-pruitt-epa-trump.html>. "Interior Secretary Zinke Resigns Amid Investigations", *Washington Post*, December 15, 2018, [https://www.washingtonpost.com/national/health-science/interior-secretary-zinke-resigns-amid-investigations/2018/12/15/481f9104-0077-11e9-ad40-cdf0e0dd65a\\_story.html?utm\\_term=.87d7680f7591](https://www.washingtonpost.com/national/health-science/interior-secretary-zinke-resigns-amid-investigations/2018/12/15/481f9104-0077-11e9-ad40-cdf0e0dd65a_story.html?utm_term=.87d7680f7591). "Ex-Trump Cabinet Heads' Lobbying Gigs Challenge 'Drain the Swamp' Message", *The Hill*, April 27, 2019 (mentioning lobbying background of replacements) [https://www.washingtonpost.com/national/health-science/interior-secretary-zinke-resigns-amid-investigations/2018/12/15/481f9104-0077-11e9-ad40-cdf0e0dd65a\\_story.html?utm\\_term=.87d7680f7591](https://www.washingtonpost.com/national/health-science/interior-secretary-zinke-resigns-amid-investigations/2018/12/15/481f9104-0077-11e9-ad40-cdf0e0dd65a_story.html?utm_term=.87d7680f7591)

30. For a range of views see the series of essays published in the *Regulatory Review*, an online publication of the Penn Program on Regulation, <https://www.theregreview.org/2017/12/04/valuing-professional-government/>

31. *Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co.*, 63 U.S. 29 (1983).

32. For a list of the relevant statutes see Kenneth L. Rosenbaum, "The Supreme Court Limits Fee Awards in Unsuccessful Environmental Suits", *Environmental Law Review* 13: 10244-10248 (1983).

it is difficult to raise public awareness. Yet, the damage done will be hard to reverse even under a future president with a stronger commitment to environmental preservation and health and safety protections.

Rulemaking procedures in the US and in parliamentary and semi-presidential systems ought to require transparency, public participation, and reason-giving (Rose-Ackerman, 1995; Rose-Ackerman *et al.*, 2015; Rose-Ackerman and Perroud, 2013). The goal of these procedures is to increase the democratic legitimacy of delegation consistent with the practical necessity of drawing on technical expertise by shifting some policymaking to the executive and to independent agencies. Of course, procedures take time and resources, but the goal is to legitimize, not stymie, executive policymaking. Some argue that the existing US system “ossifies” rulemaking<sup>33</sup>. That claim is overblown, but it will become accurate if REINS and RAA were to become law and if the Trump administration remains in power. My own view is that American notice and comment requirements, overseen by the judiciary, strike a reasonable balance between democratic accountability and policymaking discretion. Both the restrictive Republican agenda, on the one hand, and the lack of participatory requirements in rulemaking in many parliamentary systems, on the other, risk swinging too far. The former makes expertise-based policymaking increasingly difficult and limits civil society input. The latter structure risks excluding the voices of citizens from fundamental policy choices or, as with the Brexit referendum, encouraging choices that are not based on a thoughtful balancing of the options.

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33. The usual critique, however, is overly aggressive judicial review, not restrictive statutory language (McGarity, 1992 and Pierce, 1995).

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