

Regulation in Transition

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Presidents have long sought to roll back their predecessors' regulatory policies. To do so, they have typically relied on efforts to repeal regulations and to withdraw unpublished or non-final regulations pursuant to "stop-work" orders directed at agency heads. President Trump is no exception. But rather than stick to just the typical playbook, he made aggressive use of three other instruments that had not previously played a significant role: Congressional Review Act disapprovals, requests that courts hold in abeyance pending cases challenging Obama-era regulations, and suspensions of regulations issued under the Obama administration. Through these strategies, the Trump administration was able to reach a far greater proportion of regulations finalized during Obama's presidency than would have been possible under prior practices.

This Article identifies this new trend in aggressive regulatory rollbacks and argues that it is likely to become an enduring feature of American politics. In the current climate, aggressive rollback strategies will lead to an important reconceptualization of the Executive Branch, in which future one-term presidents are unlikely to see a significant portion of their regulatory output on important matters survive and the incentives that presidents face in fashioning their regulatory policies will be significantly different. The changing incentives will affect a broad set of decisions, from transition planning for an incoming administration to the timing of regulatory actions relative to a president's reelection campaign. Important electoral incentives will also be affected.

With reelection now a prerequisite for leaving a significant, durable regulatory legacy, regulatory policy will take on characteristics that are similar to electoral schemes in which multiple votes are necessary for significant decisions like constitutional amendments, which are relatively common in U.S. states and in foreign jurisdictions. But the justifications that undergird these multiple-vote requirements—legitimacy and stability—are largely inapposite to federal regulatory policy and thus do not provide normative support for this reconceptualization of the Executive Branch. Yet despite that, these features are likely to remain part of the political and

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administrative landscape for some time to come and future presidential administrations will need to adjust to them.

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INTRODUCTION

Like many prior presidents,¹ Donald Trump came into office promising to roll back his predecessor’s regulations.² But unlike earlier presidents, President Trump did not stick with just the usual strategy of using “stop-work” orders to attack very late-term regulations³ or going through notice and comment rulemaking to repeal regulations.⁴ Instead, he also made aggressive use of several relatively low-profile tools—disapprovals under the Congressional Review Act,⁵ abeyances in pending litigation,⁶ and suspensions of final regulations⁷—to target many more of the prior administration’s regulations than had been the case in previous transitions. These tools had been used before, but the Trump administration used them far more aggressively than previous administrations had, targeting many significant regulations from as far back as 2015 in areas such as the environment and financial regulation, among others.⁸

The new prominence of these tools is likely to affect future presidential strategies to a significant extent. The ability of future presidents to continue the aggressive use of these rollback tools means that a far larger proportion of regulations promulgated during a president’s last term will be at risk following an inter-party transition. As a result, we are likely to see important changes in how presidents transition into their job, weigh the decision of whether to wait until a second term to promulgate controversial regulations, and get involved in electoral campaigns for Congress and for their successor. Administrative agencies are also likely to change the manner in which they conduct their rulemaking. The impact of these tools will lead to a new conception of

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

² Gregory Korte, *Trump Promises to Reduce Federal Regulations to Pre-1960 Level*, USA TODAY (Dec. 14, 2017), <https://www.usatoday.com/story/news/politics/2017/12/14/trump-promises-reduce-federal-regulations-pre-1960-level/953072001/>; see also REMARKS BY PRESIDENT TRUMP IN JOINT ADDRESS TO CONGRESS (Feb. 28, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-address-congress/> (claiming to have “undertaken a historic effort to massively reduce job-crushing regulations”).

³ Traditionally, after an inter-party transition, a new president instructs agencies to stop work on any pending regulations and to withdraw any that were not officially published in time. See *infra* note 11.

⁴ The Administrative Procedure Act governs such repeals. See *infra* text accompanying notes 15-20.

⁵ The Congressional Review Act allows Congress to disapprove of a regulation within a certain amount of time after it is finalized. See *infra* text accompanying notes 48-63.

⁶ An abeyance is a court order placing a pending challenge to regulation on hold. See *infra* text accompanying notes 114-120.

⁷ Suspensions put a regulation on hold. See *infra* text accompanying note 34.

⁸ See, e.g., 82 Fed. Reg. 19,005 (Apr. 25, 2017) (suspending wastewater limits finalized in 2015); 82 Fed. Reg. 29,246 (Jun. 28, 2017) (suspending ozone rule that was finalized in 2015); 82 Fed. Reg. 16,902 (Apr. 7, 2017) (suspending rule regulating investment advice finalized in June 2016).

the president’s regulatory power—in which two terms, rather than just one, are necessary to promulgate significant and lasting regulatory policy.

Because this shift in regulatory policy has been undertaken with low-visibility strategies, its broader impact has gone largely overlooked, not just by the public, but also by legal scholars. Academic work to date has generally taken the traditional regulatory rollback tools as a given, implicitly seeing the world as one in which presidents must use stop-work orders or notice-and-comment rulemaking to repeal regulations.⁹ As this Article shows, that is no longer the case. And the prior work has failed to grapple with how this transformation in the rollback process will substantially change rulemaking and electoral strategies. Neither has any attention been paid to how the obscure rollback tools used aggressively by the Trump administration are changing our understanding of presidential power.

This Article is the first to identify and analyze this trend in aggressive regulatory rollbacks by the Trump administration.¹⁰ It argues that the new rollback tools are likely to cause an enduring transformation in presidential strategies and to prompt a reconceptualization of Executive Branch power. Future presidents, including for these purposes Trump himself, will need to contend with the possibility that more of their regulatory output will be likely to be undone by a future administration and that will have ripple effects across the regulatory and electoral spheres.

Part I begins by describing the Trump administration’s novel approach to regulatory rollbacks. Prior presidents exercised their powers to dismantle part of a previous president’s legacy by making use of stop-work orders issued by the White House Chief of Staff on Inauguration Day and using regulatory repeals or replacements.¹¹ The strategy of stop-work orders has proved effective for quickly withdrawing rules that had not yet been finalized and final rules that had not yet been published in the *Federal Register*.¹² While the stop-work orders

⁹ Jody Freeman, *The Limits of Executive Power: The Obama-Trump Transition*, 96 NEB. L. REV. 545, 551 (2018); Kathryn E. Kovacs, *Rules about Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515 (2018); Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump’s Deregulatory Binge*, 12 HARV. L. & POL’Y REV. 13, 27, 27 n. 85 (2018).

¹⁰ Gillian Metzger has addressed the Trump administration’s deregulatory efforts while analyzing a broader effort to deconstruct the administrative state, see Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 9 (2016). But this Article takes a different perspective by looking at the impact of the Trump administration’s deregulatory efforts on presidential incentives both inside and outside of the administrative sphere.

¹¹ See 46 Fed. Reg. 11,227, 11,227 (Jan. 29, 1981) (Reagan’s memo instructing agencies to “refrain, for 60 days following the date of this memorandum, from promulgating any final rule”); 58 Fed. Reg. 6074 (Jan. 25, 1993) (Clinton’s memo instructing agencies not to send any proposed or final regulation to the Federal Register for publication until it has been approved by a presidential-appointee); 66 Fed. Reg. 7702 (Jan. 24, 2001) (Bush’s memo instructing agencies not to submit any proposed or final regulations to the Office of the Federal Register and to withdraw any rules that had already been submitted to the Office but not yet published); 74 Fed. Reg. 4435 (Jan. 29, 2009) (Obama’s rule instructing the same); 82 Fed. Reg. 8346 (Jan. 24, 2017) (Trump’s memo instructing the same).

¹² With some exceptions, it is relatively easy to withdraw proposals, see *In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015); *Oklahoma ex rel. Pruitt v. McCarthy*, 2015 WL 4414384, at *5 (N.D. Okla. 2015) (No. 15–0369), and final rules that have not yet been published, see *Kennecott Utah Copper Corp v. Interior*, 88 F.3d 1191, 1206 (D.C. Cir. 1996). But see Joseph Gergen & Anne Joseph O’Connell, *Hiding Plain Sight? Timing and*

have at times also sought to require or encourage agencies to go further and suspend recently finalized rules without notice and comment,¹³ the courts have generally not approved of those types of suspensions.¹⁴ As a result, the effort had limited scope and covered only a small fraction of the prior administration's regulatory output.

In contrast, the other longstanding strategy, involving changing course by either repealing or replacing the prior rule, does not have any temporal limitation, but three factors limit the scope of this effort. First, the Administrative Procedure Act's "arbitrary and capricious" standard and notice and comment requirements both apply to agencies attempting to repeal or replace rules.¹⁵ Agencies must provide a "reasoned explanation" for changing course, show awareness of a changed position, and give "good reasons for the new policy."¹⁶ In addition, when the prior regulation is supported by facts or a well-conducted cost-benefit analysis, an agency faces a significant hurdle in the requirement to explain its reasons for "disregarding facts and circumstances that underlay or were engendered by the prior policy."¹⁷ As a result of all these procedural requirements, regulations can be "sticky" and difficult to change.¹⁸

Second, because the requirements of the Administrative Procedure Act make changing a regulation extremely resource intensive for an agency, the agency may be limited in the number it can undertake at one time.¹⁹ And, third, the difficulty of changing a regulation through regulatory procedures is compounded when a regulation has already gone into effect and the regulated industry has purchased durable equipment to comply with the regulation or modified its production processes, as typically happens with environmental, health, and safety regulations.

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

¹³ Several stop-work orders (issued by Reagan, Bush, Obama, and Trump) have instructed agencies to delay the effective dates of finalized rules. 46 Fed. Reg. at 11,227 (Reagan's memo instructing agencies "[t]o the extent permitted by law" to postpone the effective dates of final but-not-yet-effective regulations by 60 days); 66 Fed. Reg. at 7702 (Bush's memo instructing agencies to postpone the effective date of final regulations by 60 days, subject to an exception for emergency or other urgent situations related to health or safety); 74 Fed. Reg. at 4435 (Obama's memo instructing agencies to "[c]onsider extending for 60 days the effective date" of regulations that have been published, but not yet taken effect); 82 Fed. Reg. at 8346 (Trump's memo instructing agencies "to the extent permitted by law" to postpone the effective dates of regulations that had been published in the Federal Register "but have not taken effect").

¹⁴ See *Env'tl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 818 (D.C. Cir. 1983); *Nat. Res. Def. Council Inc. v. EPA*, 683 F.2d 752, 762 (3d Cir. 1982).

¹⁵ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁶ *Fed. Comm'n Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *accord Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

¹⁷ *Fox Television Stations, Inc.*, 556 U.S. at 516.

¹⁸ Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 90, 123 (2018); *see also* Bethany Davis Noll & Denise Grab, *Deregulation: Process and Procedures that Govern Agency Decisionmaking in an Era of Rollbacks*, 38 ENERGY L.J. 269 (2017) (describing procedures that make it difficult to reverse course); Nina Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 592-93 (2003) (same); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2264 (2001) (describing research on the rigidity and ossification of agency rulemaking).

¹⁹ See Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1423-25, 1439-40 (2012).

A repeal under these circumstances will result in forgone benefits but not save the costs that have already been sunk. Thus, such a repeal will look unattractive as a matter of policy and be vulnerable to judicial review.²⁰

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

The first of these tools—disapprovals under the Congressional Review Act—allowed the Trump administration to directly repeal rules without regard to the Administrative Procedure Act's requirements.²¹ Prior to the Trump administration, only one regulation had been disapproved through the Congressional Review Act: an ergonomics rule promulgated by the Department of Labor under President Bill Clinton.²² In contrast, early in the Trump administration, fourteen regulations suffered this fate.²³ Congressional Review Act disapprovals are particularly valuable because they put an immediate end to the rule in question. In fact, they are more effective than a regulatory repeal because, under the terms of the Act, regulations that are “substantially the same” as the disapproved rule cannot be promulgated in the future without congressional authorization²⁴—a very high bar in our current era of congressional gridlock.²⁵ As a result, of the three rollback strategies, Congressional Review Act disapprovals have been the most effective.

In contrast to disapprovals under the Congressional Review Act, the other two rollback tools that the Trump administration has used in an uncharacteristically aggressive manner—abeyances in pending litigation and suspensions—are an adjunct to, rather than a substitute for, outright repeals. That fact makes them somewhat less valuable. But these tools require control of only the presidency and thus they may be wielded in inter-party transitions where the president's party does not control Congress. In addition, the use of these tools is not limited by the strict timing rules in the Congressional Review Act²⁶ or by the fact that using Senate debate time to disapprove of a regulation requires a difficult tradeoff, early in a new administration, between confirming senior Executive Branch officials, including cabinet members, and voting on disapprovals.²⁷

²⁰ See *Fed. Commc'ns Comm'n*, 556 U.S. at 515-16 (requiring agencies to provide “a more detailed justification” for a change in regulation “when its prior policy has engendered serious reliance interests”).

²¹ See 5 U.S.C. §§ 801-808 (2012).

²² Public Law 107-5, 115 Stat. 7 (2001).

²³ See Coalition for Sensible Safeguards, *CRA Resolutions*, <https://rulesatrisk.org/resolutions/> (last visited Feb. 7, 2019) (providing full list of rules that have been disapproved).

²⁴ 5 U.S.C. § 801(b)(2) (2012).

²⁵ See Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1518-24 (2018) (discussing gridlock).

²⁶ 5 U.S.C. § 801(d) (2012); see also *infra* Part I.A.1 (discussing impact of timing rules).

²⁷ 5 U.S.C. § 802(d) (2012).

Under the second tool, abeyances in pending litigation, courts place a hold on any further briefing, argument, or decision in a challenge to a pending rule while the administration considers whether to change that rule.²⁸ Many administrations have used abeyances, though prior to the Trump administration, abeyances were requested only in cases that were still in the early stages, prior to the completion of briefing.²⁹ In contrast, the Trump administration has sought abeyances in a significant number of cases in which briefing was complete as well as in the challenge to the Clean Power Plan, the Obama-era regulation designed to cut carbon dioxide emissions from existing power plants, where oral argument had already taken place months earlier.³⁰ Placing cases in abeyance can be helpful to a new administration in a number of ways. If a court previously stayed the rule pending the completion of the litigation, as was the case for the Clean Power Plan,³¹ an abeyance extends the life of that litigation and hence the duration of the court stay.³² Even where the abeyance does not keep a regulation from going into effect, it can avoid a decision upholding the challenged rule, which could complicate the agency's efforts to repeal that rule.³³

The third tool that the Trump administration has used to an unprecedented extent in the effort to dismantle Obama-era regulations has involved suspending (or postponing, delaying, and staying) regulations while the agencies work on plans to repeal or amend the targeted rules.³⁴ This strategy has not been a wholesale success because the courts have struck down many Trump-era suspensions.³⁵ But as commentators have noted, because of the short-term quality of suspensions and the fact that the administration can either replace the rule or withdraw the delay, legal disputes over them often end up unresolved.³⁶ With suspensions, agencies can use the lack of implementation to make a repeal seem less significant and make the cost savings of a repeal

²⁸ See, e.g., *Am. Petrol. Inst. v. EPA*, 683 F.3d 382, 389 (D.C. Cir. 2012) (“[W]e can hold the case in abeyance pending resolution of the proposed rulemaking.”); *Order, West Virginia v. EPA*, No. 15-1363 (D.C. Cir. June 26, 2016).

²⁹ See Freeman, *supra* note 9, at 551 (describing practice); *infra* at Part I.B.1.

³⁰ See *infra* part I.B.2.

³¹ See *U.S. Chamber of Commerce v. EPA*, 136 S. Ct. 999 (2016).

³² Cf. *Order, West Virginia v. EPA*, No. 15-1363 (D.C. Cir. June 26, 2016) (Wilkins, J., concurring) (explaining that the abeyance was serving to facilitate the agency's rulemaking).

³³ See *infra* text accompanying notes 106-112.

³⁴ Agencies have labeled these actions “suspensions,” see 82 Fed. Reg. 58,439 (Dec. 12, 2017), “postponements,” see 82 Fed. Reg. 19,005 (Apr. 25, 2017), “delays,” see 82 Fed. Reg. 8499 (Jan. 26, 2017), “stays,” see 82 Fed. Reg. 24,878 (May 31, 2017), or “revisions,” see 82 Fed. Reg. 8894 (Feb. 1, 2017). Despite the different terminology used, all these actions have fundamentally the same effect of suspending the original rule, and thus this Article uses the term “suspension” to refer to them.

³⁵ See Timothy Puko, *For Trump's Deregulatory Agenda, a Reckoning Nears*, WALL ST. J. (Dec. 3, 2018), <https://www.wsj.com/articles/for-trumps-deregulatory-agenda-a-reckoning-nears-1543894538>. See, e.g., *Air All. Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018); *Nat. Res. Def. Council v. Nat. Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018); *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017).

³⁶ Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 993 (2003); see also Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 530 (2011); Part I.C.3 (describing this feature of suspensions).

seem more significant,³⁷ both strategies that can help them in any challenge to the repeal. While suspensions may be a less promising tool for a subsequent administration given the negative reception the Trump administration's efforts received in the courts, subsequent administrations are still likely to find this tool useful.

In Part II, this Article discusses two factors that make it likely that the Trump administration's aggressive regulatory strategy will prompt a fundamental and enduring transformation in presidential administration. First, subsequent presidents are likely to have powerful incentives to use similar playbooks to try to undo the regulations of their immediate predecessors following an inter-party transition. In recent decades, presidents have aggressively used regulatory measures to make policy and have directed the actions of administrative agencies as part of a process that has come to be known as "presidential administration."³⁸ As long as the legislative filibuster remains in place, congressional gridlock will continue to put pressure on presidents to seek policy wins in the regulatory arena.³⁹

In this climate, the Democratic party is not likely to shy away from following the aggressive approach mapped out by the Trump administration after the next inter-party transition. Both the Democratic and Republican parties have participated in tit-for-tat political behavior lately.⁴⁰ And because the parties are becoming more polarized and finding common ground between them is therefore less possible,⁴¹ future administrations will be under similar pressure to use these aggressive tools to cut back on the prior administration's policies as much as possible. For example, if President Trump is succeeded by Democratic control of the presidency, House, and Senate, the temptation of make the most use of the Congressional Review Act is likely to be irresistible. In 2017, when it was Republicans who were invoking it, Democrats complained bitterly about the lack of transparency in Congressional Review Act disapprovals, which take place with no hearings, reports, or public scrutiny of their rationales.⁴²

³⁷ See *Risk Management Programs Under the Clean Air Act, Section 112(r)(7)* (2018) at 38, <https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0907> (taking credit in proposed rescission for saving full compliance costs after suspension of the rule).

³⁸ See Kagan, *supra* note 18, at 2250; Mendelson, *supra* note 18, at 559-61 (describing presidents' desire to make policy through regulation).

³⁹ See Kagan, *supra* note 18, at 2248 (explaining how President Clinton "turned to the bureaucracy" to achieve his policy goals).

⁴⁰ See, e.g., John T. Bennett, *Trump vs. Pelosi: 5 Takeaways From Their Tit-For-Tat as Shutdown Plods On*, ROLL CALL (Jan. 18, 2019 2:52 PM), <https://www.rollcall.com/news/trump-vs-pelosi-five-takeaways-tit-tat-shutdown-plods> (discussing tit-for-tat dynamics on the winter 2019 government shutdown); Nina Totenberg, *Trump, Republicans Continue Remaking The Federal Courts – Even as Senate on Recess*, NPR (Oct. 27, 2018 7:00 AM), <https://www.npr.org/2018/10/27/660643999/trump-republicans-continue-remaking-the-federal-courts-even-as-senate-on-recess> (discussing escalation on judicial nominations).

⁴¹ Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 959-60 (2018); Cynthia R. Farina, Essay, *Congressional Polarization: Terminal Constitutional Dysfunctions?*, 115 COLUM. L. REV. 1689, 1701-05 (2015).

⁴² See Thomas O. McGarity, *The Congressional Review Act: A Damage Assessment*, PROSPECT (Feb. 6, 2018), <https://prospect.org/article/congressional-review-act-damage-assessment>; Laura Barron-Lopez & Arthur Delaney, *Republicans Are Using an Arcane Tool to Handcuff Federal Agencies*, HUFFINGTON POST (Feb. 19, 2017 8:00 AM), https://www.huffingtonpost.com/entry/republicans-cra-federal-agencies_us_58a7776ae4b045cd34c1a44c (quoting Sen. Ben Cardin, Democrat of Maryland, saying "[w]hat the Senate did with the CRA . . . is outrageous").

But not using this tool involves leaving important policy opportunities on the table. Congressional niceties are thus likely to be sacrificed. The same incentives exist for continuing to make aggressive use of abeyances and suspensions.

Second, the risks posed by these three tools are made more significant by the fact that major policy-oriented rules can take a substantial amount of time to propose, promulgate, and implement, and then to shepherd through litigation. For economically significant regulations, which are likely to be at the core of a president's priorities, the process for preparing and finalizing a rule can take two to three years, and sometimes even longer.⁴³ As a result, rules are likely to be finalized close to the end of a president's term when they are at risk of a Congressional Review Act disapproval (as well as abeyances in pending litigation and suspensions). Judicial review, for its part, can take more than a year.⁴⁴ Thus, even if a regulation is safe from a Congressional Review Act disapproval, a pending challenge at the end of the president's term can open the door to an abeyance request if a president of the other party is elected. In addition, a rule's compliance deadlines may stretch the timeline out for several more years, during which the rule is also at risk of a suspension. Thus, even rules that are finalized early enough so that they are safe from the Congressional Review Act and abeyances, might be subject to suspensions as long they have compliance deadlines that remain in the future.

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

Part IV explains how the changes begun by President Trump are likely to lead to an important reconceptualization of the nature of presidential power. A president's ability to make long-lasting policy through regulatory change is likely to depend on winning two—rather than just one—national elections. With this change, the Executive Branch may come to share common characteristics with political systems, like some states or foreign countries, in which multiple popular elections or multiple votes by a legislature are needed for constitutional amendments.⁴⁵ However, the justifications that undergird these multiple-vote requirements—legitimacy and stability⁴⁶—are largely inapposite to federal regulatory policy though and thus do

⁴³ See *infra* Part II.B.1.

⁴⁴ See *infra* text accompanying notes 273-274.

⁴⁵ See John Dinan, The Council on State Governments, *Constitutional Amendment Procedure*, in THE BOOK OF THE STATES 2016 (2016); see also *infra* Part IV.A.1 (describing multiple-vote requirements at the state level and in foreign countries).

⁴⁶ See, e.g., Leo E. Strine Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 22 (2010).

not provide normative support for this reconceptualization. Nonetheless, future presidents will need to adjust to this new reality.

The Article concludes with an explanation of why factors that could stop this reconceptualization of the Executive Branch in its tracks, such as an end to the filibuster for legislation or major changes in doctrines governing the judicial review of administrative action, are unlikely to occur in the foreseeable future.

I. TOOLS TO REVERSE REGULATORY POLICYMAKING

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

A. Congressional Review Act

The Congressional Review Act allows Congress to repeal regulations through streamlined procedures. This Part describes prior administrations' use of the Congressional Review Act and the ways in which the Trump administration has used the Act far more extensively than had previously been the case.

1. History and Purpose

On March 29, 1996, President Bill Clinton signed the Congressional Review Act, which was part of the Small Business Regulatory Enforcement Fairness Act of 1996.⁴⁷ Previously, Congress had used a one-house or two-house legislative veto to disapprove of agency rules.⁴⁸ But in *Immigration & Naturalization Service v. Chadha*, a 1983 decision, the Supreme Court closed this option, holding that a congressional veto over actions of the Executive Branch improperly circumvented the Constitution's requirement of bicameralism and presentment: to have legislation approved by both chambers and presented to the president for signature before becoming law.⁴⁹

Congress responded, through a bipartisan vote, by passing the Congressional Review Act.⁵⁰ Under the Congressional Review Act, Congress can disapprove of a regulation, which

⁴⁷ 5 U.S.C. §§ 801-808 (2012); 15 U.S.C. § 657 (2012).

⁴⁸ Note, *Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2164 (2009).

⁴⁹ *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 928 (1983).

⁵⁰ The House voted to pass it 328-91, with 201 Republicans and 127 Democrats voting yes; 30 Republicans and 60 Democrats voted no. 142 CONG. REC. H2986 (1996). The Senate passed the Act unanimously. 142 CONG. REC. S2316 (1996).

renders the regulation “of no force or effect.”⁵¹ After a disapproval, the regulation that was in effect immediately before the disapproved rule comes back into effect.⁵² In addition, an agency cannot issue another rule that is “substantially the same” as the disapproved rule unless authorized to do so in subsequent legislation.⁵³

The Act can serve as a particularly useful tool for a new president and Congress of the same party to review the actions of the prior president of the opposite party.⁵⁴ The Act bypasses the usual sixty-vote requirement to advance legislation in the Senate,⁵⁵ thus facilitating more partisan disapprovals than would otherwise be possible.⁵⁶

In addition, the Act’s timing rules help enable disapprovals during a political transition. The Act requires that all rules be reported to Congress.⁵⁷ Once Congress receives this report, Congress has sixty legislative working days to introduce a special joint resolution of disapproval of the rule.⁵⁸ When Congress begins a new term, as it does after a presidential election, the statute provides that the review period restarts for anything finalized within the last sixty days of the last Congress, and that all the rules that were finalized then become subject to review and disapproval by the new Congress for an additional sixty legislative days.⁵⁹ Though the exact timing varies because the number of legislative days changes with each congressional calendar, this timing rule means that a new Congress may be able to target regulations issued under a prior

⁵¹ 5 U.S.C. § 801(f) (2012).

⁵² *Id.*; see 82 Fed. Reg. 54,924 (Nov. 17, 2017) (explaining that after disapproval of the Stream Protection Act, the regulation’s text would revert to the “regulatory text in effect immediately prior to January 19, 2017, the effective date of the Stream Protection Rule”); see also *Nat. Res. Def. Council v. EPA*, 683 F.2d 752, 763 (3d Cir. 1982) (vacating a suspension rule and making clear that the original rule’s deadlines were back in effect); 83 Fed. Reg. 62,268 (Dec. 3, 2018) (explaining that the Chemical Disaster Rule was in effect after a court decision vacating the agency’s suspension of the rule).

⁵³ 5 U.S.C. § 801(b)(2) (2012); see MAEVE P. CAREY, ET AL., CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 1 (2016).

⁵⁴ Note, *supra* note 48, at 2167-69; CAREY, ET AL., *supra* note 53, at 1; see RICHARD S. BETH, CONG. RESEARCH SERV., RL31160, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT 1 (2001); Philip A. Wallach & Nicholas W. Zeppos, *How Powerful is the Congressional Review Act?*, BROOKINGS (Apr. 4, 2017), <https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/>.

⁵⁵ 5 U.S.C. § 802(d)(2) (2012).

⁵⁶ Note, *supra* note 48, at 2167-69; CAREY, ET AL., *supra* note 53; see BETH, *supra* note 54; Wallach & Zeppos, *supra* note 54.

⁵⁷ 5 U.S.C. § 801(a) (2012).

⁵⁸ § 802(a).

⁵⁹ § 801(d); See DANIEL R. PÉREZ, CONGRESSIONAL REVIEW ACT FACT SHEET, REGULATORY STUDIES CENTER (Nov. 21, 2016), <https://regulatorystudies.columbian.gwu.edu/congressional-review-act-fact-sheet>.

administration going back several months⁶⁰ and that the new Congress may have a few months to pass the disapproval resolutions.⁶¹

Resolutions of disapproval passed under the Congressional Review Act need to get the president's signature to become law. The president can veto the resolution,⁶² and a veto override would require a two-thirds majority of both houses of Congress, as for all legislation.⁶³ Thus, during non-transition times, resolutions, even if passed by both chambers of Congress, are unlikely to become effective because the president is likely to veto a regulation disapproving a regulation promulgated during her administration, and a veto override would require bipartisan support.⁶⁴

2. *Pre-2017 Transitions*

Three inter-party transitions have occurred since the passage of the Congressional Review Act: from Bill Clinton to George W. Bush, from George W. Bush to Barack Obama, and from Barack Obama to Donald Trump; in all three cases the new president's party also controlled both chambers of Congress, thereby making Congressional Review Act disapprovals a realistic possibility.⁶⁵ But prior to the Trump Administration, the Act had been successfully used only once.⁶⁶ In November 2000, while the results of the presidential election were still being contested, the Occupational Safety and Health Administration (OSHA) promulgated the

⁶⁰ CHRISTOPHER M. DAVIS & RICHARD S. BETH, CONG. RESEARCH SERV., IN10437, AGENCY FINAL RULES SUBMITTED AFTER MAY 16, 2016, MAY BE SUBJECT TO DISAPPROVAL IN 2017 UNDER THE CONGRESSIONAL REVIEW ACT 2 (Feb 4, 2016) (explaining that the Republican-controlled Congress could target any regulations issued under the Obama Administration on or after June 13, 2016); BETH, *supra* note 54, at 3-4, (explaining timing rules); CURTIS W. COPELAND & RICHARD S. BETH, CONG. RESEARCH SERV. RL34633, CONGRESSIONAL REVIEW ACT: DISAPPROVAL OF RULES IN A SUBSEQUENT SESSION OF CONGRESS at CRS-9-CRS-10 (Sept. 3, 2008) (same).

⁶¹ See CRA RESOLUTIONS, <https://rulesatrisk.org/resolutions/> (explaining that the period for Congress to pass disapprovals for regulations issued under Obama ended on May 11, 2017).

⁶² See *id.*

⁶³ DAVIS & BETH, *supra* note 60, at 2.

⁶⁴ During the Obama presidency, after the Democrats lost their majority in Congress, members of the Republican-controlled Congress sponsored bills under the Act to disapprove of rules issued by the Obama administration, but all of the attempts were vetoed. DAVIS & BETH, *supra* note 60, at 2. And under the Trump Administration, certain factions in Congress have attempted to use the Act to signal opposition to the administration's policies, even when the resolution has no hope of ultimately passing. See Marianne Levine, *Senate Votes to Overturn Trump Donor Disclosure Rule*, POLITICO (Dec. 12, 2018), <https://www.politico.com/story/2018/12/12/senate-democrats-overturn-trump-donor-disclosure-1057535>.

⁶⁵ See U.S. SENATE, PARTY DIVISION, <https://www.senate.gov/history/partydiv.htm> (providing party breakdown in the Senate for each Congress); U.S. HOUSE OF REPRESENTATIVES, PARTY DIVISIONS OF THE HOUSE OF REPRESENTATIVES, 1789 TO PRESENT, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (same for House); see also Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J. L. & PUB. POL'Y 187, 243 (2018).

⁶⁶ Michael D. Shear, *Trump Discards Obama Legacy, One Rule at a Time*, N.Y. TIMES (May 1 2017), <https://www.nytimes.com/2017/05/01/us/politics/trump-overturning-regulations.html>. In general, it has been difficult for Congress to engage in systematic oversight of agency decisionmaking due to "institutional and political obstacles." Mendelson, *supra* note 18, at 648, 570 (describing congressional oversight of agency decisions as "relatively ad hoc" and "fragmented").

Ergonomics Rule, requiring employers to take measures to reduce ergonomic injuries in the workplace.⁶⁷

But the Small Business Administration claimed that OSHA had vastly underestimated the cost to employers and vigorously objected to the rule.⁶⁸ And in March 2001, after George W. Bush's election, the 107th Congress voted to overturn the regulation under the Congressional Review Act.⁶⁹ The disapproval of the Ergonomics Rule passed the Senate, which at the time was evenly split between Republicans and Democrats (but controlled by Republicans because of the possibility of vice presidential tie breaks),⁷⁰ with 50 Republicans and 6 Democrats voting yes.⁷¹ In the House, which was under Republican control, 206 Republicans, 16 Democrats, and 1 Independent voted for the disapproval.⁷² President Bush subsequently signed the resolution of disapproval and the Ergonomics Rule was invalidated.⁷³

That was the last time the Act was used before the Trump administration. During the same George W. Bush transition period, there were a few other attempts by members of Congress to use the Congressional Review Act to disapprove of regulations issued in the last days of the Clinton Administration, but they were unsuccessful.⁷⁴ At the beginning of the Obama presidency, the Democratic majorities did not use the Congressional Review Act to undo any Bush-era rules.⁷⁵ Though the Bush administration had attempted to minimize the number of late-term rules it finalized,⁷⁶ there were twenty-two rules that may have been eligible for disapproval.⁷⁷ But rather than resort to using the Congressional Review Act, the Obama administration focused its early attention on filling cabinet and subcabinet positions and used

⁶⁷ 65 Fed. Reg. 68,262 (Nov. 14, 2000); *see also* Robert Pear, *After Long Delay, U.S. Plans to Issue Ergonomics Rules*, N.Y. TIMES (Nov. 22, 1999), <https://www.nytimes.com/1999/11/22/us/after-long-delay-us-plans-to-issue-ergonomic-rules.html>.

⁶⁸ Pear, *supra* note 67.

⁶⁹ *See* 66 Fed. Reg. 20,403 (Apr. 23, 2001); Note, *supra* note 48, at 2170.

⁷⁰ U.S. SENATE, THE UNFORGETTABLE 107TH CONGRESS (Nov. 22, 2002), https://www.senate.gov/artandhistory/history/minute/unforgettable_107th_congress.htm (last visited Nov. 5, 2018).

⁷¹ 147 CONG. REC. 2,873 (2001). The 107th Congress had 220 Republicans, 213 Democrats and 2 Independents in the House. The Senate had 50 Republicans and 50 Democrats. CONGRESS PROFILES, 107TH CONGRESS (2001-2003), <http://history.house.gov/Congressional-Overview/Profiles/107th/> (last visited Jul. 5, 2017).

⁷² S.J.RES 6 (107TH): ERGONOMICS REGULATIONS RESOLUTION, <https://www.govtrack.us/congress/votes/107-2001/h33> (last visited Feb. 7, 2019).

⁷³ Note, *supra* note 48, at 2170.

⁷⁴ MORTON ROSENBERG, CONG. RESEARCH SERV., RL30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE at 9-10 (May 8, 2008) (listing resolutions).

⁷⁵ There were 263 Democrats (including five Delegates and the Resident Commissioner) and 178 Republicans in the House, and 58 Democrats; 2 Independents, who caucused with the Democrats; and 40 Republicans in the Senate. JENNIFER E. MANNING, CONG. RESEARCH SERV., R40086, MEMBERSHIP OF THE 111TH CONGRESS: A PROFILE 1 (2009).

⁷⁶ Memorandum from Joshua B. Bolten, White House Chief of Staff, to the Heads of Executive Departments and Agencies (May 9, 2008), <http://policyintegrity.org/documents/BoltenMemo050908.pdf>; Note, *supra* note 48, at 2174.

⁷⁷ Note, *supra* note 48, at 2175; *see also* O'Connell, *supra* note 36, at 472 (describing numerous midnight regulations issued in waning days of Bush presidency).

regular rulemaking procedures, rather than the Congressional Review Act, to overturn at least some of the targeted rules.⁷⁸

3. *The Trump Administration's Record*

Despite having been used successfully only once in the first twenty years of its existence, the Congressional Review Act received significant interest after the November 2016 election, in which Republicans gained unified control of government.⁷⁹ The Congressional Research Service estimated that Congress could target for disapproval any completed rules submitted to Congress on or after June 13, 2016, and that Congress had until early May 2017, to pass the disapproval resolutions.⁸⁰

In January 2017, as soon as the new administration and Congress were sworn in and with the clock ticking on the 60-legislative-day limit, congressional Republicans got to work disapproving Obama regulations.⁸¹ Congress passed fourteen joint resolutions of disapproval, which were all signed by President Trump.⁸² The fourteen disapproved regulations included four environmental regulations as well as regulations covering diverse topics such as health care and limits on gun ownership for the mentally ill.⁸³

The House passed an additional resolution, disapproving the Department of Interior's regulation restricting methane pollution at mining facilities, known as the Waste Prevention Rule, but that resolution failed to pass the Senate on a 49-51 vote, when Republican Senators Collins, Graham, and McCain refused to vote for it.⁸⁴ Senator McCain explained that he had

⁷⁸ Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 740-727 (2011); Emily E. Williams, *HHS Proposes Rescission of Conscience Rule*, LEXOLOGY (Mar. 19, 2009), <https://www.lexology.com/library/detail.aspx?g=197683f9-eceb-4c3f-9d8f-a1dc99384d51>; 74 Fed. Reg. 10,207 (proposed Mar. 10, 2009) (to be codified at 45 C.F.R. pt. 88); Note, *supra* note 48, at 2176.

⁷⁹ After the election, both the House and the Senate had Republican majorities. The House had 240 Republicans (including one Delegate and the Resident Commissioner of Puerto Rico), 197 Democrats (including four Delegates), and four vacant seats. JENNIFER E. MANNING, CONG. RESEARCH SERV., R44762, MEMBERSHIP OF THE 115TH CONGRESS: A PROFILE (2018). The Senate had fifty-two Republicans, forty-six Democrats, and two Independents, who both caucused with the Democrats. *Id.*

⁸⁰ See CONG. RESEARCH SERV., IN10437, AGENCY FINAL RULES SUBMITTED ON OR AFTER JUNE 13, 2016, MAY BE SUBJECT TO DISAPPROVAL BY THE 115TH CONGRESS (2016).

⁸¹ See Brian Naylor, *Republicans Are Using An Obscure Law To Repeal Some Obama-Era Regulations*, NPR (Apr. 9, 2017), <https://www.npr.org/2017/04/09/523064408/republicans-are-using-an-obscure-law-to-repeal-some-obama-era-regulations>; John J. Vecchione, *the Congressional Review Act and a regulatory agenda for Trump's second year*, THE HILL (Mar. 31, 2017), <http://thehill.com/blogs/congress-blog/politics/326636-the-congressional-review-act-and-a-deregulatory-agenda-for>; Shear, *supra* note 66.

⁸² COALITION FOR SENSIBLE SAFEGUARDS, *supra* note 23.

⁸³ *Id.*; see Alex Guillén, *GOP Onslaught on Obama's 'Midnight Rules' Comes to an End*, POLITICO (May 7, 2017 7:10 AM), <https://www.politico.com/story/2017/05/07/obama-regulations-gop-midnight-rules-238051>. In addition to disapproving the fourteen Obama-era regulations during those initial sixty days, later in 2017, Congress also disapproved two other actions issued by the Consumer Financial Protection Bureau. See *Repealing the CFPB's Arbitration Rule*, REG. REV. (Nov. 6, 2017), <https://www.theregreview.org/2017/11/06/repealing-cfpb-arbitration-rule/>.

⁸⁴ H.J. Res. 36, 115th Cong. (2017); 163 Cong. Rec. S2,852 (daily ed. May 10, 2017).

voted against the measure because of his concern that the agency could otherwise be blocked from issuing future methane regulations under the statute’s bar against “substantially the same” regulations.⁸⁵ The main constraint on the use of the Congressional Review Act to disapprove of Obama-era rules was the provision for ten hours of debate in the Senate for each disapproval⁸⁶ and the Act’s limit on the number of legislative days that the new Congress had to pass the resolutions.⁸⁷ Likely as a result of these constraints, Congress targeted but did not succeed in repealing eighteen other rules in early 2017.⁸⁸

4. *Future Uses*

The successful use of the Congressional Review Act during the Trump administration demonstrates that it is a powerful tool to attack a prior president’s legacy, though, as discussed further below,⁸⁹ the incentives to use the tool might be somewhat different for a pro-regulatory versus anti-regulatory president. Future administrations will have to weigh using limited Senate time for confirming presidential appointments against using it for Congressional Review Act disapprovals.⁹⁰ The Obama and Trump administrations both engaged in this calculation, reaching opposite conclusions.

In addition, future administrations will need to consider the impact of the statute’s bar on promulgating “substantially the same” regulations absent congressional authorization.⁹¹ The Congressional Review Act does not define the meaning or scope of the term, what criteria should be considered, or which institution should make such a determination, and the issue has never been litigated.⁹²

Despite that uncertainty, the statute likely bars an agency from issuing a new rule with a new explanation or cosmetic changes⁹³ as well as a rule accomplishing essentially the same

⁸⁵ Tom DiChristopher, *John McCain Just Delivered Trump a Rare Loss in His Bid to Roll Back Energy Rules*, CNBC (May 10, 2017), <https://www.cnbc.com/2017/05/10/mccain-delivered-trump-a-rare-loss-in-his-bid-to-kill-energy-rules.html>.

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

⁸⁷ 5 U.S.C. § 801(d) (2012).

⁸⁸ COALITION FOR SENSIBLE SAFEGUARDS, *supra* note 23; see also Eric Lipton & Jasmine C. Lee, *Which Obama-Era Rules Are Being Reversed in the Trump Era*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/interactive/2017/05/01/us/politics/trump-obama-regulations-reversed.html>.

⁸⁹ See *infra* Part I.A.4.

⁹⁰ See Midnight Rulemaking: Shedding Some Light: Hearing Before the H. Subcomm. On Comm. and Admin. Law of the Comm. on the Judiciary, 111th Cong. 23 (2009) (statement of Rep. Jerry Nadler).

⁹¹ 5 U.S.C. § 801(b) (2012).

⁹² CAREY, ET AL., *supra* note 53, at 1; see Daniel Cohen & Peter L. Strauss, *Recent Developments: Regulatory Reform & The 104th Congress: Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 104 (1997); Finkel & Sullivan, *supra* note 78, at 740-42; Julie A. Parks, *Lessons In Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187, 199-202 (2003).

⁹³ See Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J. L. & PUB. POL’Y 187, 250 (2018).

purpose.⁹⁴ For example, as Senator McCain feared, disapproving the Department of Interior’s Waste Prevention Rule could bar Interior from issuing a future regulation similarly aimed at cutting waste in oil and gas mining.⁹⁵

But for a future antiregulatory president, the bar would not present too much of an obstacle. The idea that an agency in a subsequent administration would be barred from regulating in that area would likely be considered a plus.

And even for a pro-regulatory administration, the “substantially the same” bar might not be all that significant. First, some of the Trump administration’s rules take the form of repeals and rollbacks.⁹⁶ A subsequent administration’s Congressional Review Act disapproval of a repeal would probably not stand in the way of a measure regulating the activity because a rule that accomplished the exact opposite of a repeal is unlikely to be deemed “substantially the same” as the repeal.⁹⁷

Second, even for rollbacks that are not outright repeals, a Congressional Review Act disapproval resolution could be of great value to a pro-regulatory administration. Under the Congressional Review Act, a disapproved rule must be “treated as though such rule had never taken effect,” allowing the previous regulatory regime to come back into effect.⁹⁸ In the case of an administration seeking to reverse course on a rule that weakened the Clean Power Plan, for example, such a disapproval would have the salutary effect of putting the Clean Power Plan back in place.⁹⁹ And the disapproval would probably not stand in the way of the subsequent promulgation of an even more stringent rule because the strengthening of a standard is unlikely to be deemed “substantially the same” as the weakening of that standard.

Also, the impact of the “substantially the same” provision may be muted by the Congressional Review Act’s prohibition of judicial review over any “determination, finding, action, or omission” under the statute.¹⁰⁰ Most courts that have ruled on this question have interpreted the provision to bar review of claims that agencies failed to comply with the Congressional Review Act’s reporting requirement.¹⁰¹ In light of these rulings, it is possible that

⁹⁴ Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe “Substantially the Same,” and Decline to Defer to Agencies Under Chevron*, 70 ADMIN. L. REV. 55, 83-84 (2018).

⁹⁵ DiChristopher, *supra* note 85.

⁹⁶ *See, e.g.*, 83 Fed. Reg. 42986 (Aug. 24, 2018); 83 Fed. Reg. 16,077 (Apr. 2, 2018); 82 Fed. Reg. 36,934 (Aug. 7, 2017).

⁹⁷ *See* Finkel & Sullivan, *supra* note 78, at 741 (concluding that the statute likely does not bar an agency from engaging in “whole categories” of related activity).

⁹⁸ 5 U.S.C. § 801(f) (2012).

⁹⁹ Reinstating the Clean Power Plan would of course have the effect of reinvigorating the original challenge to the Clean Power Plan, which has been held in abeyance by the D.C. Circuit. *See infra* Part I.B.2.

¹⁰⁰ 5 U.S.C. § 805 (2012).

¹⁰¹ *See, e.g.*, *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009) (reviewing amendments of a forest plan by the U.S. Forest Service); *Via Christi Reg’l Med. Ctr. v. Leavitt*, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007) (declining to review compliance with Act in reviewing denial of reimbursement of Medicare depreciation expenses by the Secretary of Health and Human Services); *but see* *United States v. S. Ind. Gas & Elec. Comp.*, 2002 U.S. Dist. LEXIS 20936, *11-18 (S.D. Ind. 2002) (reviewing EPA’s interpretation of a statute).

challenges to regulations on the grounds that they are “substantially the same” as disapproved ones might similarly not be judicially cognizable.

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

B. Abeyances

In order to gain an advantage in efforts to roll back the challenged Obama-era rules, the Trump administration has also used another tool—abeyances in pending litigation—in a way that goes far beyond what its predecessors ever did. This Section describes this tool and shows how the practices of the Trump administration departed from prior norms.

1. Background and Prior Uses

When an agency contemplates launching a new rulemaking that would significantly amend a rule for which judicial review is pending, making sure that the pending challenge remains undecided can be extremely useful to the new administration. Abeyances are court orders that put off briefing, argument, and decision in the pending case and thus can accomplish this task.¹⁰² The clearest recent example of an abeyance serving the needs of a new administration concerns the Clean Power Plan, which had been stayed by the Supreme Court, and which the Trump administration is seeking to repeal.¹⁰³ Under its terms, the stay remains in place until the D.C. Circuit decides the pending challenge and the Supreme Court reviews the case, through either a denial of certiorari or by deciding the case on the merits.¹⁰⁴ So the abeyance keeps in place a stay of a policy that the Trump administration deeply dislikes.¹⁰⁵

The Supreme Court stay of the Clean Power Plan was exceptional.¹⁰⁶ Even without an ongoing court-issued stay in place, however, an abeyance can be useful because it allows the administration to avoid a decision which might uphold the former administration’s rule. For example, should that court find that a statute is unambiguous on a particular question, the court’s interpretation of the statute in that case would preclude an agency’s attempt to rely on any contrary construction in a rewrite;¹⁰⁷ an abeyance protects the agency from this undesirable outcome.

¹⁰² See *Am. Petrol. Inst. v. E.P.A.*, 683 F.3d 382, 386 (D.C. Cir. 2012); *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73 (D.D.C. 2015).

¹⁰³ See 83 Fed. Reg. 44,746 (proposed Aug. 31, 2018).

¹⁰⁴ *U.S. Chamber of Commerce v. EPA*, 136 S. Ct. 999 (2016).

¹⁰⁵ *What Is the Clean Power Plan, and How Can Trump Repeal It?*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/climate/epa-clean-power-plan.html>.

¹⁰⁶ Jonathan H. Adler, *Supreme Court Puts the Brakes on the EPA’s Clean Power Plan*, WASH. POST (Feb. 9, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/> (describing unprecedented nature of the stay).

¹⁰⁷ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior

Even where the statute is not unambiguous, the abeyance will aid the agency. Without an abeyance, if an incoming administration disagrees with the legal position in support of the prior administration's rule and wants its new views taken into account before the court decides a case, it would need to file a brief renouncing the government's prior legal position. But the Justice Department, which represents federal agencies in the courts,¹⁰⁸ has no authority to change the agency's policy position¹⁰⁹ and generally disfavors changing the government's litigation position in administrative law cases unless the agency has first repealed or modified the rule.¹¹⁰ Even if the Justice Department set aside its customary reluctance on this front, the agency could not benefit from the various doctrines providing for judicial deference of administrative decisions,¹¹¹ because those doctrines would attach to agency decisions following notice-and-comment rulemaking and not to representations made by Justice Department lawyers.¹¹² An abeyance keeps the case on hold until the agency can complete this lengthy process. Once the agency has completed that process, its new position can benefit from judicial deference. This also addresses the Justice Department's concerns about premature changes in legal position.

In addition, avoiding a decision upholding the former administration's rule can help to keep public opinion from solidifying in support of the original rule. For example, the Trump administration has been able to work on building political support for its change in policy by decrying the illegality of the prior regulation without needing to worry about the possibility of a judicial decision upholding that rule.¹¹³ Typically, abeyances are granted to allow a new rulemaking to "run its course" and save the judicial resources, which would otherwise be involved in deciding the pending matter.¹¹⁴ If the agency ultimately revises the challenged rule in a way that moots the issues in the pending case,¹¹⁵ the abeyance saves the court the resources that

court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

¹⁰⁸ Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 146-47 (2000); see also Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 800 & n.171 (2013) (describing statutes that authorize certain agencies to conduct their own litigation).

¹⁰⁹ See DONALD L. HOROWITZ, *THE JUROCRAZY: GOVERNMENT LAWYERS, AGENCY PROGRAMS, AND JUDICIAL DECISIONS* 5, 37 (1977); Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 291 (2002).

¹¹⁰ See Freeman *supra* note 9, at 551 (explaining that the Justice Department's practice in such cases is not to adopt a new view until the agency announces its decision following notice and comment).

¹¹¹ See HARRY T. EDWARDS & LINDA A. ELLIOTT, *FEDERAL STANDARDS OF REVIEW* 211-58.

¹¹² SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (the court "must judge the propriety" of an agency's action based on the agency's reasoning, not the reasoning provided by the Department of Justice).

¹¹³ See, e.g., 83 Fed. Reg. 44,746, 44,753 (Aug. 31, 2018) (proposing to conclude that the statute "does not delegate discretion" to the agency to establish a standard that can only be accomplished through generation mixing); 82 Fed. Reg. 48,035, 48,037-38 (Oct 16, 2017) (asserting that the Clean Power Plan "is not within Congress's grant of authority to the Agency under the governing statute" and "exceeds the bounds of the statute").

¹¹⁴ See *Am. Petrol. Inst. v. E.P.A.*, 683 F.3d 382, 386 (D.C. Cir. 2012); *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73 (D.D.C. 2015).

¹¹⁵ See *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100, 106 (D.C. Cir. 2016); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997).

it would have expended on that case.¹¹⁶ And if the agency decides not to change the rule under review, the court can proceed with the pending case, avoiding a situation where the challengers are forced to bring a new suit.¹¹⁷ In addition, where there is a significant likelihood that the decision under review is subject to change, courts prefer to allow the administrative process to “run its course” rather than become entangled in an “abstract disagreement.”¹¹⁸

But the usual justifications for an abeyance are not as strong where there is no firm deadline on any potential rewrite, and where the pending case has already been fully briefed and argued and is ready for decision.¹¹⁹ Without a firm deadline on a new rule, the agency could drag its feet and use an abeyance simply as an attempt to evade review of the original rule.¹²⁰ And if all the briefs have been filed, it is likely that the court has started working on the case. That is definitely the case if oral argument has already taken place. In these situations, the reviewing court may not actually save judicial resources because work that the court likely already did on the case could go stale and would need to be redone should the court need to decide the case in the future.

Prior to the Trump administration, courts granted abeyances in cases where the argument that the court would save judicial resources by waiting was relatively strong.¹²¹ For example, while the Obama administration filed several abeyance requests to facilitate its review of Bush-era rules, those requests were made in cases where briefing had not yet been completed and, with few exceptions, were unopposed.¹²² Similarly, during the George W. Bush administration, the courts placed cases in abeyance when agencies explained that they planned to reconsider a portion of the challenged rule, but those requests were made before the briefs had been filed.¹²³

¹¹⁶ See, e.g., *California v. EPA*, No. 08-1178, ECF No. 1167136 (D.C. Cir. 2009) (dropping suit over denial of a waiver to enforce the state’s own emission standards after EPA granted California); *Order, Specialty Steel Industry of North American and Steel Manufacturers Association v. EPA*, No. 00-1434 (D.C. Cir. Nov. 28, 2007), No. 1082858 (dismissing suit after abeyance and settlement reached between the parties).

¹¹⁷ See *Mississippi v. EPA*, 744 F.3d 1334, 1341 (D.C. Cir. 2013) (explaining that the court had granted an abeyance to allow the agency to decide whether to reconsider a rule).

¹¹⁸ *Am. Petrol. Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012).

¹¹⁹ *Cf. id.* at 389 (explaining that the court reviews an agency’s “finalized” decisions).

¹²⁰ *Cf. id.* (explaining that the fact EPA had to meet a deadline for its new rule helped “alleviate[] any concern that EPA is using a new rulemaking to elude review”).

¹²¹ See *B.J. Alan Co., Inc. v. ICC*, 897 F.2d 561, 563 & n.1 (D.C. Cir. 1990) (explaining that the court had granted an abeyance because the agency had granted reconsideration and the court had “not yet taken up the case for preparation and argument” at that time).

¹²² See, e.g., *Order, Am. Petrol. Inst. v. EPA* (D.C. Cir. Mar. 3, 2009), No. 1168229; *Order, Am. Petrol. Inst. v. EPA*, No. 08-1277 (D.C. Cir. Apr. 1, 2009), No. 1173675; *Order, California v. EPA*, No. 08-1178 (D.C. Cir. Feb. 25, 2009), ECF No. 1167136; *Order, New Jersey v. EPA*, No. 08-1065 (D.C. Cir. April 2, 2008), ECF No. 1108959; *Mississippi v. EPA*, No. 08-01200 (D.C. Cir. Mar. 19, 2009), ECF No. 1171013; *Sierra Club v. EPA*, No. 09-1018 (D.C. Cir. Feb. 19, 2009), ECF No. 1165868; *Nat. Res. Def. Council v. EPA*, No. 08-1250 (D.C. Cir. Dec. 3, 2008), ECF No. 1152283.

¹²³ *Order, Sierra Club v. EPA*, No. 02-1135 (D.C. Cir. Feb. 19, 2004), ECF No. 804148; *Order, New York v. EPA*, No. 02-1387 (D.C. Cir. Sept. 30, 2003), No. 775025; *Order, Am. Iron & Steel, et al v. EPA*, Docket No. 00-01435 (D.C. Cir. Oct 10, 2000), ECF No. 578824.

As a result, in these prior situations, the courts would not have expended any resources in reviewing the merits of the cases.

2. *The Trump Administration's Record*

During the Trump administration, just like under prior administrations, several abeyances were granted in cases that had yet to be briefed.¹²⁴ But in contrast to the practice under prior administrations, agencies in the Trump administration asked for abeyances in a substantial number of cases that had already been fully briefed as well as in the Clean Power Plan litigation, which had already been argued.¹²⁵ And, unlike the generally unopposed abeyance requests of the past, many of the Trump administration's requests faced stiff opposition from intervenors supporting the rules and even from some petitioners who themselves were challenging the rules.¹²⁶ Moreover, the issues raised in the pending cases are likely to be raised again in litigation over any revision and thus opponents have stressed that holding off on deciding the pending cases will not serve the interests of judicial economy.¹²⁷ For example, in the challenge to the Clean Power Plan, one of the main issues in the litigation was whether EPA had the authority to set emission standards for power plants that take into account the ability of states to induce shifts from dirty fuels to cleaner fuels.¹²⁸ Now under the Trump administration, EPA has proposed to find that the agency does not have authority to rely on such generation shifting.¹²⁹ Since supporters of the Clean Power Plan disagree with that interpretation, the D.C. Circuit will need to decide this issue eventually.¹³⁰

¹²⁴ Order, *Cloud Peak Energy, Inc. v. U.S. Dep't. of Interior*, No. 16-CV-315-F (Dist. Wyo. Mar. 24, 2017), ECF No. 30; Notice of Voluntary Dismissal Pursuant to F.R.C.P. 41(a)(1)(A)(i), *Cloud Peak Energy, Inc. v. U.S. Dep't of Interior*, No. 16-CV-315-F (Dist. Wyo. Nov. 3, 2017); Order, *Am. Chemistry Council v. EPA*, No. 17-1085 (D.C. Cir. April 4, 2017), No. 1669461; Order, *Truck Trailer Mfrs. Ass'n, Inc., v. EPA*, No. 16-1430 (D.C. Cir. May 5, 2017), No. 1674238; Order, *Am. Petrol. Inst. v. EPA*, No. 13-1108 (D.C. Cir. May 18, 2017), No. 1675813; *Nat'l Waste v. EPA*, No. 16-1372 (D.C. Cir.).

¹²⁵ Multiple examples of abeyances of this type demonstrate the wide use of this tool in pending and briefed cases. See Order, *Dalton Trucking Inc. v. EPA*, No. 13-74019 (9th Cir. May 10, 2017); Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 28, 2017); Order, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. April 27, 2017), No. 167298; Order, *Sw. Elec. Power Co. v. EPA*, No. 15-60821 (5th Cir. Apr. 24, 2017); Order, *North Dakota v. EPA*, No. 15-1381 (D.C. Cir. Apr. 17, 2017); Order, *Walter Coke, Inc. v. EPA*, No. 15-1166 (D.C. Cir. Apr. 24, 2017), No. 1672430; *Murray Energy v. EPA*, No. 15-1385 (D.C. Cir. Apr. 11, 2017), No. 1670626; Order, *ARIPPA v. EPA*, No. 15-1180 (D.C. Cir. Apr. 27, 2017), No. 1672985.

¹²⁶ See *supra* notes 124 & 125.

¹²⁷ See Environmental Intervenors' Opposition to Motion to Postpone Oral Argument, *Walter Coke, Inc. v. EPA*, No. 15-1166 (D.C. Cir. Apr. 20, 2017), ECF No. 1671922 (explaining that an abeyance would serve no purpose because the question at the center of the case concerning the scope of EPA's authority was likely to recur).

¹²⁸ 80 Fed. Reg. 64,662, 64,760-61 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

¹²⁹ 83 Fed. Reg. 44,746, 44,753 (proposed August 31, 2018) (proposing to conclude that the statute does not "delegate discretion" to the agency to establish a standard that can only be accomplished through generation mixing); 82 Fed. Reg. 48,035, 48,037-38 (proposed Oct 16, 2017) (asserting that the Clean Power Plan "is not within Congress's grant of authority to the Agency under the governing statute," and "exceeds the bounds of the statute").

¹³⁰ See Comments of the Attorneys General of New York, et al. on the Environmental Protection Agency's Proposed Emission Guidelines for Greenhouse Gas Emissions at 14 (Oct. 31, 2018),

Nonetheless, many courts have granted the Trump administration's abeyance requests, leaving the challenges in limbo, despite the long time horizon for the administration's revision efforts¹³¹ and despite the argument that the courts were unlikely to save any effort by putting off decision on issues that are very likely to remain central in any litigation over potential revisions.¹³²

Some judges have expressed reservations about granting the continued abeyance requests. Following the D.C. Circuit's grant of the first short-term abeyance in the Clean Power Plan litigation, the court has continued to grant similar short-term abeyances, including most recently in December 2018.¹³³ But a few of the judges on the court expressed reservations during the course of issuing those orders. In June 2018, Judge Tatel, joined by Judge Millett, criticized EPA for using the abeyance, combined with the Supreme Court's stay, to avoid complying with its duty to regulate greenhouse-gas emission from power plants.¹³⁴ Judge Wilkins also wrote separately to say that, in his opinion, because of the stay, EPA had used the abeyance to "hijack[] the Court's equitable power" for the purpose of facilitating the agency's continued review and reconsideration of the rule.¹³⁵ In August 2018, EPA published its proposed replacement plan.¹³⁶ And as mentioned above, in December 2018, the court again renewed the abeyance, this time, unanimously and without any concurring opinions.

Though the D.C. Circuit granted a significant majority of abeyance requests, there have been a few exceptions.¹³⁷ In one case in which the court denied the abeyance, the court did not explain its reasons for rejecting the abeyance, but at oral argument, Judge Millett noted that EPA was two decades overdue on its statutory duty to issue an effective rule.¹³⁸ In another case, the court rejected EPA's request to hold off on deciding whether the agency had statutory authority to issue a particular rule pending reconsideration because, in the court's view, the statutory

https://ag.ny.gov/sites/default/files/cpp_replacement_comments.pdf (explaining in comments to the agency that EPA has no basis for determining that it lacks authority to rely on generation-shifting).

¹³¹ See, e.g., Report, Sw. Elec. Power Co. v. EPA, No. 15-60821 (5th Cir. July 6, 2018), No. 00514543762 (reporting to the court that the agency continues to consider its plans to revise the effluents limitations, after almost a year and a half had passed since the abeyance began); Motion, Murray Energy Corp. v. EPA, No. 15-1385 (D.C. Cir. May 18, 2018), No. 1731770 (arguing that a lengthy abeyance during reconsideration had denied petitioners the ability to have arguments decided).

¹³² Respondent-Intervenor Opposition to Motion to Hold Proceedings in Abeyance, West Virginia v. EPA, No. 15-1363 (D.C. Cir. April 5, 2017), No. 1669699 (arguing that assessing whether a repeal of the CPP is arbitrary and capricious will require an assessment of whether the policy was illegal).

¹³³ See Docket, West Virginia v. EPA, No. 15-1363 (D.C. Cir.) (granting continued abeyances on Dec. 21, 2018, June 26, 2018, Mar. 1, 2018, Nov. 9, 2017 and Aug. 8, 2017).

¹³⁴ Order, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Aug. 8, 2017), No. 1687838 (Tatel, J., concurring).

¹³⁵ Order, West Virginia v. EPA, No. 15-1363 (D.C. Cir. June 26, 2018) No. 1737735 (Wilkins, J., concurring).

¹³⁶ 83 Fed. Reg. 44,746 (proposed Aug. 31, 2018).

¹³⁷ See *Sierra Club v. EPA*, 895 F.3d 1, 6 (2018) (denying motion to hold case in abeyance without providing explanation); *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 426 (D.C. Cir. 2018) (declining to exercise discretion to place case in abeyance and leaving it open for EPA to address the relevance of certain statutory issues in the case on remand).

¹³⁸ *D.C. Circuit Judges Lean Against Abeyance For Industry's Brick MACT Suit*, INSIDE EPA (Nov. 9, 2017), <https://insideepa.com/daily-news/dc-circuit-judges-lean-against-abeyance-industrys-brick-mact-suit>.

authority question was “intertwined with any exercise of agency discretion going forward.”¹³⁹ And in one case, the court took a case out of abeyance¹⁴⁰ after petitioners argued that EPA had made no progress in its reconsideration of the rule and that the continued abeyance “effectively denies” the petitioners’ right to challenge the rule.¹⁴¹

In two other cases where a lower court had already ruled, the reviewing courts were also not as receptive to the Trump administration’s abeyance requests as the D.C. Circuit has been. For example, the Supreme Court denied the government’s motion to put off decision in an appeal over whether a challenge to an Obama-era Clean Water Act regulation should be filed in the district or circuit court,¹⁴² ultimately leading to lifting of the circuit court’s stay of the regulation.¹⁴³ And after a district court vacated the Bureau of Land Management’s fracking regulation and the Bureau announced it would be reconsidering the rule, the Tenth Circuit held that the appeals were “prudentially unripe” and vacated the district court’s decision, depriving the government of its lower-court victory, rather than letting the case sit in abeyance, as the government had requested.¹⁴⁴

Despite these exceptions, it is clear that things changed. Before the Trump administration, abeyances were used exclusively in cases where little or no briefing had occurred in the case, and they were generally unopposed. In contrast, the pattern is very different in cases in which the Trump administration has requested abeyances. In many of the cases, briefing had already been filed and oral argument had either been scheduled or had taken place.¹⁴⁵ Moreover, the abeyance requests in those cases were often opposed, making clear that the issues would likely remain disputed.¹⁴⁶ Yet in many circumstances, courts have remained willing to grant abeyances for long periods of time.

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

¹³⁹ *Id.*

¹⁴⁰ Order, *Murray Energy Corp. v. EPA*, No. 15-1385 (D.C. Cir. Jul. 3, 2018), No. 1739106.

¹⁴¹ Motion, *Murray Energy Corp. v. EPA*, No. 15-1385 (D.C. Cir. May 18, 2018), No. 1731770.

¹⁴² See Order, *Nat’l Ass’n of Mfrs v. U.S. Dep’t of Def.*, No. 16-299 (U.S.S.C. Apr. 3, 2017).

¹⁴³ See *In re U.S. Dep’t of Def.*, 713 F. App’x 489, 490 (6th Cir. 2018).

¹⁴⁴ *Wyoming v. Zinke*, 871 F.3d 1133, 1140 (10th Cir. 2017).

¹⁴⁵ See Jonathan H. Adler, *The En Banc D.C. Circuit Meets the Clean Power Plan*, WASH. POST (Sep. 28, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/28/the-en-banc-d-c-circuit-meets-the-clean-power-plan/>.

¹⁴⁶ Respondent-Intervenor Opposition to Motion to Hold Proceedings in Abeyance, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. April 5, 2017), No. 1669699 (arguing that assessing whether a repeal of the CPP is arbitrary and capricious will require a decision about whether the policy was illegal).

C. Suspensions

Another tool that the Trump administration has used to an unprecedented extent has been suspensions of final regulations: regulatory decisions that defer compliance by either postponing the compliance dates or putting off a regulation's effective date,¹⁴⁷ prior to substantively changing or repealing the regulation itself.¹⁴⁸ Suspensions can be extremely useful to a new administration seeking to change or alter rules because once implemented a rule is always harder to change.¹⁴⁹

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

I. Prior Uses

Before the Trump administration, suspensions were used aggressively under President Reagan, both with and without notice and comment, to indefinitely delay regulations.¹⁵⁰ But the courts pushed back, holding that indefinite delays were “tantamount to a revocation” and that the Administrative Procedure Act's procedural requirements applied to those delays just like they applied to repeals.¹⁵¹ As a result, both the notice-and-comment requirements¹⁵² and the arbitrary and capricious standard of the Administrative Procedure Act apply, requiring an agency to provide a reasoned explanation for the change.¹⁵³

With few exceptions,¹⁵⁴ between the Reagan administration and the beginning of the Trump administration, agencies did not suspend already-effective rules and instead focused on suspending regulations that were not yet effective and thus more likely to be seen as so-called

¹⁴⁷ The “effective date” is the date when a rule is officially added to the Code of Federal Regulations, and depending on the rule, that date might be the date by which entities must be in full compliance with the rule. National Archives and Records Administration, Document Drafting Handbook at 3-8 (2018), <https://www.archives.gov/federal-register/write/handbook>. Some rules also contain “compliance” dates, which are additional dates by which regulated entities must have taken specified actions. *See id.* at 3-9.

¹⁴⁸ *See supra* note 34 (collecting suspension examples and explaining that agencies use various terms to delay deadlines and explaining that we will use the term “suspensions” here to refer to all of those similar rules).

¹⁴⁹ Freeman, *supra* note 9, at 559 (explaining that “the longer the rules have been in place, the harder they may be to undo”).

¹⁵⁰ *See* William M. Jack, *Taking Care That Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479, 1498-99 (2002) (explaining that Reagan delayed as many as 119 regulations and that many of those suspensions led to lawsuits).

¹⁵¹ Nat. Res. Def. Council v. EPA, 683 F.2d 752, 762, n. 23 (3d Cir. 1982); *accord* Env'tl. Def. Fund v. EPA, 716 F.2d 915, 920 (D.C. Cir. 1983).

¹⁵² *See* Jack, *supra* note 150, at 1503-04 (collecting cases).

¹⁵³ *See* Pub. Citizen v. Steed, 733 F.2d 93, 105 (D.C. Cir. 1984) (finding an indefinite suspension to be arbitrary and capricious); *accord* Air All. Houston v. EPA, 906 F.3d 1049, 1066 (D.C. Cir. 2018) (reviewing a delay under the State Farm standard).

¹⁵⁴ *See* Safety-Kleen Corp. v. EPA, 1996 U.S. App. LEXIS 2324 (D.C. Cir. 1996) (vacating a Clinton-era suspension of a Bush-era rule exempting oil mixtures from hazardous waste regulations because the oil mixture rule was already effective).

“midnight regulations” issued near the end of a president’s term,¹⁵⁵ which some commentators argue are more likely to be of poor quality because they are rushed.¹⁵⁶ In addition, agencies generally avoided issuing lengthy suspensions, typically restricting their duration to sixty days.¹⁵⁷ President Obama, for example, instructed agencies to issue sixty-day extensions for regulations that were not yet effective, but instructed them to immediately provide the public with an opportunity to comment on both the extension and the merits of the original rule.¹⁵⁸ Obama also instructed agencies not to issue indefinite suspensions.¹⁵⁹ As a result of these precautions, many of the delays were not challenged perhaps because of their short duration.¹⁶⁰

In the case of higher-profile suspension that were challenged, the courts confirmed that delaying a regulation is a substantive change and that agencies are required to have statutory authority for the changes.¹⁶¹ Some agencies either lifted the challenged suspensions¹⁶² or allowed the suspensions to expire after being sued,¹⁶³ without waiting for a judicial resolution.

¹⁵⁵ See Beermann, *supra* note 36, at 986-89 (describing Bush-era suspensions); Jack, *supra* note 150, at 1486-87 (same); VICTOR S. REZENDES, U.S. GOV’T ACCOUNTABILITY OFFICE, REGULATORY REVIEW: DELAY OF EFFECTIVE DATES OF FINAL RULES SUBJECT TO THE ADMINISTRATION’S JANUARY 20, 2001 MEMORANDUM (Feb. 15, 2002) (describing Bush-era suspensions of rules that had not yet reached their effective dates); *see also* 66 Fed. Reg. 7864 (Jan. 26, 2001) (delaying effective date by two years); 66 Fed. Reg. 21,626 (Apr. 30, 2001) (delaying effective date by one year); 66 Fed. Reg. 29,501 (May 31, 2001) (delaying effective date from May 31, 2001, to a future date to be specified in FRA’s response to petition for reconsideration if the petition is not granted); 77 Fed. Reg. 13,978 (Mar. 8, 2012) (delaying effective date by two months); 78 Fed. Reg. 33,754 (Jun. 5, 2013) (further delaying effective date by one year).

¹⁵⁶ One recent study found that last-term Presidents, but not continuing Presidents, issue considerably more rules categorized as “controversial” according to a variety of proxy measures during their midnight period. *See* Edward H. Stiglitz, *Unaccountable Midnight Rulemaking? A Normatively Informative Assessment*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 137 (2014).

¹⁵⁷ *See, e.g.*, Peter R. Orszag, Mem. for the Heads and Acting Heads of Executive Departments and Agency, Implementation of Memorandum Concerning Regulatory Review at 1-2, M-09-08 (Jan. 21, 2009) (directing agencies to consider postponing the effective dates of rules for sixty days, but to immediately open the notice-and-comment period for thirty days to allow comment on those rules).

¹⁵⁸ *See* O’Connell, *supra* note 36, at 530; 74 Fed. Reg. 4435 (Jan. 26, 2009) (instructing agencies to “consider” delaying for sixty days the effective dates of final rules for the purpose of “reviewing questions of law and policy raised in those regulations”).

¹⁵⁹ Orszag, *supra* note 157, at 2 (“In no event should you extend the effective date of rules indefinitely.”).

¹⁶⁰ *See* O’Connell, *supra* note 36, at 530 (explaining that despite the “legal issues,” presidents can evade review by issuing only short extensions or being prepared to “unfreeze” the suspension in order to moot out a challenge).

¹⁶¹ *See, e.g.*, N.C. Growers’ Ass’n, Inc. v. United Farm Workers, 702 F.3d 755, 765 (4th Cir. 2012) (holding that Obama-era suspension of George W. Bush regulation was illegal); Nat. Res. Def. Council v. Abraham, 355 F.3d 179 (2d Cir. 2004) (vacating Bush-era suspension of Clinton efficiency rule for lack of statutory authority); Nat. Res. Def. Council, Inc. v. Reilly, 976 F.2d 36, 37 (D.C. Cir. 1992) (vacating George H.W. Bush-era suspension of congressionally mandated radionuclide emissions standards); Sierra Club v. Jackson, 833 F. Supp. 2d 11, 27 (D.D.C. 2012) (vacating Obama-era section 705 suspension of court-ordered emissions standards).

¹⁶² *See, e.g.*, 66 Fed. Reg. 28,342 (May 22, 2001) (nine-month suspension in arsenic regulation); Press Release, EPA Announces Arsenic Standard for Drinking Water of 10 Parts Per Billion, 2001 WL 1337226 (Oct. 31, 2001) (lifting suspension); Order, Nat. Res. Def. Council v. EPA, D.C. Cir. No. 01-1291 (dismissing lawsuit after agency announced intent to keep original rule).

¹⁶³ Final Rule To Stay the Grandfathering Provision for PM2.5, 74 Fed. Reg. 48,153 (Sept. 22, 2009); *see* Clerk’s Order, Util. Air Res. Grp. v. EPA, D.C. Cir. No. 09-1287 (Aug. 27, 2010) (dismissing case after stay expired).

2. *The Trump Administration's Record*

In contrast to recent administrations, the Trump administration revived many of the strategies that the Reagan administration had used: more aggressively using suspensions to delay rules that were already effective but still had compliance dates in the future,¹⁶⁴ and using suspensions to delay rules for lengthy and sometimes indefinite periods of time. Many agencies followed this playbook, including EPA,¹⁶⁵ the Food and Drug Administration,¹⁶⁶ the Department of Labor,¹⁶⁷ the Department of Transportation,¹⁶⁸ the Department of Energy,¹⁶⁹ the Department of the Interior,¹⁷⁰ the Federal Aviation Administration,¹⁷¹ and the Department of Housing and Urban Development.¹⁷² Many other agencies also suspended rules before their effective dates.¹⁷³

Multiple agencies issuing these suspensions failed to follow the requirements established by law and the courts have repeatedly ruled against the Trump administration after finding both procedural and substantive violations.¹⁷⁴ For example, many courts found that agencies had no excuse for failing to go through notice and comment for the suspensions.¹⁷⁵ Presumably in light of

¹⁶⁴ See *supra* note 147 (describing difference between effective and compliance dates).

¹⁶⁵ See 82 Fed. Reg. 19,005 (indefinite suspension of rule after it was effective).

¹⁶⁶ 82 Fed. Reg. 20,825 (May 4, 2017) (one-year delay of compliance deadlines); 82 Fed. Reg. 8,894 (Feb. 1, 2017) (short-term delay of effective date issued two days after date had passed); 82 Fed. Reg. 22,338 (May 15, 2017) (publishing guidance to delay compliance deadlines for three months, after the rule was already effective).

¹⁶⁷ 82 Fed. Reg. 16,902 (Apr. 7, 2017) (delaying rule regarding investment advisors for two months after the effective date).

¹⁶⁸ 82 Fed. Reg. 32,139 (July 12, 2017) (indefinite delay after effective date passed); 82 Fed. Reg. 9,368 (Feb. 6, 2017) (thirty-six day delay after the effective date).

¹⁶⁹ 82 Fed. Reg. 8,807 (Jan. 31, 2017) (two-month delay issued after the effective date)

¹⁷⁰ 82 Fed. Reg. 27,430 (postponing compliance dates pending judicial review after effective date); 82 Fed. Reg. 11,823 (Feb. 27, 2017) (postponing effectiveness after rule was effective pending review).

¹⁷¹ 82 Fed. Reg. 14,437 (Mar. 21, 2017) (one-year delay of rule after the effective date).

¹⁷² *Open Cmty. All. v. Carson*, 286 F. Supp. 3d 148, 158 (D.D.C. 2017) (describing memo that delayed fair housing rule for two years after the effective date of the rule).

¹⁷³ 82 Fed. Reg. 8,985 (February 2, 2017); 82 Fed. Reg. 8,499 (January 26, 2017); *Chemical Substances When Manufactured or Processed as Nanoscale Materials*, 82 Fed. Reg. 22,088 (May 12, 2017); 82 Fed. Reg. 8,499 (January 26, 2017); 82 Fed. Reg. 22,088 (May 12, 2017); 82 Fed. Reg. 9,501 (Feb. 7, 2017); 82 Fed. Reg. 8,901 (Mar. 21, 2017); 82 Fed. Reg. 10,443 (February 13, 2017); 2 Fed. Reg. 10,441 (Feb. 13, 2017); 82 Fed. Reg. 10,863 (Feb. 16, 2017); 82 Fed. Reg. 14,464 (Mar. 21, 2017); 82 Fed. Reg. 12,508 (Mar. 3, 2017).

¹⁷⁴ See, e.g., *Nat. Res. Def. Council v. Nat. Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018) (vacating suspension of increased penalties for violations of fuel economy standards); *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050 (N.D. Cal. 2018) (vacating delay of Formaldehyde Rule); ; *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017) (vacating Interior's delay of a rule restricting leaks of natural gas from mining facilities on public lands); *Becerra v. U.S. Dep't. of Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (declaring illegal Interior's delay of a rule updating royalty payment procedures);

¹⁷⁵ *Nat. Res. Def. Council*, 894 F.3d at 114 (rejecting reliance on imminent deadlines); *Pineros y Campesinos Unidos del Noreste v. Pruitt*, 293 F. Supp. 3d 1062 (N.D. Cal. 2018) (vacating delay of Pesticide Rule) (rejecting claim that agency needed time to further review and reconsider the rule); *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 17-20 (N.D. Cal. 2017) (vacating delay of the International Entrepreneur Rule) (rejecting reliance on limited agency resources and the stop-work order to justify failure to go through notice and comment).

the clear case law, in several cases, the Trump administration withdrew suspensions issued without notice and comment after being sued.¹⁷⁶

Some agencies that failed to go through notice and comment attempted to rely on section 705 of the Administrative Procedure Act, which allows an agency to “postpone the effective date” of a regulation “pending judicial review,” as justification for that shortcut.¹⁷⁷ But section 705 may be used only to suspend a rule before it is effective.¹⁷⁸ And this provision requires agencies to make some showing that a suspension is necessary to enable judicial review over the original rule to proceed in a “just” manner.¹⁷⁹ Courts ruled against agencies on several of these suspensions for violating these principles.¹⁸⁰

Agencies have also lost several suspension cases for failure to show that they had the necessary authority under the relevant substantive statute. For example, the D.C. Circuit vacated EPA’s suspensions of two Clean Air Act regulations because of the agency’s failure to provide an adequate explanation for how each suspension was consistent with EPA’s authority under the Clean Air Act.¹⁸¹ In another example, the Northern District of California vacated EPA’s delay of a formaldehyde emissions rule after finding that the applicable statute did not allow the agency to extend compliance with the formaldehyde standards past a statutorily mandated 180-day deadline.¹⁸² Here too the mere filing of a lawsuit led agencies to drop some of their suspensions, presumably because the legal basis for their actions was weak or nonexistent.¹⁸³

Agencies have also lost cases for failure to comply with the reasoned explanation requirement of the Administrative Procedure Act.¹⁸⁴ For example, the D.C. Circuit vacated EPA’s suspension of the Chemical Disaster Rule, designed to improve safety procedures at chemical plants, after finding that the agency had not adequately justified forgoing the rule’s benefits, among other failings.¹⁸⁵ Just like in cases where agencies were challenged for failure to comply with notice-and-comment requirements and for lack of statutory authority, agencies have also dropped

¹⁷⁶ See BETHANY DAVIS NOLL & ALEC DAWSON, DEREGULATION RUN AMOK 3, https://policyintegrity.org/files/publications/Deregulation_Run_Amok_Report.pdf (collecting examples).

¹⁷⁷ See 82 Fed. Reg. 27,430 (Jun. 15, 2017).

¹⁷⁸ 5 U.S.C. § 705 (2012); *Safety-Kleen Corp. v. EPA*, 1996 U.S. App. LEXIS 2324.

¹⁷⁹ *Bauer v. DeVos*, 325 F. Supp. 3d 74, 107 (D.D.C. 2018) (quoting 5 U.S.C. § 705 (2012)).

¹⁸⁰ See, e.g., *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017); *Bauer*, 325 F. Supp. 3d at 108; *Becerra v. U.S. Dep’t of Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017).

¹⁸¹ *Air All. Houston v. EPA*, 906 F.3d 1049, 1060 (D.C. Cir. 2018) (vacating suspension in part because EPA had made no attempt to show how the suspension was authorized by the Clean Air Act); *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) (vacating suspension of EPA’s methane rule for failure to satisfy requirements of Clean Air Act).

¹⁸² *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1056 (N.D. Cal. 2018) (describing series of delays issued by EPA).

¹⁸³ See DAVIS NOLL & DAWSON, *supra* note 176, at 8 (collecting examples).

¹⁸⁴ *Air All. Houston*, 906 F.3d at 1060 (vacating suspension of Chemical Disaster Rule in part for failure to satisfy the arbitrary and capricious standard); *California*, 277 F. Supp. 3d at 1122-23 (vacating suspension of the Waste Prevention Rule for failure to provide a reasoned explanation for the suspension); *California*, 286 F. Supp. 3d at 1054 (enjoining second stay of the Waste Prevention Rule for the same reason).

¹⁸⁵ *Air All. Houston*, 906 F.3d at 1067.

suspensions after being sued for failing to comply with the duty to provide a reasoned explanation for the action.¹⁸⁶

3. *Value of Suspensions Despite Potential for Court Losses*

Despite significant losses and an uphill battle in the courts, however, not all suspension efforts have failed. In some cases, agencies have not faced a legal challenge and in others they were able to evade review. As a result, suspensions are likely to remain a powerful tool. This Section discusses some reasons for these successful suspensions and then analyzes how suspensions could be useful to deregulatory or regulatory administrations.

There are several barriers, driven primarily by resource constraints, that stand in the way of lawsuits being brought to challenge suspensions in the first place. Litigation is an expensive and time consuming process and potential challengers must prove standing¹⁸⁷ as well as marshal the resources to move quickly to vacate what are generally time-limited suspensions.¹⁸⁸ Perhaps as a result of some of these roadblocks, several of the Trump administration's suspensions have not been challenged in court.¹⁸⁹

In addition, even when lawsuits are brought, an agency can play a game of “whack-a-mole,” withdrawing a challenged suspension and replacing it with a different rule.¹⁹⁰ For example, in *Clean Water Action v. Pruitt*,¹⁹¹ EPA had invoked section 705 to indefinitely suspend¹⁹² a rule limiting toxic metal wastewater discharges from power plants, known as the Effluents Rule, after its effective date.¹⁹³ Eight environmental organizations promptly sued the agency, arguing that the agency had violated the Administrative Procedure Act by not seeking public comment, among other deficiencies, and moved quickly for summary judgment.¹⁹⁴ But one day after the motion for summary judgment had been fully briefed, EPA finalized a second suspension, this time with notice and comment, withdrawing the first indefinite suspension.¹⁹⁵ EPA then argued that the challenge to the first suspension should be dismissed as moot and the court agreed.¹⁹⁶ Though

¹⁸⁶ See DAVIS NOLL & DAWSON, *supra* note 176, at 9.

¹⁸⁷ See, e.g., *Nat. Res. Def. Council*, 894 F.3d at 104 (holding that states and environmental petitioners had standing to challenge the agency's suspension of penalties for violation of fuel-economy standards, because the suspension could lead to increased air emissions); *Air All. Houston*, 906 F.3d at 1058 (holding that workers suffered tangible harm during the time that the Chemical Disaster Rule was delayed); see also *Nat. Res. Def. Council v. EPA*, 683 F.2d 752, 762, n. 23 (3d Cir. 1982) (observing that indefinite stays are “tantamount to a revocation”).

¹⁸⁸ See Emergency Mot. for a Stay or in the Alt., Summ. Vacatur, *Clean Air Council v. Pruitt*, No. 17-1145, ECF No. 1678141 (D.C. Cir. June 5, 2017) (compiling motion papers and almost 125 pages of affidavits from scientists, experts, and affected individuals in support of motion to vacate three-month suspension).

¹⁸⁹ See DAVIS NOLL & DAWSON, *supra* note 176, at 10 (collecting examples).

¹⁹⁰ See, e.g., 83 Fed. Reg. 11,639 (Mar. 16, 2018) (indefinite suspension following previous delays and providing that knowledge of off-label uses of tobacco products could make those uses “intended uses” of the products); 82 Fed. Reg. 57,066 (Dec. 1, 2017) (rescinding the rule bundling payments for cardiac care and joint replacement following early delays issued without notice and comment); see also *Clean Water Action*, 315 F. Supp. 3d at 86.

¹⁹¹ *Clean Water Action*, 315 F. Supp. 3d at 76.

¹⁹² 82 Fed. Reg. 19,006 (Apr. 25, 2017).

¹⁹³ 80 Fed. Reg. 67,838 (Nov. 3, 2015).

¹⁹⁴ *Clean Water Action*, 315 F. Supp. 3d at 78.

¹⁹⁵ 82 Fed. Reg. 43,494 (Sep. 18, 2017).

¹⁹⁶ *Clean Water Action*, 315 F. Supp. 3d at 86.

plaintiffs have a pending appeal, thus far the timing of EPA’s actions has allowed the agency to avoid any declaration that the first indefinite suspension violated the Administrative Procedure Act.¹⁹⁷ The Department of Interior similarly avoided the vacatur of its section 705 suspension of the Valuation Rule, aimed at reforming royalty procedures for the exploitation of natural resources on federal lands.¹⁹⁸ In that case, the agency rushed out a repeal of the rule.¹⁹⁹ Though the court hearing that challenge found that the suspension was illegal,²⁰⁰ it did not vacate the suspension because the repeal was due to be promulgated only a few days later.²⁰¹

Suspensions are likely to remain useful to future deregulatory and regulatory administrations. Where suspensions remain in effect, they can be helpful to a deregulatory administration by tipping the scales in favor of subsequent repeals. Suspensions help to ensure that businesses do not spend money coming into compliance with a new regulation when the agency hopes to repeal or roll back the regulation.²⁰² Typically, without a suspension, the question on repeal would be whether a rule that has been finalized and is in the process of being implemented, should be changed. The baseline for analysis should therefore include this rule.²⁰³ The agency must then assess the costs and benefits of departing from the baseline and “in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits.”²⁰⁴ But when firms have already spent the money needed to come into compliance, for example by purchasing durable equipment, the proposed repeal might not save any money and thus would not have any benefits. Indeed, implementation may take even the impetus for repeal away,²⁰⁵ which can be problematic for an administration intent on trumpeting its deregulatory achievements.

By making it possible for firms not to implement a rule, agencies can make the repeal look less significant. For example, while EPA acknowledged that its plan to replace the Clean Power Plan with a weaker rule would cut fewer greenhouse gas emissions, at public events Acting Administrator Wheeler was able to downplay the harm of the change because the Clean Power

¹⁹⁷ *Id.*

¹⁹⁸ 82 Fed. Reg. 11,823 (Feb. 27, 2017).

¹⁹⁹ 82 Fed. Reg. 36,934 (Aug. 7, 2017).

²⁰⁰ *Becerra v. U.S. Dep’t of Interior*, 276 F. Supp. 3d 953, 960-61 (N.D. Cal. 2017).

²⁰¹ *Id.* at 967.

²⁰² See O’Connell, *supra* note 36, at 527 (explaining that rules are “harder to undo” once they have taken effect).

²⁰³ *Air All. Houston v. EPA*, 906 F.3d 1049, 1068 (D.C. Cir. 2018).

²⁰⁴ Exec. Order § 12,866(1)(a), 3 C.F.R. § 638 (1993), *reprinted in* 5 U.S.C. § 601 app. at 557-61 (1994).

²⁰⁵ Connor Raso, *Trump’s Deregulatory Efforts Keep Losing in Court—and the Losses Could Make It Harder for Future Administration to Deregulate*, BROOKINGS (Oct. 25, 2018), <https://www.brookings.edu/research/trumps-deregulatory-efforts-keep-losing-in-court-and-the-losses-could-make-it-harder-for-future-administrations-to-deregulate/> (explaining that when regulated parties invest in compliance they may lose their “appetite . . . to eliminate the rule”); Amena H. Saiyid, *We Already Spent the Money, Keep Air Toxics Rule: AEP, Duke to EPA*, BLOOMBERG BNA (July 12, 2018), <https://www.bna.com/already-spent-money-n73014477383/> (explaining that power companies generally can recoup through customer fees only costs that are deemed “prudent” and that rolling back a rule might interfere with those companies’ ability to recoup the costs they spent on complying with a now-defunct rule).

Plan had never been implemented.²⁰⁶ In addition, when agencies propose a repeal, they can take credit for the compliance cost savings, which would not be available if the rule had been implemented. For example, when EPA proposed to repeal the Chemical Disaster Rule,²⁰⁷ the agency had issued a suspension, making it unnecessary for firms to comply with the rule.²⁰⁸ In the proposed repeal, the agency then credited itself with saving the rule’s compliance costs, making the repeal therefore look more beneficial than it would have looked without the suspension.²⁰⁹ As another example, the Department of Agriculture twice delayed the Organic Livestock Rule, a rule regarding welfare for organic livestock, first without²¹⁰ and then with²¹¹ notice and comment. After a challenge to these suspensions,²¹² the agency repealed the rule and withdrew the suspensions.²¹³ The suspensions, despite their withdrawal, enabled the agency to claim that the repeal would save all of the costs of the original rule.²¹⁴ In contrast, had the rule gone into effect, the regulated entities would have begun coming into compliance, and any of those sunk costs could not have been counted toward the repeal’s cost savings.

Suspensions also allow an agency to take advantage of implementation uncertainties when justifying a repeal, which can be helpful to both deregulatory and regulatory agencies seeking to repeal rules after an inter-party transition. For example, with the Organic Livestock Rule, the agency’s repeal proposal argued that the repeal was justified because of concerns that the rule “could have” unintended consequences in the marketplace.²¹⁵ Without the suspension, challengers may have been able to rebut those claims with facts showing the actual market reactions to implementation. Similarly, in the case of the Valuation Rule, the Department of the Interior claimed that several “potential” problems with the original rule required its repeal.²¹⁶ Had Interior not delayed the Valuation Rule’s implementation, there would have been evidence on whether those “potential” problems were indeed occurring. Both deregulatory and regulatory administrations may want to repeal rules and could thus benefit from the uncertainty that a suspension produces.

Suspensions may also be useful to a new pro-regulatory administration seeking to quickly tighten standards. For example, if the prior administration had loosened a formerly tighter regulatory standard, a suspension could be useful for reinstating the formerly stricter regime.²¹⁷ Or if the prior administration had exempted a category of manufacturers from a rule, suspending the

²⁰⁶ Lee Logan, *Health Risk Dispute Over EPA’s ACE Rule Focuses On Regulatory Baseline*, INSIDE EPA (Sept. 6, 2018), <https://insideepa.com/weekly-focus/health-risk-dispute-over-epas-ace-rule-focuses-regulatory-baseline/>; Richard J. Pierce, Jr., *Putting Trump’s “Affordable Clean Energy” Plan in Perspective*, REG. REV. (Aug 28, 2018), <https://www.theregreview.org/2018/08/28/pierce-trumps-affordable-clean-energy-plan-perspective/>.

²⁰⁷ 83 Fed. Reg. 24,850 (May 30, 2018).

²⁰⁸ 82 Fed. Reg. 27,133 (June 14, 2017).

²⁰⁹ 83 Fed. Reg. at 24,850.

²¹⁰ 82 Fed. Reg. 21,677 (May 10, 2017).

²¹¹ 82 Fed. Reg. 52,643 (Nov. 14, 2017).

²¹² Complaint, *Organic Trade Assoc. v. U.S. Dep’t of Agric.*, No. 17-01875 (D.D.C. Sep. 13, 2017).

²¹³ 83 Fed. Reg. 10,775 (Mar. 13, 2018).

²¹⁴ 83 Fed. Reg. 10,775, 10,781 (Mar. 13, 2018).

²¹⁵ 82 Fed. Reg. 59,988, 59,990 (Dec. 18, 2017).

²¹⁶ See 82 Fed. Reg. at 36,937-39.

²¹⁷ See *N.C. Growers’ Ass’n, Inc. v. United Farm Workers*, 702 F.3d 755, 760 (4th Cir. 2012).

exemption could subject those manufacturers to the rule.²¹⁸ As these examples show, the aggressive use of suspensions will likely remain a useful tool to administrations of both parties, despite the significant court losses suffered by Trump-era agencies. Litigation challenging a suspension is difficult to bring and an agency can play a game of whack-a-mole by keeping suspensions short and replacing them with new suspensions or repeals. Thus, future presidents may be able to use suspensions to help undo a substantial portion of the last several years of a predecessor's regulatory policies, as the Trump administration is currently doing.²¹⁹

II. THE FUTURE OF ROLLBACKS

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

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

Second, regulatory policymaking requires a significant investment of time and can stretch through almost all of a president's term. And, judicial review and implementation very often stretches beyond the term. As a result, the three tools discussed in this Article can be invoked to place a president's regulatory policymaking at risk in the event of an inter-party transition.

We conclude this Part by discussing the timing of a few of the Trump's administration's own signature regulatory efforts. Their timing could well make them vulnerable should a Democratic president be inaugurated in January 2021.

A. Tit-for-Tat Strategies

The two dominant political parties are currently engaged in a game of "tit-for-tat," where one party departs from a norm that had been widely considered to be institutionally desirable and, in response, the other party complains. But later, when given the opportunity, that other party uses the same tool itself and may even double down in the game, breaking further norms. This ongoing game of tit-for-tat is likely to play out in future regulatory rollbacks.

²¹⁸ See, e.g., 60 Fed. Reg. 55,202 (Oct. 30, 1995).

²¹⁹ See O'Connell, *supra* note 36, at 530 (suggesting that incoming Presidents can suspend regulations and simply unfreeze the suspension to make legal challenges moot); Beermann, *supra* note 36, at 992-94 (same).

As Robert Axelrod explained, when two actors are engaged in repeated games, a tit-for-tat strategy is generally understood to be optimal.²²⁰ Under this strategy, one actor will be cooperative in one period only if the other actor was cooperative in the prior period.²²¹ In contrast, non-reciprocation, or “unconditional cooperation,” can hurt not just the target party but it can also embolden the attacker and further reduce social welfare.²²²

The clearest example of this game of tit-for-tat in recent U.S. politics is the use of the filibuster. Under the George W. Bush administration, the Democratic minority in the Senate used the filibuster to block several judicial nominations.²²³ In response, under the Obama administration, when control of the Senate had shifted, then-Minority Leader McConnell used the filibuster to block Executive Branch and judicial nominees.²²⁴ These tactics delayed confirmation for many individuals, including Defense Secretary Chuck Hagel, Consumer Financial Protection Bureau Director Richard Cordray, Federal Housing Finance Agency Administrator Mel Watts, and three D.C. Circuit nominees.²²⁵

At that point, the tit-for-tat escalated. In November 2013, Democrats responded to the Republican’s obstreperousness on circuit court nominees by invoking the “nuclear option” to do away with the filibuster’s requirement of sixty votes to Executive Branch appointments and lower-court judges.²²⁶ The filibuster remained in place for Supreme Court nominees and for legislation.

In response, Minority Leader McConnell complained and somewhat ominously warned that Democrats would regret it and “may regret it a lot sooner” than they thought.²²⁷ This prediction turned out to be accurate. After the 2016 election, with the presidency now controlled by a Republican, the Republican Senate majority did away with the filibuster for Supreme Court nominations,²²⁸ allowing President Trump to obtain confirmation for both Neil Gorsuch and

²²⁰ See ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION: REVISED EDITION* (2009) (presenting the findings of the original tournaments of iterated prisoners’ dilemma games). An extensive literature has complicated this finding, while still affirming the wisdom of the tit-for-tat approach. See, e.g., Amnon Rapoport, Darryl A. Seale, & Andrew M. Colman, *Is Tit-for-Tat the Answer? On the Conclusions Drawn from Axelrod’s Tournaments*, PLOS ONE (2015), <https://bit.ly/2SnmEGD>.

²²¹ AXELROD, *supra* note 220, at 136.

²²² See *id.* (“Unconditional cooperation tends to spoil the other player; it leaves a burden on the rest of the community to reform the spoiled player, suggesting that reciprocity is a better foundation for morality than is unconditional cooperation.”).

²²³ Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 524 (2004).

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

²²⁵ *Id.* at S8414-15.

²²⁶ See Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), <https://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html>; see also Ryan Teague Beckwith, *Donald Trump Won by Breaking Norms. Democrats Are Starting to Consider It Too*, TIME (Sept. 7, 2018), <http://time.com/5390143/donald-trump-democrats-norms/> (citing recent examples of Democratic norm-breaking).

²²⁷ 159 CONG. REC. at S8416.

²²⁸ See Ali Rogin, *Senate Approves ‘Nuclear Option,’ Clears Path for Neil Gorsuch Supreme Court Nomination Vote*, ABC NEWS (Apr. 6, 2017 12:55 PM), <https://abcn.ws/2GyulTj>.

Brett Kavanaugh to the Supreme Court without the sixty votes that would have otherwise been required.²²⁹

The Senate has not yet crossed what is perhaps the biggest line in the escalating partisan fights. The legislative filibuster remains in place and requires sixty Senate votes to obtain cloture and thus bring legislation to a vote.²³⁰ As Senator Schumer, the Democratic Minority Leader, explained it in 2017, losing the filibuster for legislation would turn the Senate into a “majoritarian institution like the House, much more subject to the winds of short-term electoral change.”²³¹ And at least for now that seems unlikely.²³²

But even though the filibuster has not been eliminated for legislation, the “tit-for-tat” game has entered the legislative sphere. In particular, the parties’ use of the “reconciliation” process for legislation has allowed some legislation to evade the Senate filibuster rule and be enacted on a simple majority vote. Reconciliation was created to allow Congress to adjust the draft budget so that it would line up with substantive legislation enacted by Congress.²³³ An additional rule, known as the Byrd Rule, restricts the use of reconciliation to pass provisions that are “extraneous” to the budgetary process.²³⁴ But despite that rule’s restrictions, over time, both parties have expanded the scope of the reconciliation procedure, using it to pass significant substantive legislation without bipartisan support.

Partisan use of reconciliation began in the Clinton administration when Republicans uniformly refused to support Clinton’s proposed fiscal stimulus plan.²³⁵ The Democrats responded by using reconciliation to pass a budget containing tax increases and funding for other policies such as education initiatives, which received no Republican support.²³⁶ Later in 2001, President George W. Bush used the same process to deliver on his campaign promise of tax cuts,

²²⁹ U.S. SENATE, NEIL GORSUCH VOTE SUMMARY (Apr. 7, 2017), <https://bit.ly/2KwKviB> (showing that fifty-four senators voted yea and forty-five senators voted nay); U.S. SENATE, BRETT KAVANAUGH VOTE SUMMARY (Oct. 6, 2018), <https://bit.ly/2NkOTTK> (showing that fifty senators votes yea and forty-eight voted nay).

²³⁰ Standing Rules of the Senate, S. Doc. No. 113-18, Rule XXII, at 15-17 (2013) (filibuster rule).

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

²³² See *infra* Conclusion.

²³³ ALLEN SCHICK, RECONCILIATION AND THE CONGRESSIONAL BUDGET PROCESS 4-8 (1981), <https://bit.ly/2SIIR8b>; see also Sarah Kliff, *Paul Ryan’s Big Enemy on Health Care? Senate Rules.*, VOX (March 9, 2017 6:50 PM), <https://www.vox.com/2017/3/9/14876100/ryan-health-care-enemy-parliamentarian-ahca> (quoting a Senate parliamentarian as saying “reconciliation was designed for minor budgetary adjustments, not major policy proposals”).

²³⁴ See 2 U.S.C. § 644 (2012); BILL HENIFF JR., CONG. RESEARCH SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE’S “BYRD RULE” 1-2 (2016).

²³⁵ See Jeff Davis, *The Rule That Broke the Senate*, POLITICO (Oct. 15, 2017), <https://www.politico.com/magazine/story/2017/10/15/how-budget-reconciliation-broke-congress-215706> (calling this incident “the first time budget reconciliation had been used successfully in what turned out to be a partisan manner”).

²³⁶ Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, 107 Stat. 312 (1993); William E. Foster, *Partisan Politics and Income Tax Rates*, 2013 MICH. ST. L. REV 703, 719 (2013) (describing bill and passage).

despite lack of bipartisan support and despite Democratic claims that the use of reconciliation for this purpose was improper.²³⁷

Tit-for-tat responses heated during the Obama administration, when Senate Democrats used reconciliation, thereby avoiding a filibuster to pass the Affordable Care Act.²³⁸ The law was passed in two steps. First, Congress passed the Patient Protection and Affordable Care Act through ordinary procedures.²³⁹ But that bill had amendments that some Democrats in the House “loathed” and so the administration used the promise of a second bill removing those provisions to bring those members on board to pass the first bill.²⁴⁰ And a few days after the first bill was enacted, the Democrats implemented this promise, using the reconciliation procedure to pass the Health Care and Education Reconciliation Act without any Republican support.²⁴¹ President Obama then signed both laws on the same day.²⁴²

Republicans complained bitterly that the use of reconciliation to pass the Affordable Care Act was underhanded and anti-democratic.²⁴³ But after the 2016 election, Republicans responded in kind by using the reconciliation process to pass a massive tax bill.²⁴⁴ In doing so, Republicans made it even harder for the minority to resist the bill by moving it through Congress so fast that Democrats and the public barely had a chance to build political opposition, or even to read it.²⁴⁵

There is no end in sight to the partisan politics that have dominated U.S. politics recently.²⁴⁶ Some commentators have noted that the incentives to engage in norm-breaking may be different for the Republican party than for the Democratic party.²⁴⁷ They have argued Republicans may be more prone to this behavior because escalating tit-for-tat carries the risk of “undermin[ing] the constitutional system,” in a way that might serve the goals of a party intent

²³⁷ See BARBARA SINCLAIR, UNORTHODOX LAWMAKING 242-51 (4th ed. 2012) (giving thorough history of the use of reconciliation process to enact Bush era tax cuts); Charles Tiefer, *How to Steal a Trillion: The Uses of Laws about Lawmaking in 2001*, 17 J.L. & POL. 409, 411 (2002).

²³⁸ Pub. L. No. 111-148; see also Health Care and Education Reconciliation Act of 2010, Public Law 111-152.

²³⁹ See Pub. L. No. 111-148.

²⁴⁰ SINCLAIR, *supra* note 237, at 220; see Michael O’Brien, *Reid: Dems Will Use 50-Vote Tactic to Finish Healthcare in 60 Days*, THE HILL (Feb. 20, 2010 6:44 PM), <https://thehill.com/blogs/blog-briefing-room/news/82461-reid-dems-will-use-50-vote-tactic-to-finish-healthcare-within-60-days>.

²⁴¹ Pub. L. No. 111-152.

²⁴² SINCLAIR, *supra* note 237, at 230.

²⁴³ *Id.* at 215 (“Republicans tried hard to paint the use of reconciliation as an underhanded, undemocratic trick, but their own use of the procedure in the past undercut their claims.”); see also 159 CONG. REC. S8415-16 (statement of Sen. Mitch McConnell) (complaining that Democrats had “muscle[d]” healthcare legislation through without taking into account “the views of the minority”).

²⁴⁴ Z. Byron Wolf, *The Senate Voted on a Tax Bill Pretty Much Nobody Had Read*, CNN (Dec. 2, 2017), <https://www.cnn.com/2017/12/01/politics/senate-vote-still-writing-tax-bill/index.html>.

²⁴⁵ See Elizabeth Drew, *How Republicans Killed the Legislative Process*, NEW REPUBLIC (Dec. 4, 2017), <https://newrepublic.com/article/146107/republicans-killed-legislative-process>; Tara Golshan, *Republicans Are Handwriting Their Tax Bill at the Last Minute*, VOX (Dec. 1, 2017), <https://www.vox.com/policy-and-politics/2017/12/1/16726234/handwritten-republican-tax-bill>.

²⁴⁶ See Tushnet, *supra* note 223, at 551-52.

²⁴⁷ Fishkin & Pozen, *supra* note 41, at 961; but see David Bernstein, *Constitutional Hardball Yes, Asymmetric Not So Much*, 118 COLUM. L. REV. ONLINE 207, 213 (2018) (arguing that Democrats have just as much of an incentive to engage in constitutional hardball as Republicans).

on “incapacitating the government”²⁴⁸ For those reasons, some commentators have argued that Democrats should not “fight like Republicans.”²⁴⁹

Yet despite this possible asymmetry, other commentators have argued that Democrats *should* “fight like Republicans’ and play more constitutional hardball.”²⁵⁰ And in the current political climate, continued escalation seems likely.²⁵¹ The parties are more polarized than they were in the past and may be unable to seek out a middle ground with each other.²⁵² They lack the “internal ideological diversity” that is necessary to form a moderating force and to develop policies that have at least some degree of inter-party consensus.²⁵³

The academic literature contemplates the possibility of non-cooperation in perpetuity,²⁵⁴ and some commentators predict that this will cause the parties to escalate “with no obvious endpoint.”²⁵⁵ The last instance of norm-eroding governance with high political polarization ended with the Civil War, when governmental “dysfunction” was cured only because one of the parties won control of all institutions following untold horror.²⁵⁶

To deescalate in a less traumatic manner, actors can encourage cooperation by agreeing to change payoff structures so as to reward cooperation and “enlarge the shadow of the future.”²⁵⁷ But for now, it seems unlikely that the tit-for-tat going on between the Democratic and Republican parties will end unless the parties move closer to the center, creating more space for bipartisanship.²⁵⁸ That does not seem to be in the cards for anytime soon, though history suggests that it could happen at some point in the future.²⁵⁹ In the meantime, partisan politics and the continued escalation of norm-breaking is likely to remain a significant driving force in regulatory policy. As a result, game theory predicts that, as soon as it has the opportunity to do

²⁴⁸ Fishkin & Pozen, *supra* note 41, at 979-80.

²⁴⁹ STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 215 (2018).

²⁵⁰ Fishkin & Pozen, *supra* note 41, at 979.

²⁵¹ Bernstein, *supra* note 247, at 232-33.

²⁵² Fishkin & Pozen, *supra* note 41, at 959-60; Brian F. Schaffner, *Party Polarization*, in *THE OXFORD HANDBOOK OF THE AMERICAN CONGRESS* 527, 539 (George C. Edwards et al. eds., 2011).

²⁵³ Fishkin & Pozen, *supra* note 41, at 959-60; Barbara Sinclair, *Is Congress Now the Broken Branch?*, 2014 *UTAH L. REV.* 703, 716-718 (2014).

²⁵⁴ See AXELROD, *supra* note 220, at 138 (noting that once a feud gets started it can continue indefinitely); Jonathan Levin, *Bargaining and Repeated Games* (2002), <http://web.stanford.edu/~jdlevin/Econ%20203/RepeatedGames.pdf>; Peter T. Leeson, *The Laws of Lawlessness*, 38 *J. LEGAL STUD.* 471, 479-80 (2009) (“Note that even in the mutual violence equilibrium, both borderers earn a positive payoff.”).

²⁵⁵ See Fishkin & Pozen, *supra* note 41, at 977, 980.

²⁵⁶ Jack Balkin, *Last Days of Disco: Why the American Political System is Dysfunctional*, 94 *B.U. L. REV.* 1159, 1191 (2014); see also Mark A. Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order*, 94 *B.U. L. REV.* 611, 644-647 (2014) (describing earlier times of constitutional collapse and reinvention).

²⁵⁷ See AXELROD, *supra* note 220, at 125-36; see also Tushnet, *supra* note 223, at 552-53.

²⁵⁸ See Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 *DRAKE L. REV.* 989 (2013) (arguing, before the 2016 election, that hardball in the political system will self-correct).

²⁵⁹ See Russell Berman, *What’s the Answer to Political Polarization in the U.S.?*, *ATLANTIC* (Mar. 8, 2018), <https://www.theatlantic.com/politics/archive/2016/03/whats-the-answer-to-political-polarization/470163/>.

so, a Democratic administration is likely to copy the Trump administration’s aggressive use of Congressional Review Act disapprovals, abeyances in pending litigation, and suspensions.

B. Time Frame for the Regulatory Process

As explained in the previous Section, because of the continued calls for escalation, the next Democratic president, and subsequent presidents of both parties following inter-party transitions, are thus likely to use the same rollback tools as the Trump administration if they can thereby obtain policy advantages. And that is likely to be the case because of the protracted timeline for issuing significant rules through notice-and-comment rulemaking, which is the primary mechanism under which agencies establish major regulatory policies.²⁶⁰

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

1. Promulgation

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

For significant rules with large economic impacts—the types of rules that presidents care the most about—agencies are likely to need to invest significant time and resources prior to the publication of a proposed rule.²⁶¹ The statement of basis and purpose accompanying a proposed rule often is hundreds of pages long and includes highly complex, technical details, such as data, studies regarding that data, and explanations about how the agency interpreted and used the data.²⁶² Though it is difficult to pinpoint exactly when work begins on a proposed rule, research by the Government Accountability Office found that the development of such proposals by the Department of Transportation, EPA, and Federal Drug Administration typically took at least two

²⁶⁰ See Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 929-52 (2008).

²⁶¹ CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 43-44 (2018).

²⁶² Richard J. Pierce, *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1495-96 (2012).

years.²⁶³ And for some regulations, this period spanned four to six years.²⁶⁴ For example, in a study of ninety EPA rules issued under the Hazardous Air Pollutant program during the Clinton and George W. Bush presidencies, EPA took close to four years to issue a proposed rule after initiating review.²⁶⁵

The timing of the notice-and-comment period and promulgation of a final rule is also lengthy, though shorter than the average time it takes to prepare a proposed rule. Two different studies found that the average notice-and-comment rulemaking for the last several decades has been about a year and a half from the publication of the proposed rule until the publication of the final rule; the median time was one year.²⁶⁶ And some agencies took significantly longer.²⁶⁷ For example, the averages at agencies with “controversial regulatory histories and mandates,” such as EPA and the Federal Drug Administration were 28 and 42 months, respectively.²⁶⁸ Significant rules, defined as those having large economic effects, also took longer, averaging 596 days.²⁶⁹

As a result of the multi-year process for preparation of a proposed rule and the one- to two-year period required for the notice-and-comment period and the promulgation of the final rule, it is highly likely that future presidential administrations will be finalizing a significant proportion of their major rules sufficiently close to the end of the presidential term to put those rules at risk of rollback tactics. This problem will be particularly salient for one-term presidents but, as we discuss in Part III, it will affect two-term presidents as well.

2. *Judicial Review*

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

The speed at which the government is able to get through judicial review, both for the original challenge and for any possible further review, can have a significant impact on rollback efforts. While no comprehensive empirical studies have sought to document the typical length of judicial review, the D.C. Circuit’s review period can provide a useful gauge because the court has jurisdiction, including in some cases exclusive jurisdiction, over several categories of administrative challenges and as a result, in 2010, heard 36% of all administrative review

²⁶³ CURTIS W. COPELAND, CONG. RESEARCH SERV., R40713, UNIFIED AGENDA: IMPLICATIONS FOR RULEMAKING TRANSPARENCY AND PARTICIPATION 4 (2010).

²⁶⁴ *Id.*

²⁶⁵ Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 144 n. 150, 144-45 (2011) (analyzing the length of the entire “life cycle” for ninety EPA rules).

²⁶⁶ See Jason Webb Yackee & Susan Webb Yackee, *Delay in Notice and Comment Rulemaking: Evidence of Systemic Regulatory Breakdown?*, in REGULATORY BREAKDOWN 163, 168 (Cary Coglianese ed., 2012); O’Connell, *supra* note 36, at 513; see also Webb Yackee & Webb Yackee, *supra* note 19, at 1414.

²⁶⁷ Webb Yackee & Webb Yackee, *Delay in Notice and Comment*, *supra* note 266, at 164.

²⁶⁸ *Id.* at 164, 171.

²⁶⁹ See O’Connell, *supra* note 36, at 514.

cases.²⁷⁰ The D.C. Circuit's review period starts with petitioners filing their challenges, in accordance with the timing requirements in the relevant statute.²⁷¹ For important categories of regulations under the Clean Air Act, petitioners typically have sixty days from the publication of the final rule in the *Federal Register* to file challenges in the D.C. Circuit.²⁷² The median time from filing a notice of appeal until the disposition of a case on the merits in all D.C. Circuit cases is a little bit more than twelve months.²⁷³ But challenges to complex administrative cases can take considerably longer.²⁷⁴ This means that it is likely that a rule finalized within the last year or so of a presidential term is likely to be undergoing judicial review at the end of the presidency. The additional delay caused by Supreme Court review, whether at the certiorari stage or on the merits, makes more rules vulnerable to rollback efforts.

Several rules serve to illustrate these dynamics. For example, two mercury regulations finalized in 2005 under President George W. Bush were challenged at the D.C. Circuit and struck down in February 2008.²⁷⁵ The government obtained several extensions in the deadline for filing a certiorari petition, pushing the appeal beyond the inauguration of President Obama in January 2009.²⁷⁶ As a result, the Obama administration was able to proceed with its planned revision

²⁷⁰ See Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence & Stephen A. Calhoun, *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J. L. & PUB. POL'Y 131, 138-42 (2013).

²⁷¹ Brigida Benitez, *From the President: D.C. Court of Appeals Inside the Numbers*, WASH. LAW. (Apr. 2015), <https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/april-2015-from-the-president.cfm>.

²⁷² See 42 U.S.C. § 7607(b)(1) (2012).

²⁷³ Data on the length of time is not broken down by type of case. But for the last five years, the D.C. Circuit has consistently ranked with the First and Ninth Circuits as one of the top three slowest appeals courts in the country. See Admin. Office of the U.S. Courts, Federal Court Management Statistics Archive, Appeals Summary Pages, *U.S. Court of Appeals Summary-12-Month Period Ending March 31, 2018* (showing the D.C. Circuit's median time as 12.3 months) http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsummary0331.2018.pdf; Admin. Office of the U.S. Courts, Federal Court Management Statistics Archive, Appeals Summary Pages, *U.S. Court of Appeals Summary-12-Month Period Ending March 31, 2017* (11.5 months), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsummary0331.2017.pdf; Admin. Office of the U.S. Courts, Federal Court Management Statistics Archive, Appeals Summary Pages, *U.S. Court of Appeals Summary-12-Month Period Ending March 31, 2016*, (14.2 months), http://www.uscourts.gov/sites/default/files/data_tables/fcms_NA_appsummary0331.2016.pdf; Admin. Office of the U.S. Courts, Federal Court Management Statistics Archive, Appeals Summary Pages, *U.S. Court of Appeals Summary-12-Month Period Ending March 31, 2015*, (13.4 months), http://www.uscourts.gov/sites/default/files/fcms_appeals_summary_pages_march_2015_0.pdf; Admin. Office of the U.S. Courts, Federal Court Management Statistics Archive, Appeals Summary Pages, *U.S. Court of Appeals Summary-12-Month Period Ending March 31, 2014* (12.2 months), http://www.uscourts.gov/sites/default/files/statistics_import_dir/appeals-fcms-summary-pages-march-2014.pdf.

²⁷⁴ See, e.g., Docket, *White Stallion Energy Ctr. LLC v. EPA*, No. 12-1100 (D.C. Cir.) (showing petition for review filed in February 2012, and opinion issued on April 15, 2014, in challenge to EPA's mercury regulation); Docket, *Coal. for Responsible Regulation v. EPA*, No. 10-1073 (D.C. Cir.) (showing petition for review filed in April 2010, and opinion issued in June 2012 in challenge to EPA's greenhouse-gas emissions limits for new stationary sources).

²⁷⁵ *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

²⁷⁶ See Richard Lazarus, *The Transition and Two Court Cases*, 26 ENVTL. L. FORUM. 12 (Jan./Feb. 2009).

before supporters of the Bush-era rule could have a chance to ask the Supreme Court to reverse the D.C. Circuit's decision.²⁷⁷

The experience of the Obama administration with some of its key environmental regulations also illustrates this dynamic. Consider, for example, the Cross State Air Pollution Rule, which requires states to reduce emissions interfering with the ability of downwind states to comply with air quality standards. EPA began drafting this rule in mid-2008 in response to a court decision remanding a previous attempt to regulate those emissions. Three years later, in August 2011, EPA promulgated the final Cross States Air Pollution Rule.²⁷⁸ In 2012, the D.C. Circuit vacated the rule,²⁷⁹ but two years later, the Supreme Court reversed and upheld the rule.²⁸⁰ In total, nearly six years elapsed between the time the agency began to work on this rule and when the Supreme Court upheld its validity. Had this work not begun before President Obama took office, the case might have been pending before the Supreme Court at the beginning of the Trump administration. And had President Obama not won a second term, the new administration almost certainly would have sought an abeyance in the pending litigation.²⁸¹

Perhaps the most ominous illustration of the dangers posed by a lengthy rulemaking process combined with time-consuming legal challenges, is President Obama's Clean Power Plan. Obama initially directed EPA to begin preparations for a rule regulating carbon dioxide emissions in June 2013, early in his second term.²⁸² EPA released the proposed rule a year later in June 2014²⁸³ and published the final rule on October 23, 2015, more than halfway through the presidential term.²⁸⁴ That same day, twenty-four states and regulated entities sued to have the rule stayed.²⁸⁵ The D.C. Circuit initially denied a motion for a stay and granted expedited consideration of the case, scheduling oral argument before a panel on June 2, 2016,²⁸⁶ but in February 2016, the Supreme Court granted a stay in a 5-4 decision and prevented the rule from going into effect while the case was litigated.²⁸⁷ Presumably in order to expedite matters, the D.C. Circuit then ordered the case to be heard by the en banc court instead of a panel, putting off

²⁷⁷ *Id.*

²⁷⁸ 76 Fed. Reg. 48,208 (Aug. 8, 2011) (to be codified at 40 C.F.R. pt. 51, 52, 72, 78, and 97).

²⁷⁹ *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012).

²⁸⁰ *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014).

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

²⁸² Press Release, White House Office of the Press Secretary, Presidential Memorandum – Power Sector Carbon Pollution Standards (June 25, 2013), <http://www.whitehouse.gov/the-pressoffice/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards>.

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

²⁸⁴ 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

²⁸⁵ Associated Press, *States, Industry Groups Sue to Block Obama's "Clean Power" Plan*, NBC NEWS (Oct. 23, 2015), <https://www.nbcnews.com/business/energy/states-industry-groups-sue-block-obamas-clean-power-plan-n450216>.

²⁸⁶ *Order, West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Jan. 21, 2016).

²⁸⁷ *West Virginia v. EPA*, 136 S. Ct. 1000 (2016). See Tatiana Schlossberg, *What to Know About Trump's Order to Dismantle the Clean Power Plan*, N.Y. TIMES (Dec. 22, 2017), <https://www.nytimes.com/2017/03/27/science/what-to-know-about-trumps-order-to-dismantle-the-clean-power-plan.html>.

argument until September 27, 2016.²⁸⁸ The court then did not issue a decision during the Obama administration.²⁸⁹

After President Trump took office, EPA successfully convinced the D.C. Circuit to place the case in abeyance while the agency reviewed whether it should rescind or revise the Clean Power Plan.²⁹⁰ At present, the development of the Clean Power Plan and subsequent judicial proceedings have stretched on for almost six years, from June 2013 to the present, and the litigation over the rule remains in abeyance.²⁹¹ Had the rule not been stayed already, it is possible that EPA would have used the pending litigation to justify a suspension.²⁹² Now EPA has proposed to replace the Clean Power Plan with a new and much weaker rule,²⁹³ and the original challenge remains in abeyance.²⁹⁴

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

3. Implementation

Even if a rule has been finalized and has survived judicial review, long implementation periods can also pose a threat to the rule's long-term viability. If the rule's compliance deadlines extend beyond an inter-party presidential transition, the incoming administration could seek to suspend those future compliance deadlines.²⁹⁵

For some rules, the deadlines for compliance are long after the rule's promulgation. At a minimum, under the Congressional Review Act, agencies generally must set a regulation's "effective date" thirty days after final publication in the *Federal Register*,²⁹⁶ in order to give regulated entities time to prepare for compliance,²⁹⁷ with sixty days granted if the rule is categorized as "major."²⁹⁸ But agencies often must also set "compliance deadlines," as distinct

²⁸⁸ West Virginia v. EPA, No. 15-1363 (D.C. Cir. May 16, 2016).

²⁸⁹ Transcript of Oral Argument, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Sep. 27, 2016).

²⁹⁰ Order, West Virginia v. EPA, No. 15-1363, (D.C. Cir. Apr. 28, 2017); see *supra* text accompanying notes 133-136.

²⁹¹ Niina Heikkinen, *Court Becoming Impatient with EPA Over Clean Power Plan*, SCI. AM. (Jun. 27, 2018), <https://www.scientificamerican.com/article/court-becoming-impatient-with-epa-over-clean-power-plan/>.

²⁹² Cf. 82 Fed. Reg. 27,430 (Jun. 15, 2017) (announcing a suspension of the Waste Prevention Rule in "light of the existence and potential consequences of the pending litigation"); 82 Fed. Reg. 19,005 (April 25, 2017) (announcing suspension of Effluents Rule pending judicial review).

²⁹³ 83 Fed. Reg. 44,746 (Aug. 31, 2018).

²⁹⁴ See *supra* Part I.B.2.

²⁹⁵ See *supra* Part I.C.

²⁹⁶ 5 U.S.C. § 553 (d) (2012); see also MAEVE P. CARY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER 2-3 (Oct. 4, 2016) (explaining that some rules are exempt from the requirements of § 553).

²⁹⁷ See U.S. v. Gavrilovic, 551 F.2d 1099, 1104 (8th Cir. 1977) (collecting legislative history of provision).

²⁹⁸ 5 U.S.C. § 801(a)(3) (2012).

from effectiveness, when designing the rule. While some agencies must set those additional deadlines within a certain timeframe,²⁹⁹ many agencies have discretion over those deadlines.³⁰⁰ Thus, the compliance period is often much longer than the required thirty or sixty-day period required before a rule becomes effective.³⁰¹ In some cases, compliance can be delayed for several years after final publication to give regulated entities sufficient time to meet the rule's requirements.³⁰²

Although empirical work on the average time between a rule finalization and the compliance deadlines has not yet been performed, major environmental rulemakings illustrate that these periods can be longer than the rulemaking process itself.³⁰³ Multiple rules issued in the Obama administration had compliance deadlines years after the effective date of the final rule. For example, the Effluents Rule, an EPA regulation limiting toxic metals in wastewater discharges finalized in 2015 had a compliance deadline three years after promulgation of the rule.³⁰⁴ An EPA regulation concerning chemical accident prevention finalized in January 2017, had a compliance deadline four years after finalization of the rule.³⁰⁵ The Clean Power Plan set significant compliance deadlines starting in 2018, three years after it was finalized.³⁰⁶ These long deadlines are not a recent phenomenon. During the George W. Bush administration, for example, EPA set a compliance date for its key environmental regulation, the Clean Air Interstate Rule, four years after publication of the final rule.³⁰⁷

Agencies have generally granted these lengthy compliance periods to accommodate industry concerns that compliance would require large-scale, complex changes to their

²⁹⁹ See, e.g., *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1055 (N.D. Cal. 2018) (finding that EPA could not delay compliance in formaldehyde emissions standards beyond the 180 days stipulated by Congress in the relevant statute).

³⁰⁰ See 42 U.S.C. § 7412(r)(7) (2012) (providing that “[r]egulations promulgated pursuant to this subparagraph shall have an effective date . . . assuring compliance as expeditiously as practicable”).

³⁰¹ See, e.g., U.S. FOOD & DRUG ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., *THE FOOD SAFETY LAW AND THE RULEMAKING PROCESS: PUTTING FSMA TO WORK 1-2* (2011), <https://www.fda.gov/downloads/Food/GuidanceRegulation/UCM277713.pdf>; see also 78 Fed. Reg. 23,638, 23,638 (Apr. 19, 2013) (setting effective date for 30 days after date of publication in the Federal Register and compliance date for 30 days plus six months after date of publication in the Federal Register).

³⁰² See Heinzerling, *supra* note 9, at 27, n. 85 (“Compliance dates set by agencies are often later than effective dates, in order to give affected parties time to bring their activities into conformity with the rule.”); see, e.g., 82 Fed. Reg. 7149, 7208 (Jan. 19, 2017) (setting the compliance date three years after final publication); 78 Fed. Reg. 7138 (Jan. 31, 2013) (setting the compliance date for existing sources three years after final publication); 74 Fed. Reg. 53,590, 53,596 (Oct. 19, 2009) (setting the compliance date for the sampling plan required by the rule at 18 months after final publication).

³⁰³ Literature on agency ossification does not examine this question. See, e.g., Webb Yackee & Webb Yackee, *Delay in Notice and Comment*, *supra* note 266, at 171 (measuring time between notice of proposed rulemaking and finalization of the rule); Webb Yackee & Webb Yackee, *Testing the Ossification Thesis*, *supra* note 19, at 1446 (measuring time between notice of proposed rulemaking and finalization of the rule); O’Connell, *supra* note 36, at 513; Wagner, *supra* note 265, at 145 (noting her research quantified the time until finalization of a rule).

³⁰⁴ See 80 Fed. Reg. 67,838, 67,854 (Nov. 3, 2015) (to be codified at 40 C.F.R. pt. 423).

³⁰⁵ See 82 Fed. Reg. 4594, 4676 (Jan. 13, 2017) (to be codified at 40 C.F.R. pt. 68).

³⁰⁶ 80 Fed. Reg. 64,662, 64,855-56 (Oct. 23, 2015).

³⁰⁷ See 70 Fed. Reg. 25,162, 25,216 (May 12, 2005) (to be codified at 40 C.F.R. pt. 51, 72, 73, 74, 77, 78 and 96).

operations.³⁰⁸ Indeed, some industry officials argued that even the long deadlines set in the rules would give them insufficient time to meet the new requirements.³⁰⁹ In the future, rules with those long compliance deadlines are likely to be at risk of suspensions. In sum, given the long promulgation, judicial review, and compliance timeframes, a large proportion of significant rules may face rollback efforts.

C. Likely Fate of the Trump Administration's Regulations

The timeline of the Trump administration's own rules, often seeking to repeal or amend signature Obama-era regulations,³¹⁰ helps illustrate the risks that presidents now face. At the two-year mark, the Trump administration has proposed, among other initiatives, to flatline EPA's vehicle emissions standards,³¹¹ repeal and replace EPA's Clean Power Plan,³¹² repeal and replace EPA's Clean Water Rule,³¹³ and weaken EPA's methane emissions rule.³¹⁴

But none of those proposals has yet been finalized. As a result, after the final rules are eventually promulgated, should President Trump not win reelection, the Justice Department might not have sufficient time to be able to guide them through litigation while it is still under his control.³¹⁵ A Democratic administration could then seek abeyances in the pending litigation to aid efforts to undo the rollbacks. And even if the litigation were to be completed in time, rules with long compliance periods would be vulnerable to suspension efforts.

Moreover, the Trump administration has not taken the proposal steps yet in numerous other promised revisions. Among other proceedings, EPA announced that it is reconsidering its rule limiting methane emissions at landfills.³¹⁶ EPA has been planning to reconsider and revise the Effluents Rule, the rule limiting toxic metal wastewater discharges at power plants.³¹⁷ And EPA announced it would "review" a pesticide rule.³¹⁸ Yet at the two-year mark, EPA has not published proposals repealing those regulations. If the agencies wait too long and if President Trump serves only one term, repeals, even if they are finalized, could be at risk of Congressional Review Act disapprovals, and would almost certainly be at risk of abeyance and suspension efforts.

III. IMPACT ON FUTURE PRESIDENTS

This Part analyzes the political implications of the transformation put in motion by the Trump administration's use of Congressional Review Act disapprovals, abeyances, and

³⁰⁸ See, e.g., 80 Fed. Reg. at 67,854; 82 Fed. Reg. 4594, 4676 (Jan. 12, 2017).

³⁰⁹ See 70 Fed. Reg. at 25,216.

³¹⁰ See Freeman, *supra* note 9, at 566 (describing the legislative roadblocks that have led Trump to seek policy wins through regulatory rollbacks).

³¹¹ 83 Fed. Reg. 42,986 (Aug. 24, 2018).

³¹² 83 Fed. Reg. 44,746 (Aug. 31, 2018).

³¹³ 82 Fed. Reg. 34,899 (July 27, 2017).

³¹⁴ 83 Fed. Reg. 52,056 (Oct. 15, 2018).

³¹⁵ Dawn Reeves, *EPA Scrambles To Complete Rollbacks, Suits Before End of Trump's Term*, INSIDEEPA (Jan. 2, 2019), <https://insideepa.com/outlook-2019/epa-scrambles-complete-rollbacks-suits-end-trumps-term>.

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

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

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

suspensions to roll back Obama administration regulations. Section A looks at the effects of this transformation on the strategies that subsequent presidents are likely to follow with respect to the promulgation of regulations that are central to their agenda. Section B explores the electoral incentives that are likely to be put in motion by the Trump administration’s practices.

A. Regulatory Strategies

As Parts I and II show, a significant number of regulations are likely to be at risk after an inter-party presidential transition as a result of the rollback efforts put in play by the Trump administration. As a result, future presidents are likely to face different incentives with respect to their regulatory strategies than has been the case before the Trump presidency.

Previously, outgoing presidents worried that regulations issued in the last few months of the administration—the so-called “midnight rules”—would be at risk of rollbacks.³¹⁹ For example, in May 2008, facing an election, George W. Bush instructed agencies not to propose any new regulations after June 1, 2008, or to finalize any new regulations after November 1, 2008.³²⁰ Similarly, Barack Obama instructed agencies to “strive to complete their highest priority rulemakings by the summer of 2016.”³²¹

But now a much greater proportion of a president’s regulatory output is at risk from the bigger arsenal of rollback tools deployed by the Trump administration and likely to be deployed as well by subsequent administrations. This Section explores how the actions of the Trump administration may affect future presidential strategies with respect to significant regulatory initiatives in three key ways, each with progressively more potential pitfalls. This Section discusses these issues.

1. Transition Planning

Completing important regulatory initiatives before leaving office has long been a presidential concern.³²² But not enough attention has been placed on getting started quickly enough to issue rules early. And research on recent administrations has found that fewer rules are

³¹⁹ See, e.g., Stuart Shapiro, *Will Congressional Review Act Repeals Change Agency Behavior?*, REG. REV., <https://www.theregreview.org/2017/04/03/shapiro-congressional-review-act-agency-behavior/>; Beermann, *supra* note 36, at 950 (explaining that most attention has been paid to the actions taken at the very end of an administration); Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the “Midnight” Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441, 1448 (2005).

³²⁰ Memorandum from Joshua Bolten, White House Chief of Staff, to the Heads of Executive Departments and Agencies (May 9, 2008), <https://www.biologicaldiversity.org/campaigns/esa/pdfs/BoltenMemo05092008.pdf>.

³²¹ Memorandum from Howard Shelanski, Administrator of the Office of Information and Regulatory Affairs, to Deputy Secretaries (Dec. 17, 2015), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/agencyinformation_circulars_memoranda_2015_pdf/regulatory_review_at_the_end_of_the_administration.pdf (explaining that agencies should finish significant regulations by the summer of 2016 in order to “avoid an end-of-year scramble that has the potential to lower the quality of regulations that OIRA receives for review”).

³²² See O’Connell, *supra* note 36, at 503; Mendelson, *supra* note 18, at 597 (describing the “end of the presidential term” as the “natural deadline”).

promulgated in a president's first year in office than in later years.³²³ In the future, as a result of the broader rollback strategies that are likely to become commonplace, presidential candidates should plan that the period for completing action on their regulatory initiatives, without risking rollbacks following an inter-party transition, will be shorter. And adjusting to that will require presidents to place more attention on the transition period before they take office. By focusing on this time, a candidate or incoming president can get a jump-start on two tasks that are crucial to issuing regulations quickly: developing a regulatory agenda and having the political appointees in place for shepherding the rules through the process.

Developing a regulatory agenda has been a focus for some presidents in the past. For example, President Reagan's transition period is generally considered one of the most successful in recent decades. He instructed his advisers to prepare policy recommendations which would enable him to begin work right after the inauguration.³²⁴ These helped ensure a smoother transition and quicker implementation of Reagan's policy choices.³²⁵ But many recent presidents have not placed this much of a focus on getting policy goals in place. President Carter, for example, began low-profile planning for his transition in the spring of 1976, but his transition team was not formed officially until after the election and he limited his time in Washington before the inauguration.³²⁶ President Clinton, like Carter, stayed out of Washington and his transition was marked by delay and problems, including a dispute about who would run the transition effort.³²⁷ George W. Bush's transition faced its own unique problems because of the dispute over the 2000 election results; Bush did not immediately receive funding or office space for his transition planning.³²⁸ President Trump also faced problems when he changed his transition team after the election, which delayed agency-level transition work.³²⁹

To develop a robust regulatory agenda, a future president will need to work hard to avoid repeating the mistakes of prior transitions and use both the pre-election and post-election transition times to develop and hone her goals. This process has some limitations. For example, developing priorities and writing draft rules will be hampered by the lack of access to career staff, a crucial part of any effort to complete the technical tasks necessary to shepherd a successful rule through the notice-and-comment process.³³⁰ In addition, the substance of important rules will need to have the approval from the presumptive agency head, an individual who is unlikely to be in place until after the election. But there are many steps that can be undertaken before the election and before the inauguration. The Presidential Transition Act, originally enacted in 1963 and recently updated to address pre- and post-election needs, provides

³²³ O'Connell, *supra* note 260, at 896.

³²⁴ Stephanie Smith, *Presidential Transitions*, in *PRESIDENTIAL TRANSITIONS: BACKGROUNDS AND ISSUES* 19 (Ida Burkhalter ed., 2009).

³²⁵ JOHN P. BURKE, *PRESIDENTIAL TRANSITIONS: FROM POLITICS TO PRACTICE* 178-79 (2000).

³²⁶ See Smith, *supra* note 324, at 18; BURKE, *supra* note 325, at 17-19, 25.

³²⁷ Smith, *supra* note 324, at 21; BURKE, *supra* note 325, at 284-86.

³²⁸ Smith, *supra* note 324, at 22-23.

³²⁹ CTR. FOR PRESIDENTIAL TRANSITION, *AGENCY TRANSITION GUIDE* 72 (2017), <http://cfpt.ourpublicservice.org/publications/agency-transition-guide/>.

³³⁰ See Richard L. Revesz, *Pruitt Exemplified How Partisanship Hinders Policymaking*, SLATE (July 10, 2018), <https://slate.com/technology/2018/07/pruitt-exemplified-how-partisanship-hinders-policymaking.html>.

funding for many key tasks that need to be accomplished in order to get to the policy-making job quickly, such as support for developing a human resources management system and office space, and provides for negotiation of a memorandum of understanding between the incumbent president and eligible candidate to facilitate communications with the agencies.³³¹ The Act also allows likely political appointees to receive orientation on matters like the functions, duties, responsibilities and mission of the agencies and to meet with agency staff tasked to the transition before and after the election, with certain restrictions.³³²

Candidates can also prepare a list of policy priorities and begin discussing or having drafting done for outlines of rules that would be necessary to accomplish their regulatory goals. Getting started on regulatory policymaking before the election is important because even without taking into account the tasks of developing a regulatory agenda and choosing agency staff, the period between the election and when a president-elect takes office is typically too short to adequately prepare for the basic requirements necessary for launching new substantive initiatives.³³³ For example, President Clinton spent months prior to his election preparing a new approach to regulation that eventually culminated in the issuance of Executive Order 12,866. He convened numerous meetings with groups such as the U.S. Chamber of Commerce and OMB Watch to discuss how to make the regulatory process more efficient. Despite this advance work, it was nevertheless six months into his administration before he issued his executive order and began to coordinate regulatory planning among various agencies.³³⁴

Moving quickly on presidential appointees is also an important step for getting rules out quickly. In the past, presidents have focused on announcing cabinet nominees in the month after the election.³³⁵ But it is an enormous task to fill the rest of the political positions at agencies at the start of an administration, as there are more than 700 top agency positions that require Senate confirmation.³³⁶ Delays in rulemakings are associated with delays in filling these positions, which can be exacerbated by insufficient preparation during the transition period.³³⁷ Over the last few decades, presidents have taken longer and longer to find suitable professionals to fill all of the many posts. While the Reagan administration filled 86.4% of Senate-confirmed agency positions during its first year in office, George H.W. Bush managed to have 80.1% in place, Clinton 69.8%, George W. Bush 73.8%, and Obama 64.4 %, showing a marked decline over the

³³¹ HENRY B. HOGUE, CONG. RESEARCH SERV., RS22979, PRESIDENTIAL TRANSITION ACT: PROVISIONS AND FUNDING 6 (2016).

³³² *Id.* at 7; CTR. FOR PRESIDENTIAL TRANSITION, *supra* note 329, at 16-17, 72.

³³³ John P. Burke, *Lessons from Past Presidential Transitions: Organization, Management, and Decision Making*, 31 PRESIDENTIAL STUD. Q. 5, 7 (2001).

³³⁴ Robert J. Duffy, *Regulatory Oversight in the Clinton Administration*, 27 PRESIDENTIAL STUD. Q. 71, 73-74 (1997).

³³⁵ *See, e.g.*, Coral Davenport, *Trump Is Said to Offer Interior Job to Ryan Zinke, Montana Lawmaker*, N.Y. TIMES (Dec. 13, 2016), <https://www.nytimes.com/2016/12/13/us/politics/donald-trump-ryan-zinke-interior-secretary.html>; Coral Davenport & Eric Lipton, *Trump Picks Scott Pruitt, Climate Change Denialist, to Lead E.P.A.*, N.Y. TIMES (Dec. 7, 2016), <https://www.nytimes.com/2016/12/07/us/politics/scott-pruitt-epa-trump.html>.

³³⁶ *See* O'Connell, *supra* note 36, at 496-97.

³³⁷ *Id.*; Anne Joseph O'Connell, *Let's Get It Started: What President-elect Obama Can Learn from Previous Administrations in Making Political Appointments*, CTR. FOR AM. PROGRESS 11-13 (2009), <https://www.americanprogress.org/issues/general/reports/2009/01/15/5462/lets-get-it-started/>.

years.³³⁸ The trend has continued in the Trump administration. About a year into Trump's first year, he had *nominated* only 40% of 633 key positions.³³⁹ By December 31, 2017, Trump had succeeded in having only 300 appointees confirmed, compared to 452 for Barack Obama and 493 for George W. Bush at the same point in their presidencies.³⁴⁰ Without sufficient personnel in place, it may be difficult for agencies to undertake the necessary preparations for new rules, including the development of solid working relationships between career staff and incoming political appointees.³⁴¹

In some ways, transition efforts have become considerably more robust over the last two decades with improvements in areas such as national security since 9/11.³⁴² But these improvements have not trickled down into agencies, which continue to be plagued by staffing shortages into the first months of an administration.³⁴³ To ameliorate these shortcomings, transition teams should at a minimum devote more efforts to agency staffing, particularly identifying personnel for top administrative positions. While the transition period does not provide a magic bullet, by devoting significantly more attention to regulatory planning than has been the case to date, incoming administrations make it more likely that rules are completed earlier in the president's first term and are therefore more likely to be safe from the rollback tactics discussed in this Article, should the president fail to be reelected.

2. *Speed and Compromise*

The threat posed by the rollback tools is also likely to have an impact on agency decisions when planning and drafting regulations in three significant ways. Each, in turn, could have its own potential pitfalls. First, agencies might try to complete rules more quickly than has historically been the case.³⁴⁴ For example, an agency could devote more resources to a smaller list of important rules in order to promulgate them quickly, while working more slowly on a bigger list. To be sure, some presidents may face factors outside of the administration's control,

³³⁸ See O'Connell, *supra* note 36, at 532, n. 210.

³³⁹ Charles S. Clark, *Trump Continues to Set Records for Agency Vacancies*, GOV'T EXECUTIVE (Jan. 16, 2018), <https://www.govexec.com/oversight/2018/01/trump-continues-set-records-agency-vacancies/145218/>; see also Juliet Eilperin, Josh Dawsey, and Seung Min Kim, *'It's Way Too Many': As Vacancies Pile Up in Trump Administration, Senators Grow Concerned*, WASH. POST (Feb. 4, 2018), https://www.washingtonpost.com/national/health-science/its-way-too-many-as-vacancies-pile-up-in-trump-administration-senators-grow-concerned/2019/02/03/c570eb94-24b2-11e9-ad53-824486280311_story.html.

³⁴⁰ Jay Diehm, Sergio Hernandez, et al., *Tracking Trump's Nominations*, CNN (Dec. 31, 2017), <https://www.cnn.com/interactive/2017/politics/trump-nominations/>.

³⁴¹ See, Richard L. Revesz, *Pruitt Exemplified How Partisanship Hinders Policymaking. That Problem Lingers for Trump*, SLATE MAG. (July 10, 2018), <https://slate.com/technology/2018/07/pruitt-exemplified-how-partisanship-hinders-policymaking.html>.

³⁴² Richard Skinner, *9/11 Improved Presidential Transitions*, VOX (Oct. 10, 2016), <https://www.vox.com/mischiefs-of-faction/2016/10/10/13143264/september-11-improved-presidential-transitions>.

³⁴³ Russell Berman, *"The Most Important Takeover of Any Organization in History,"* ATLANTIC (Apr. 22, 2016), <https://www.theatlantic.com/politics/archive/2016/04/improving-the-presidential-transition-2016/477528/>.

³⁴⁴ See Stuart Shapiro, *Will Congressional Review Act Repeals Change Agency Behavior?*, REG. REV. (Apr 3, 2017), <https://www.theregreview.org/2017/04/03/shapiro-congressional-review-act-agency-behavior/> (“[A]lthough these regulations might get to bed earlier, there is no guarantee that they will wake up looking better.”).

such as congressional resistance, when attempting to speedily issue new and important rules.³⁴⁵ For example, during the Clinton administration Congress used appropriations riders to block the Department of Labor from issuing any rule addressing ergonomics injuries over a period of years.³⁴⁶ But focused attention on this issue could help.

A potential pitfall with this strategy is that issuing regulations quickly could lead to a sacrifice of research and reasoning. Some studies suggest that the quality of economic analyses may suffer when agencies are placed on tight deadlines.³⁴⁷ Cutting corners in that way could lead to judicial reversal. As a recent example, many rules issued out of the Trump administration were finalized very quickly and a significant number of those rules has been struck down for cutting corners.³⁴⁸ Thus, while it definitely makes sense for agencies to give serious thought to speeding up the various components of the rulemaking process, they need to be cognizant of the tradeoff between shortcuts that might make rules more vulnerable to judicial review and delays that might make the rules more vulnerable to rollback efforts.

Agencies may also work with the White House to speed up review by the Office of Management and Budget, a process that is meant to ensure that other affected agencies have been consulted and to shore up the technical and economic soundness of the rule.³⁴⁹ But review time is not typically a substantial part of the process, and so there is not much time to be saved there. Moreover, a sacrifice in review time could also lead to shakier rules.

Second, to avoid the threat of future suspensions, agencies might need to shorten compliance deadlines. Industry often asks for long compliance deadlines to allow time to install complex equipment or technology and to train staff to comply with complicated new procedures.³⁵⁰ And to set shorter deadlines, an agency would need to be able to provide a reasoned explanation for why the shorter deadlines are realistic.³⁵¹ Otherwise, the agency risks having a court strike down the compliance deadline, or maybe even the rule itself. Thus, here too, agencies face a difficult tradeoff between shorter compliance deadlines, which might be attacked in court as infeasible, and longer ones, which would increase the risk that the rule would be subjected to rollback efforts following an inter-party transition.

Third, facing a bigger threat of rollbacks might also cause agencies to be less likely to be ambitious or take policy risks, especially with rules they issue later in the presidential term. For example, if an agency is issuing a rule near the end of the presidential term, keeping the rule limited and relatively uncontroversial or obtaining more buy-in from more stakeholders might help protect the rule from disapproval under the Congressional Review Act, though this could mean that the president might have to compromise on a policy priority. These changes might

³⁴⁵ See Beermann, *supra* note 36, at 957, 960-61.

³⁴⁶ *Id.*

³⁴⁷ Jerry Ellig & Christopher J. Conover, *Presidential Priorities, Congressional Control, and the Quality of Regulatory Analysis: an application to healthcare and homeland security*, 161 PUB. CHOICE 305, 306-307 (2014).

³⁴⁸ See Raso, *supra* note 205.

³⁴⁹ O'Connell, *supra* note 36, at 533 (suggesting that OMB "could establish a separate, faster review track for rulemaking proposals connected to important regulatory priorities").

³⁵⁰ See 82 Fed. Reg. 4594, 4676.

³⁵¹ See *Covad Commc'ns Co. v. Fed. Commc'ns Comm'n*, 450 F.3d 528, 550 (D.C. Cir. 2006).

help because, depending on the composition of the Senate, it may be necessary to sway only a few Senators from the other party to protect a rule from disapproval under the Act and a somewhat less ambitious rule might be perceived as less threatening by at least a few Senators of the opposite party.³⁵² The example of the defeat of the resolution to disapprove the Waste Prevention Rule, with three Republican Senators defecting from a party-line vote to join all the Democratic Senators is instructive in this regard.³⁵³

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

3. *Regulatory Timing and Elections*

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

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

These considerations deeply shaped the Obama Administration's approach to certain environmental regulations, and its recent experiences serve as a warning for future presidents who might seek to delay rulemaking out of fear of electoral consequences. President Obama entered his first term seemingly well positioned to quickly tackle his policy priorities through rulemaking. His transition to office in 2008 is generally viewed as one of the most effective in recent administrations, thanks in part to President Bush's extensive preparations, begun a year before the election, to turn over the reins of power.³⁵⁴ Obama also paid significant attention to planning for the transition and was able to begin the presidency with White House staff "in place, a personnel operation up and running," and a set of legislative and executive priorities ready to announce.³⁵⁵

³⁵² See Kellie Lunney, *Surprise! Senate Fails to Kill Obama Methane Rule*, E&E NEWS (May 10, 2017), <https://www.eenews.net/stories/1060054362>.

³⁵³ See *supra* text accompanying notes 84-85.

³⁵⁴ MARTHA JOYNT KUMAR, *BEFORE THE OATH: HOW GEORGE W. BUSH AND BARACK OBAMA MANAGED A TRANSFER OF POWER* 249-250 (2015).

³⁵⁵ *Id.* at 250.

But despite this running start, President Obama opted not to address a number of regulatory initiatives during his first term, instead spending the Administration's initial political capital on legislative initiatives, including healthcare reform, which resulted in the passage of the Affordable Care Act,³⁵⁶ and greenhouse gas reductions, which led to the failed Waxman-Markey bill, which passed the House in 2009 but did not clear the filibuster hurdle in the Senate in 2010.³⁵⁷

After that, the Obama administration chose to postpone important administrative actions until after the 2012 election to increase the president's probability of reelection.³⁵⁸ The Office of Information and Regulatory Affairs (OIRA) appears to have played an important role in delaying potentially controversial regulatory initiatives prior to Obama's reelection. Cass Sunstein, who served as director of OIRA, has been accused of using his position to stall agency actions at the behest of the White House prior to the 2012 election.³⁵⁹ For example, there is suspicion that President Obama delayed implementation of a stricter ozone standard to avoid a political backlash before the 2012 election, intervening to stop issuance of an EPA rule over the objections of administrator Lisa Jackson.³⁶⁰

With the benefit of hindsight, the decision to put off important regulatory initiatives until the second term has generated widespread criticism,³⁶¹ because, had EPA, for example, moved more quickly and issued the rules earlier, some of its more controversial rules, such as the Clean Power Plan and methane emissions rules, may have been less vulnerable to reversal later.³⁶² But, on the other hand, these regulatory initiatives would have been dead in their tracks had their unveiling in the first term doomed President Obama's reelection.

The Obama administration is not alone in delaying rules and regulations until after reelection. Stalling potentially controversial regulations is part of a broader pattern political scientists have documented in reelection campaigns, in which presidents avoid divisive issues to

³⁵⁶ Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, Pub. L. No. 111-192 (2010).

³⁵⁷ Amanda Reilly & Kevin Bogardus, *7 Years Later, Failed Waxman-Markey Bill Still Makes Waves*, E&E NEWS (June 27, 2016), <https://www.eenews.net/stories/1060039422>.

³⁵⁸ Evan Lehmann & Jean Chemnick, *Obama's Climate Legacy: 8 Years of Troubles and Triumphs*, E&E NEWS (Jan. 20, 2017), <https://www.eenews.net/stories/1060048703>.

³⁵⁹ See Scot J. Paltrow, *Small White House Agency Stalls Life-Saving Regulations, Reuters Finds*, REUTERS (Oct. 29, 2015), <http://www.reuters.com/investigates/special-report/usa-regulations-oira/>; Helena Bottemiller Evich, *Why President Obama and Congress Turned Their Backs on Food Safety*, POLITICO (Jul. 14, 2015), <https://www.politico.com/story/2015/07/sickness-in-the-system-120057>.

³⁶⁰ See Jason Plautz, *With Proposed New Ozone Rule, Obama Tees Up Next Environmental Fight*, ATLANTIC (Nov. 25, 2014), <https://www.theatlantic.com/politics/archive/2014/11/with-proposed-new-ozone-rule-obama-tees-up-next-environmental-fight/452691/>; John M. Broder, *Re-election Strategy Is Tied to a Shift on Smog*, N.Y. TIMES (Nov. 16, 2011), <https://www.nytimes.com/2011/11/17/science/earth/policy-and-politics-collide-as-obama-enters-campaign-mode.html>.

³⁶¹ Marianne Lavelle, *2016: President Obama's Climate Legacy Marked by Triumph, but also Lost Opportunities*, INSIDECLIMATE NEWS (Dec. 26, 2016), <https://insideclimatenews.org/news/23122016/obama-climate-change-legacy-trump-policies>; see also Beermann, *supra* note 36, at 966-69.

³⁶² Emily Atkin, *Scott Pruitt Is the Hypocritical Liar That Trump Deserves*, NEW REPUBLIC (May 19, 2017), <https://newrepublic.com/article/142671/scott-pruitt-hypocritical-liar-trump-deserves>.

maximize their appeal to the electorate.³⁶³ Although no studies have precisely documented this phenomenon for prior presidents, there is evidence that the George W. Bush administration postponed rules on food safety, land development, telecommunications and corporate governance until after the 2004 election.³⁶⁴ President Reagan slowed his agency “deregulatory” efforts ahead of his 1984 reelection campaign, fearing political backlash.³⁶⁵ Reagan later sped up his regulatory work and issued several controversial midnight regulations at the end of his term so as to avoid interfering with President George H.W. Bush’s incoming message of a “kinder, gentler” nation.³⁶⁶ This gamesmanship stretches as far back as the Nixon administration, which was accused of delaying worker health and safety standards in 1972 as part of a broader effort to manipulate agency activities in order to maximize campaign contributions ahead of his reelection bid.³⁶⁷

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

Assuming a president is reelected, a second-term president does have an advantage that first term presidents do not. She can spend the first four years in office developing a proposed rule, potentially having it ready to publish in the *Federal Register* right after the election, before the second term even begins, though care would need to be taken to avoid leaks that could have negative electoral consequences. Waiting to go public until after the election could avoid the reelection fears that fuel delays in regulation while simultaneously completing one of the lengthiest steps in regulatory process for significant rules with more than four years to spare. Under typical circumstances, this strategy could protect rules from Congressional Review Act disapprovals and abeyances, and if the compliance deadlines are short enough, it could also help shield the rule from suspension efforts.³⁶⁸ If President Obama had followed this protocol with the Clean Power Plan shortly after the November 2012 election instead of on June 2014, the additional year and a half probably would have ended shielding the rule from an abeyance.³⁶⁹

B. Electoral Incentives

The changes in the administrative state that are likely to result from the actions of the Trump administration will also affect electoral incentives. This Section discusses congressional control and presidential succession, respectively. On the first, it argues that outgoing presidents will face a significant additional incentive to try to maintain their party’s control of at least one

³⁶³ See Michael Nelson, *Bill Clinton and the Politics of Second Terms*, 28 PRESIDENTIAL STUD. Q. 786, 788 (1998).

³⁶⁴ Stephen Labaton, *Agencies Postpone Issuing New Rules as Election Nears*, N.Y. TIMES, Sep. 27, 2004, at A1.

³⁶⁵ Oann S. Lublin & Christopher Conte, *The Rule Slashers*, WALL ST. J., Dec. 14, 1983, at 1.

³⁶⁶ See O’Connell, *supra* note 36, at 479.

³⁶⁷ *When Safety Didn’t Come First*, NEWSDAY, Jul. 17, 1974, at 4.

³⁶⁸ See *supra* Part II.B.

³⁶⁹ See *supra* text accompanying notes 361-362.

chamber of Congress at the end of their terms. On the second, it argues that presidents will now need to think not only about how a successor might imperil their legacy through future policies but also about whether she might dismantle a significant portion of their own regulatory legacy.

1. Congressional Control

The Trump administration's aggressive use of the Congressional Review Act underscores the importance of an electoral incentive that has gotten virtually no attention: control by the party of a term-limited president of at least one chamber of Congress at the end of a president's term. A third of all Senators face reelection every two years,³⁷⁰ and a party's control of the House during a mid-term election can give that party the incumbent advantage at the end of a president's term. As a result, a president can help ensure that her party controls at least one chamber of Congress following the end of her term not only by making electoral efforts in the last congressional election of her presidency, but also by doing so in each prior congressional election.

But there is little historical precedent for robust presidential involvement in congressional elections, particularly at the end of the tenure of a term-limited president, perhaps in part because for much of the twentieth century, control of Congress was relatively stable. Between 1933 and 1981, the Democratic Party had almost exclusive control of both the House and the Senate except for two short periods in the late 1940s and early 1950s.³⁷¹ Because competition for congressional seats was relatively low, party campaigning and collective action was "meager" and there was no serious contest for control of Congress.³⁷² The stability and consistency of party control of the House and Senate reduced the incentive on presidents to invest time and energy seeking to ensure their party's success in congressional elections. Some scholars have even gone so far as to refer to certain Democratic presidents, including John F. Kennedy, as "party predators" who used funds and resources for their own reelections rather than strengthening the overall party apparatus.³⁷³

Since the 1980s, contests over congressional seats have become much more competitive, increasing the incentives for presidents to take an active role and interest in securing congressional seats for their party.³⁷⁴ While the turnover rate in the 1980s was under 10%, by the 2000s the rate was in the teens, and in 2010, 2012, and 2018, it was over 20%.³⁷⁵ The 2018 election cycle saw the third highest turnover rate since 1974, due to a large number of resignations and retirements.³⁷⁶ This change, however, has not been reflected in significant shifts

³⁷⁰ U.S. CONST. art. I, § 3, cl. 2.

³⁷¹ FRANCES E. LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN* 1-2 (2016). As a result, scholarly interest in the drive to hold Congressional majorities has been relatively recent. *See id.* at 9-10.

³⁷² *Id.* at 3-4, 18-19.

³⁷³ DANIEL J. GALVIN, *PRESIDENTIAL PARTY BUILDING: DWIGHT D. EISENHOWER TO GEORGE W. BUSH* 170, 251 (2009).

³⁷⁴ *See* LEE, *supra* note 371, at 2.

³⁷⁵ *Id.*

³⁷⁶ *See* Geoffrey Skelley, *There Was a Lot of Turnover in The House in the 2018 Cycle*, FIVETHIRTYEIGHT (Nov. 13, 2018 5:58 AM), <https://fivethirtyeight.com/features/retirements-resignations-and-electoral-losses-the-104-house->

in the fundraising priorities of recent presidents. Both George W. Bush and Barack Obama focused considerably more attention on raising money for their own campaigns rather than on assisting their parties' congressional candidates.³⁷⁷ President Obama inherited perhaps the best-organized Democratic Party in recent memory, thanks to the efforts of Howard Dean between 2005 and 2009.³⁷⁸ Yet under his watch, Democrats saw the worst election losses at all levels of government than occurred in any prior administration. In contrast to a Senate majority that had sixty members (59 Democrats and one independent) in 2009 after Obama was inaugurated, Obama's majority had been reduced to a 48 member minority at the end of his second term (46 Democrats and 2 independents³⁷⁹; the number of house seats fell from 257 to 188.³⁸⁰ Similar losses occurred in governorships as well as in state and local offices.³⁸¹

Many members of Congress felt that President Obama did little to help them win elections. This narrative first surfaced during the 2010 midterm elections, when House Democrats claimed he had not given them sufficient public credit for helping him accomplish his agenda,³⁸² and continued throughout his presidency.³⁸³ President Obama did eventually take on a more active role in party campaigning for the 2016 elections.³⁸⁴ Unfortunately, he could not overcome several political and cultural forces that hurt Democratic candidates, including partisan gerrymandering, and deepening racial and social divisions.³⁸⁵

In seeking to reverse this pattern of historic detachment, however, outgoing presidents are likely to contend with the general trend of waning public support for lame-duck administrations. Presidents are usually unpopular during the last two years of their final term in office, which may in part explain why President Obama stayed off the campaign trail in 2014, even though he raised considerable money for the party.³⁸⁶ President George W. Bush faced a similar problem in

members-who-wont-be-back-next-year/ ("The [2018 Congressional elections] had the third-highest turnover rate since at least 1974.").

³⁷⁷ BRENDAN J. DOHERTY, *THE RISE OF THE PRESIDENT'S PERMANENT CAMPAIGN* 83-84 (2012).

³⁷⁸ See GALVIN, *supra* note 373, at 250.

³⁷⁹ U.S. SENATE, PARTY DIVISION, <https://www.senate.gov/history/partydiv.htm> (providing party breakdown in Senate).

³⁸⁰ U.S. HOUSE OF REPRESENTATIVES, PARTY DIVISIONS OF THE HOUSE OF REPRESENTATIVES, 1789 TO PRESENT, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (providing party breakdown in the House).

³⁸¹ Mara Liasson, *The Democratic Party Got Crushed During the Obama Presidency. Here's Why*, NPR (Mar. 4, 2016), <https://www.npr.org/2016/03/04/469052020/the-democratic-party-got-crushed-during-the-obama-presidency-heres-why>.

³⁸² Jake Tapper, *House Democrats Furious with President Obama*, ABC NEWS (Jul. 16, 2010), <https://abcnews.go.com/WN/house-democrats-furious-president-barack-obama-lack-support/story?id=11174124>.

³⁸³ Chris Cillizza, *President Obama Never Cared All That Much About Downballot Democrats. Until Now*, WASH. POST (Nov. 15, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/15/obama-is-going-to-try-to-do-something-out-of-office-that-he-never-did-in-office-build-the-democratic-party>.

³⁸⁴ Ed O'Keefe & Paul Kane, *On the Airwaves, Obama Is Stepping Up for Down-Ballot Democrats Like Never Before*, WASH. POST (Oct. 20, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/10/20/on-the-airwaves-obama-stepping-up-for-down-ballot-democrats-like-never-before/>.

³⁸⁵ Clare Malone, *Barack Obama Won the White House, But Democrats Lost the Country*, FIVETHIRTYEIGHT (Jan. 19, 2017), <https://fivethirtyeight.com/features/barack-obama-won-the-white-house-but-democrats-lost-the-country/>.

³⁸⁶ Jay Newton-Smith, *Vulnerable Democrats Run Away from Obama*, TIME (Oct. 14, 2014), <http://time.com/3507165/alison-grimes-barack-obama-midterm-elections/>.

the waning years of his presidency because of the unpopular Iraq war, which likely cost his party control of both chambers of Congress in 2006.³⁸⁷ President Trump has shown considerable interest in campaigning to maintain control of Congress, though he has declined to follow the advice of Republican party leaders about the best way to do so and may end up proving toxic to at least some Republican candidates.³⁸⁸

As a result of the increasing importance of having a president's party control at least one of the chambers of Congress at the end her term, we might observe a greater commitment by future presidents in providing logistical support to their party's electoral structures. For example, President Obama had a massive database of supporters that was kept a tightly guarded secret after his election, and he has been criticized for housing his campaign's data and analytics separately from those of the Democratic Party.³⁸⁹ Future presidents might, instead, opt to cooperate more closely and earlier with their party's national committees in order to improve the odds of protecting their regulatory legacy through control of Congress. In summary, while presidents have spent significant time fundraising for party candidates over the last two decades, the threat of Congressional Review Act disapprovals is likely to intensify this trend.³⁹⁰

2. *Presidential Succession*

Presidents have understood for a long time that their legacy is likely to be better protected by a successor of the same party and commentators have traditionally been concerned with the impact of a successor's policies on that president's legacy.³⁹¹ But now, due to the Trump administration's rollback tactics, outgoing presidents will also need to worry more than in the past about efforts to dismantle their legacy if their successor is of a different party.

An outgoing president seeking to help elect a successor, however, is likely to face significant hurdles. One difficulty is that there is little historical precedent for the same party to keep control of the Executive Branch for three terms in a row, suggesting that Americans may desire a change in leadership after a two-term president. Since the ratification in 1951 of the

³⁸⁷ *See id.*

³⁸⁸ *See* Jonathan Martin, et al., *Trump's Role in Midterm Elections Roils Republicans*, N.Y. TIMES (Apr. 29, 2018), <https://www.nytimes.com/2018/04/28/us/politics/trump-midterm-elections.html>.

³⁸⁹ *See* Lois Beckett, *Three Things We Don't Know About Obama's Massive Voter Database*, PROPUBLICA (Mar. 27, 2012), <https://www.propublica.org/article/three-things-we-dont-know-about-obamas-massive-voter-database>; Maggie Haberman, *Obama 2012 Data to DNC*, POLITICO (Nov. 20, 2013), <https://www.politico.com/story/2013/11/barack-obama-2012-campaign-data-100133.html>; *see also* Eric Bradner, *Democrats to Clinton: You Used Data Wrong*, CNN (Jun. 2, 2017), <https://www.cnn.com/2017/06/02/politics/hillary-clinton-dnc-data-pushback/index.html>.

³⁹⁰ Sebastian Payne, *Obama Extends Long-Term Trend of Fundraising Presidents*, WASH. POST (July 26, 2014), https://www.washingtonpost.com/politics/obama-extends-long-term-trend-of-fundraising-presidents/2014/07/26/668cda78-14d8-11e4-9285-4243a40ddc97_story.html.

³⁹¹ *See, e.g.*, THE PRESIDENCY OF BARACK OBAMA: A FIRST HISTORICAL ASSESSMENT (Julian E. Zelizer, ed. 2018) (surveying key policies of Pres. Obama with a strong focus on the predicted impact of Pres. Trump); THE PRESIDENCY OF GEORGE W. BUSH: A FIRST HISTORICAL ASSESSMENT (Julian E. Zelizer, ed. 2010) (same for Pres. Bush and Pres. Obama, respectively); *see also* Richard Alexander Izquierdo, *The Architecture of Constitutional Time*, 23 WM. & MARY BILL OF RTS. J. 1089, 1097-1101 (2015) (describing Presidential efforts to create enduring legacies).

Twenty-Second Amendment, limiting presidents to two terms in office, the same party has occupied the White House for three straight terms only once, when George H.W. Bush succeeded Ronald Reagan.³⁹² This poor track record may be deceptive because some of those elections were very close, but it does not bode well for future attempts to secure three-term party control of the White House.³⁹³

Another problem is that outgoing presidents, as noted above, tend to be fairly unpopular.³⁹⁴ This unpopularity has led to either the outgoing president declining to campaign or to the candidate refusing the assistance.³⁹⁵ For example, Vice President Al Gore distanced himself from President Clinton during his campaign, publicly saying he felt “disappointed” about the Monica Lewinsky scandal.³⁹⁶

Even presidents who maintain their popularity have shown little interest in helping their party’s candidate.³⁹⁷ One exception may be President Reagan, who had historically high approval ratings at the end of his second term.³⁹⁸ Yet the successful campaign of then Vice President George H.W. Bush may not have benefited significantly from his help.³⁹⁹ After giving a somewhat tepid endorsement, Reagan hit the campaign trail for Bush, traveling at least once a week in the final months before the election.⁴⁰⁰ But although there is polling evidence indicating that Reagan’s popularity may have helped Bush in a way that Bill Clinton’s lower popularity could not help Gore,⁴⁰¹ Bush’s win may actually have resulted from his subtle attempts to distance himself from President Reagan on matters ranging from foreign policy to the environment.⁴⁰²

³⁹² Raymond A. Smith, *Is It That Hard for a Party to Hold the White House for Three Terms?*, THE HILL (Apr. 15, 2015), <http://thehill.com/blogs/pundits-blog/presidential-campaign/238812-is-it-that-hard-for-a-party-to-hold-the-white-house>.

³⁹³ *See id.*

³⁹⁴ Rebecca Kaplan, *Why Outgoing Presidents Stay Off the Campaign Trail*, CBS NEWS (Nov. 24, 2014), <https://www.cbsnews.com/news/why-outgoing-presidents-stay-off-the-campaign-trail/>.

³⁹⁵ Domenico Montanaro, *Why President Obama Campaigning for Clinton Is Historic*, NPR (July 5, 2016), <https://www.npr.org/2016/07/05/484817706/looking-back-at-a-century-of-presidents-not-campaigning-for-their-successor>.

³⁹⁶ ABC 20/20 Transcript, Albert Gore, Jr., (June 16, 1999) (quoting Gore describing the Monica Lewinsky affair as “inexcusable” and explaining that he was “disappointed”), <https://votesmart.org/public-statement/1873/abc-2020-transcript#.XD41vM1OmHs>; *see also* Melinda Henneberger & Don Van Natta Jr., *Once Close to Clinton, Gore Keeps a Distance*, N.Y. TIMES, Oct. 20, 2000, at A1.

³⁹⁷ *See* Montanaro, *supra* note 395.

³⁹⁸ Some scholars have found evidence suggesting that this may have helped Bush in the election. *See* J. Merrill Shanks & Warren E. Miller, *Partisanship, Policy and Performance: The Reagan Legacy in the 1988 Election*, 21 BRIT. J. POL. SCI. 129 (1991).

³⁹⁹ Newsweek Staff, *Reagan And Bush: Call It A Snub*, NEWSWEEK (Mar. 8, 1992), <https://www.newsweek.com/reagan-and-bush-call-it-snub-196034>.

⁴⁰⁰ James Gerstenzang, *President Emerging as Major Asset of the Bush Campaign*, L.A. TIMES, Oct. 15, 1988, at 18.

⁴⁰¹ William Schneider, *Al Gore’s Challenges*, 32 NAT’L J. 2650 (2000).

⁴⁰² *See* JAMES MANN, THE REBELLION OF RONALD REAGAN: A HISTORY OF THE END OF THE COLD WAR 307-09 (2009); Barbara Rosewicz & Michel McQueen, *Bush, Resolving Clash in Campaign Promises, Tilts to Environment: How He Settled on Proposals That Irk Business Shows Break with Reagan Style a Battle in the Inner Sanctum*, WALL ST. J., June 13, 1989, at 1.

Considering the long history of presidents staying out of the campaigns of their possible replacements, President Obama’s serious efforts to assist Hillary Clinton’s election bid after she was formally nominated were quite notable.⁴⁰³ There were good reasons to think his appearances at rallies and fundraisers would be beneficial, as he had worked closely with Clinton during her tenure as Secretary of State and had high approval ratings among Democrats.⁴⁰⁴ However, some observers believe that President Obama stole the limelight from Clinton at public events, with Obama himself admitting that he might be enjoying the 2016 campaign “too much.”⁴⁰⁵ And his ability to connect with certain groups, particularly African-American voters, did not seem to convince them to turn out for Clinton in the same numbers as they did for his elections.⁴⁰⁶

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

IV. RECONCEPTUALIZING THE EXECUTIVE BRANCH

The Trump administration’s actions, and the reaction that is likely to follow, will produce an important reconceptualization of the nature of the Executive Branch. As discussed throughout this Article, one-term presidents are likely to be significantly constrained in their ability to have important policy initiatives adopted through regulation, which has emerged as the predominant tool for making domestic policy as a result of congressional gridlock.

To be effective on the domestic front, a president will need to be reelected. As a result, we are moving from a world in which a single electoral victory was sufficient to effect significant policy changes through regulation to one in which consecutive victories in national elections will be necessary. Requirements of multiple victories in order to have decisions become effective are not uncommon in political systems,⁴⁰⁷ but the Executive Branch of the federal government has never been viewed in this light. This Part discusses requirements, in other political contexts, that multiple votes take place before a decision becomes effective and the justifications for such requirements. It then shows that these justifications are inapposite to the regulatory context. Therefore, they do not provide normative support for the reconceptualization of the Executive Branch that is being wrought by the aggressive use of rollback tools.

⁴⁰³ See Montanaro, *supra* note 395.

⁴⁰⁴ Nora Kelly, *President Obama’s Campaign-Trail Debut*, ATLANTIC (July 5, 2016), <https://www.theatlantic.com/politics/archive/2016/07/obama-clinton-campaign-north-carolina/490079/>.

⁴⁰⁵ Matt Flegenheimer, *How Obama Stole the Show at Hillary Clinton’s Campaign Rally*, N.Y. TIMES (Jan. 20, 2018), <https://www.nytimes.com/2016/07/06/us/politics/obama-hillary-clinton.html>.

⁴⁰⁶ Eugene Scott, *Obama Campaigns for Doug Jones, but the Obama Effect Doesn’t Always Extend Beyond Obama*, WASH. POST (Dec. 11, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/12/11/obama-campaigning-for-doug-jones-but-the-obama-effect-doesnt-always-extend-beyond-obama/>.

⁴⁰⁷ The idea that there should be multiple electoral victories before legislative acts become final goes as far back as the American colonial period. See PA. CONST. of 1776, § 15, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3086 (Francis Newton Thorpe ed., 1909).

A. Multiple-Vote Requirements

Multiples-vote requirements for constitutional changes have existed in many U.S. states as well as in other countries. They have been justified primarily on legitimacy and stability grounds. This Section surveys these multiple-vote requirements and their justifications.

1. State and Foreign Provisions

Currently, fourteen states⁴⁰⁸ and at least one territory⁴⁰⁹ require two sessions of a legislature, and generally an intervening election, to ratify legislatively suggested constitutional amendments.⁴¹⁰ Of these, the most common scheme requires a simple majority vote by both chambers of the state legislature, another vote by both chambers in a subsequent session, and then a majority vote by the people in a general election.⁴¹¹ There are variations: for example, Delaware does not require a vote by the people, but does require two-thirds votes in both chambers two times, with the second vote happening after an intervening general election.⁴¹² South Carolina inverts the order: first it requires two-thirds approval in both chambers, then popular ratification, and after that a simple majority vote in both chambers.⁴¹³ Other states offer an option: amending Hawaii's constitution requires a two-thirds vote in both houses in one session, or a simple majority in both houses in two successive sessions.⁴¹⁴ In that constitution, a stable majority can substitute for a perhaps fleeting supermajority.

Provisions of this sort also exist outside of the United States. Constitutional amendment provisions in many European countries have requirements for multiple votes,⁴¹⁵ generally separated by intervening elections.⁴¹⁶ Some call for the dissolution of the legislature after a successful vote, so that the electorate can express its view of the change and a newly elected representatives who can consider the amendment again.⁴¹⁷ Variations exist beyond Europe too. Azerbaijan and Eritrea require successive votes in their national assemblies, without the need for

⁴⁰⁸ John Dinan, Council on State Gov'ts, *Constitutional Amendment Procedure*, in THE BOOK OF THE STATES 2016 (2016).

⁴⁰⁹ AM. SAMOA CONST. art. 1, § 3.

⁴¹⁰ See, e.g., N.Y. CONST. art. 19, § 1; VA. CONST. art. 12, § 1. Of the U.S. states with multiple-vote requirements for constitutional amendments, three do not require intervening elections. See HAW. CONST. art. 17, § 3; MASS. CONST. art. 48, pt. 4, § 4; N.J. CONST. art. 9, pt. 1.

⁴¹¹ Dinan, *supra* note 408.

⁴¹² DEL. CONST. art. XVI, § 1.

⁴¹³ S.C. CONST. art. XVI, § 1.

⁴¹⁴ HAW. CONST. art. XVII, § 3.

⁴¹⁵ See, e.g., CONST. OF LUXEMBOURG art. 114; 1975 SYNTAGMA [SYN.] [CONSTITUTION] 110 (Greece); NORWAY CONST. art. 121; RIKSDAGORDNINGEN [RO] [CONSTITUTION] 14 (Swed.); see also Study No. 469/2008, Report on Constitutional Amendments, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (Venice Commission) (2010) (listing other countries with similar measures), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)001-e).

⁴¹⁶ See, e.g., Grundloven [GrL] [Constitution] Lov. nr. 88 (Den.); 1975 Syntagma [Syn.] [Constitution] 2, art. 110 (Greece).

⁴¹⁷ See, e.g., Grundloven [GrL] [Constitution] Lov. nr. 88 (Den.); CONST. OF ICELAND art. 79; CONST. OF LUXEMBOURG § 114(1)-(2).

intervening general elections.⁴¹⁸ Ghana requires two successive votes with a supermajority in Parliament for amendments having to do with fundamental rights and freedoms.⁴¹⁹ Nicaragua requires two votes for partial changes to the constitution, while large, substantive changes need a full constitutional convention.⁴²⁰

2. *Legitimacy and Stability Justifications*

The justifications for these provisions generally fall into two categories: legitimacy and stability. On the first, multiple-vote requirements help improve the democratic legitimacy of the proposed amendment by ensuring that the amendments “approximate the will of the people as a whole” as much as possible.⁴²¹ For example, the Swedish procedure is designed to ensure that there is “time for reflection” and the opportunity for the people “to express their views” about any potential changes, thus ensuring that anything that passes has received “broad support.”⁴²² In this way, multiple votes help guard against an “unrepresentative majority” capturing the amendment process.⁴²³ And the requirements promote legitimacy by preventing “self-dealing that would either benefit incumbent political actors or disadvantage their adversaries.”⁴²⁴ In addition, in the case of the provisions that dissolve the legislature shortly after the first vote,⁴²⁵ the provisions can help focus the electorate’s attention on this issue, before other matters take attention away from the electorate.

As for the second theme, successive vote requirements are akin to constitutional provisions designed to promote more long-term stability and guard against a “momentary majority.”⁴²⁶ Many multiple-vote requirements in U.S. states were designed to ensure that constitutional changes were not brought about by only a temporary majority.⁴²⁷ For example, when Wisconsin changed its state constitutional amendment process from supermajority to multiple votes, one Wisconsin newspaper explained the reason as to put changes “beyond the reach of any sudden ebullition of feeling, prompted by whatever motive.”⁴²⁸ And in discussing

⁴¹⁸ See CONST. OF AZERBAIJAN, art. 156, § 5, ch. XII; CONST. OF ERITREA, ch. VII art. 58.

⁴¹⁹ See CONST. OF GHANA, art. 290-91.

⁴²⁰ See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] art. 192-94, LA GACETA, DIARIO OFICIAL [L.G.]; see also Renaldy J. Gutierrez, *Democracy and the Rule of Law: Myth or Reality?*, 47 DUQ. L. REV. 803, 807 n.10 (2009) (discussing Nicaraguan constitution).

⁴²¹ Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535, 539, 571-72 (1995).

⁴²² Magnus Isberg, *Introduction to The Constitution of Sweden, The Fundamental Laws and the Riksdag Act*, 9 (2016), <http://www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf>.

⁴²³ Richard Albert, *Amending Constitutional Amendment Rules*, 13 INT’L J. CONST. L. 655, 678-81 (2015); see also Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1593 (2010).

⁴²⁴ Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 955 (2014).

⁴²⁵ Grundloven [Grl] [Constitution] Lov. nr. 88 (Den.); CONST. OF ICELAND art. 79; CONST. OF LUXEMBOURG § 114(1)-(2).

⁴²⁶ Leo E. Strine Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 22 (2010).

⁴²⁷ David E. Kyvig, 18 LAW & HIST. REV. 228 (2000) (reviewing MARC W. KRUMAN, *BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* (1997)).

⁴²⁸ Joseph A. Ranney, *Wisconsin’s Constitutional Amendment Habit: A Disease or a Cure?*, 90 MARQ. L. REV. 667, 672 (2007).

New York’s prior amendment procedure requiring multiple votes, Judge Cardozo noted the need to protect “against hasty or ill-considered changes, the fruit of ignorance or passion.”⁴²⁹

These provisions limit momentary majoritarianism and promote stability by requiring voters to show approval over extended periods.⁴³⁰ The resulting delays produced by requirements for multiple votes help stem impulsiveness by raising the political costs of an amendment.⁴³¹ “[R]epeated and sustained majorities . . . help demonstrate durable rather than transient support” for changes.⁴³² And the requirement that politicians shepherd an amendment through that process helps lower the incentives to act on “temporary spikes in their popularity.”⁴³³ In sum, multiple-vote procedures may be well-suited to protect against moments of intense, but passing political pressure.

The requirements for multiple votes can also be thought of as applications to the public sphere of cooling-off periods found in other areas of the law, which also are thought to benefit increased stability. Those types of periods are present in provisions involving consumer protection (e.g., mandatory, non-waivable cancellation periods for certain purchases), public safety (e.g., waiting periods to buy a gun), and family law (delays between issuance of a license and marriage).⁴³⁴ Forcing people to wait can give them time to reflect and allow them to make more informed decisions⁴³⁵ or decisions that are more likely to serve their “true” preferences, thus potentially leading to fewer changes over time.⁴³⁶ Such provisions can be particularly helpful to individuals who might otherwise make poor decisions due to problems of self-control.⁴³⁷

The empirical literature, though limited, suggests that the difficulty of passing an amendment under a multiple-vote requirement, does not render it impossible to pass the amendments, but that it instead may indeed promote the goals of stability and legitimacy. The evidence shows that two-vote requirements for simple majorities, absolute majorities, and three-fifths majorities have a relatively small effect on whether an amendment passes, while a two-vote requirement for a high supermajority imposes a higher barrier.⁴³⁸ Garnering a simple

⁴²⁹ *Browne v. City of New York*, 149 N.E. 211, 213-14 (1925) (Cardozo, J.).

⁴³⁰ Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1429 (2007).

⁴³¹ Samuel Issacharoff, *Constitutional and International Law: The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985, 1989 (2003).

⁴³² Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438, 503 (2018).

⁴³³ David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 289 (2013).

⁴³⁴ Russell Korobkin, *Libertarian Welfarism*, 97 CALIF. L. REV. 1651, 1664 (2009).

⁴³⁵ Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1240-43 (2003).

⁴³⁶ Mario J. Rizzo & Douglas Glen Whitman, *The Knowledge Problem of New Paternalism*, 2009 B.Y.U. L. REV. 905, 916 (2009).

⁴³⁷ Oskari Juurikkala, *The Behavioral Paradox: Why Investor Irrationality Calls for Lighter and Simpler Financial Regulation*, 18 FORDHAM J. CORP. & FIN. L. 33, 57 (2012).

⁴³⁸ See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 256 (Sanford Levinson ed. 1995); see also FRANK P. GRAD & ROBERT F. WILLIAMS, 2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 70-71 (2006) (“There seems to be no relationship . . . between the requirement of a special majority or of dual legislative passage and the frequency of amendment.”); Donald S. Lutz,

majority twice (the most common procedure) is easier, or at least statistically more common, than getting a supermajority of any kind once.⁴³⁹ And states “with more onerous procedures” have been able to improve the quality of amendments and thus the possibility of passage.⁴⁴⁰ Those states have approved amendments at “rates that are as great or greater than those with less onerous procedures” and have higher success rates at the referendum stage.⁴⁴¹

B. Analogy to the Modern Executive Branch

The domestic and international justifications for multiple votes in the context of constitutional amendments provide a vantage point for the normative evaluation of the current transformation of the Executive Branch set in motion by the Trump administration’s rollback actions. Like with multiple-vote requirements for constitutional amendments in certain jurisdictions, the new and aggressive use of the rollback tools effectively means that an incoming president needs two terms to ensure that a substantial proportion of her regulatory achievements remain in place.

The analogy is not perfect. With the multiple-vote requirements for constitutional amendments, because there is an intervening election between two legislative votes in favor of an amendment, the opponents have the opportunity to evaluate the amendment and punish the legislators who voted for it. In contrast, a president’s reelection is not a referendum on any particular regulatory measure. In fact, presidential candidates advocate a large number of domestic and foreign policies and the fate of any single regulation is likely to play a small role in a voter’s decision. And, voters may well be more influenced by a candidate’s style and values than by her policy prescriptions.⁴⁴²

But the reelection of legislators also does not always serve as a referendum on the constitutional amendment. Voters electing a legislator presumably have preferences over many dimensions. As a result, some might prefer a legislator despite their opposition to the amendment that the legislator favors. And others might oppose a legislator despite their support for the amendment that the legislator opposes. The analogy between the Executive Branch, as it is in the

Patterns in the Amending of American State Constitutions, in CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 24 (G. Alan Tarr ed. 1996) (discussing the same data).

⁴³⁹ See Lutz, *Toward a Theory of Constitutional Amendment*, *supra* note 438, at 255.

⁴⁴⁰ Bruce Cain, Sara Ferejohn, Margarita Najjar, & Mary Walther, *Constitutional Change: Is It Too Easy to Amend Our State Constitution?*, in CONSTITUTIONAL REFORM IN CALIFORNIA 273, 276 (Bruce E. Cain & Roger G. Noll eds. 1995).

⁴⁴¹ *Id.*; see also Lutz, *Patterns in the Amending of American State Constitutions*, *supra* note 438, at 40.

⁴⁴² See, e.g., GEORGE E. MARCUS, W. RUSSELL NEUMAN, & MICHAEL MACKUEN, *AFFECTIVE INTELLIGENCE AND POLITICAL JUDGMENT* (2000); Amanda Taub, *Why Americans Vote ‘Against Their Interest’: Partisanship*, N.Y. TIMES (Apr. 12, 2017), <https://www.nytimes.com/2017/04/12/upshot/why-americans-vote-against-their-interest-partisanship.html>; Max Ehrenfreund, *A Strange But Accurate Predictor of Whether Someone Supports Donald Trump*, WASH. POST (Feb. 1, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/01/how-your-parenting-style-predicts-whether-you-support-donald-trump/>.

process of being transformed, and the constitutional amendment regimes of some states and foreign jurisdictions, is therefore relatively strong.

It is true that even after the Trump administration's aggressive use of rollback tools, a president would not need to propose a rule in the first term and finalize it in the second term. In fact, as discussed above,⁴⁴³ presidents might not want to do that, preferring instead to work on the proposed rule in the first term but publish the proposal only after the reelection. But it is nonetheless the case that modern presidents have had a general perspective on regulations, which the electorate can evaluate. For example, since the 1980s, Republican presidential nominees have generally run on anti-regulatory platforms and have attributed pro-regulatory designs on their Democratic opponents.⁴⁴⁴ Thus, even if a particular legislative proposal is not visible to the electorate when a president runs for reelection, the president's general approach to regulatory issues is likely to be well understood.

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

1. *Legitimacy*

The trend towards requiring a president to be reelected for a significant proportion of her regulatory measures to have lasting power would have a plausible legitimacy justification if regulations were somehow less legitimate than legislation, which does not require multiple votes across time. Courts, commentators, and practitioners have long debated the “democratic legitimacy of administrative power.”⁴⁴⁵ Critics have argued that agencies lack democratic legitimacy when they attempt to entrench their policies so that a future president of the opposing party cannot easily change them.⁴⁴⁶ This literature has been premised in part on the view that, compared to legislation, regulatory policymaking exhibits a lack of transparency and accountability.⁴⁴⁷

But the way in which regulations are promulgated and legislation is enacted these days does not support the view that regulations should be viewed as having lesser legitimacy.⁴⁴⁸ Starting in the 1960s and 1970s and accelerating through the 1980s until now, courts have imposed significant requirements on agencies, to the point that agencies now conduct their work

⁴⁴³ See *supra* Part III.A.3.

⁴⁴⁴ See Soren Jordan, Clayton McLaughlin Webb, & B. Dan Wood, *The President, Polarization and the Party Platforms, 1944-2012*, 12 THE FORUM 169, 180 (2014), <http://www.auburn.edu/~scj0014/Downloads/JordanWebbWood.pdf>.

⁴⁴⁵ See Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN L. REV. 605, 607 (2016).

⁴⁴⁶ See Mendelson, *supra* note 18, at 566-67.

⁴⁴⁷ Metzger, *supra* note 10, at 31; Kagan, *supra* note 18, at 2263-64.

⁴⁴⁸ Cf. Metzger, *supra* note 10, at 7 (explaining that the administrative state has several features that are “essential for an accountable, constrained, and effective exercise of executive power”).

as “quasi-legislatures,” working to build a record and to represent the interests of the varied stakeholders affected by their decisions.⁴⁴⁹ To fulfill this vision, courts have required increased participation in the process, through multiple doctrines. For example, courts made it easier to meet standing requirements so that stakeholders could enforce their right to participate in the process and implemented the “hard look” doctrine designed to ensure that agencies addressed all the important issues raised.⁴⁵⁰ These procedures have helped create accountability and have served as a predictable set of constraints on agency overreach, waste, and abuse.⁴⁵¹ Relatedly, the “hard look” doctrine reinforces the view that agency decisions are best made by experts who have more experience with a topic than the other branches of government, which in turn helps increase their legitimacy as policymakers.⁴⁵² As an example, during the Obama administration, EPA’s decision to issue the Clean Power Plan involved several years of study as well as EPA’s review of millions of public comments, all with the understanding that the rule would eventually undergo judicial review and that every step in the analysis would be carefully scrutinized.⁴⁵³

Legislation, in comparison, which is enacted by directly elected representatives may deserve significant respect because it reflects the will of the people and allows different parties to “come together” transparently and devise “common schemes.”⁴⁵⁴ Under the traditional rules of “regular order,” Congress may approximate this idea because, under those rules, to pass legislation requires consideration in committee, public hearings coordinated between the two parties, markups, floor consideration, and public debates, all of which fosters consensus-building.⁴⁵⁵ But nowadays, legislation coming out of Congress has not come anywhere near to the “regular order” ideal, deserving of dignity as described by Jeremy Waldron.⁴⁵⁶ Rather, as described above,⁴⁵⁷ to pass legislation, the majority party has had to resort to tactics that ignored the minority viewpoint and eschewed any attempt at consensus building.⁴⁵⁸ It is therefore possible that regulations should no longer be viewed as deserving of less dignity than legislation.

Another possibility is that regulatory policymaking is less salient to the electorate and less legitimate for that reason as well. Multiple-vote requirements are sometimes driven by a

⁴⁴⁹ See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 510 (1985).

⁴⁵⁰ See Garland, *supra* note 449, at 510-11.

⁴⁵¹ Eric Berger, *Individual Rights, Judicial Deference, And Administrative Law Norms In Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2056-58 (Dec. 2011); Mendelson, *supra* note 18, at 652; Gergen & O’Connell, *supra* note 11, at 1170; *But see* Mendelson, *supra* note 18, at 572 (describing ways that agencies often “escape procedural discipline”).

⁴⁵² See Kagan, *supra* note 18, at 2270 (The hard-look “requirements both express a vision of an expert-driven, technocratic administration and attempt to force that vision on the agencies”); *See also* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council., 467 U.S. 837, 865 (1984) (finding that agency expertise justified deference).

⁴⁵³ See 80 Fed. Reg. 64,662, 64,707 (Oct. 23, 2015) (explaining that the agency published the proposal and supplemental proposal for comment and that it received more than four million comments).

⁴⁵⁴ See JEREMY WALDRON, *THE DIGNITY OF LEGISLATION 2* (1999).

⁴⁵⁵ See Ron Elving, *What Is The ‘Regular Order’ John McCain Longs To Return To On Health Care?*, NPR (July 26, 2017), <https://www.npr.org/2017/07/26/539358654/what-is-the-regular-order-john-mccain-longs-to-return-to-on-health-care>.

⁴⁵⁶ WALDRON, *supra* note 454, at 2.

⁴⁵⁷ See *supra* text accompanying notes 233-245

⁴⁵⁸ See *supra* Part II.A.

desire to increase the visibility and vetting of salient and important decisions. Most significantly, provisions that require the legislature to be dissolved after the first constitutional amendment vote are designed to ensure that the attention of the electorate is focused on the amendment.⁴⁵⁹

But nowadays there is little to support a thesis that regulatory policymaking is not sufficiently visible to the electorate. Though presidential elections focus on a wide range of issues of domestic and foreign policy and on many aspect of the candidates' values and style, regulatory policymaking plans have played a prominent role in recent elections. President Clinton took "ownership of administrative actions" repeatedly.⁴⁶⁰ And regulations have played important roles in elections since then. For example, whether to promulgate regulations to address the financial industry problems that led to the 2008 financial crisis was a major theme of the 2008 election.⁴⁶¹ In the 2012 election, presidential candidate Mitt Romney made rolling back Obama's "job-killing" regulations a centerpiece of his campaign.⁴⁶² Regulatory responses to environmental challenges was a big theme of the 2012 presidential election season.⁴⁶³ In the 2016 election season, Donald Trump made ending the so-called "war on coal" a big feature of his campaign.⁴⁶⁴ Indeed, with presidents opting to use the administrative state to make policy, the transparency and visibility of their signature regulations has been greatly enhanced.⁴⁶⁵

Over the last several decades, regulatory policy and legislation have moved in different directions. The former has acquired more indicia of legitimacy and the latter has shed many of the ones it had. As a result, the traditional legitimacy arguments used to justify multiple votes for state and foreign constitutional amendments do not provide a compelling normative justification for the transformation of the Executive Branch resulting from the aggressive use for rollback tools.

2. *Stability*

Stability is another goal that might justify the changes in the Executive Branch's ability to meet significant and policy goals through lasting regulatory policymaking. If, for example, multiple-vote requirements are meant to restrict impulsive decisionmaking and thus promote stability and more long-lasting and resilient change in the constitutional amendment arena, then

⁴⁵⁹ See *supra* note 425.

⁴⁶⁰ See Kagan, *supra* note 18, at 2300.

⁴⁶¹ See *Transcript of Second McCain, Obama Debate*, CNN POLITICS (October 7, 2008), <http://www.cnn.com/2008/POLITICS/10/07/presidential.debate.transcript/> (Obama explaining in response to the first question of the night that the lack of regulatory oversight helped cause the financial crisis).

⁴⁶² Justin Sink, *Romney Ad Vows "Obama Era of Big Government" Ends on "Day One,"* THE HILL (May 24, 2012), <https://thehill.com/video/campaign/229289-romney-continues-hammering-day-one-theme-in-new-commercial>.

⁴⁶³ See Elizabeth Shogren, *On The Campaign Trail, Regulations Dominate The Environmental Debate*, NPR, <https://www.npr.org/sections/itsallpolitics/2012/10/14/162811669/on-the-campaign-trail-regulations-dominate-the-environmental-debate>.

⁴⁶⁴ Coral Davenport, *Donald Trump, in Pittsburgh, Pledges to Boost Both Coal and Gas*, N.Y. TIMES (Sep. 22, 2016), <https://www.nytimes.com/2016/09/23/us/politics/donald-trump-fracking.html>; see also Justin Sink, *New Romney Ads Rip Obama on Coal Energy*, THE HILL (Sep. 19, 2012), <https://thehill.com/video/campaign/250269-romney-ads-rip-obama-on-coal>.

⁴⁶⁵ Kagan, *supra* note 18, at 2332 (the "visibility" and "personality" of the president "all render the office peculiarly apt to exercise power in ways that the public can identify and evaluate").

the question becomes whether there are certain features of regulatory policymaking that call out for similar restrictions.

There is no doubt that stability can be a salutary feature of regulatory policymaking. Regulated entities often need to make substantial investments in order to comply with the regulatory requirements. With too much regulatory vacillation, companies may put off investment decisions until the uncertainty is resolved.⁴⁶⁶ Similarly, the back and forth caused by polarized regulatory decision-making can have welfare consequences by creating uncertainty and weakening trust in regulations.⁴⁶⁷

A presidential reelection might be seen as evidence of greater stability in the preferences for the regulation. In general, the desire to issue rules that are lasting and can withstand the more aggressive use of rollback tools, as described in this Article, may lead to more robust and “disciplined” regulatory activity than would otherwise be the case.⁴⁶⁸ For example, a president who is reelected could take the first term to formulate a rule, which would be proposed only after a successful reelection, leading to a potentially stronger policy.

But it is debatable whether the forces unleashed by the Trump administration and described in this Article promote regulatory stability overall. Before the Trump administration’s aggressive rollback strategies, all regulations were more stable, because, as discussed above, the traditional rollback strategies mainly centered around stop-work orders, which applied only to regulations promulgated very late in the outgoing president’s term, and regulatory repeals and replacements, which were relatively rare.⁴⁶⁹ But after the next inter-party transition, it is likely that the president will attempt to use the same strategies that the Trump administration has used. And being able to attack a greater proportion of a predecessor’s regulations will have negative consequences from the vantage point of stability. If more regulations can be more easily rolled back by a new administration, a firm may either hold off on investing or face a chance that its compliance investments could become unproductive.⁴⁷⁰ In sum, given the destabilizing impact that rollback tools can have, a move towards a regime that is defined as a result of the aggressive use of these tools cannot be normatively justified on stability grounds.

⁴⁶⁶ See Alfred A. Marcus & Allen M. Kaufman, *Why It Is Difficult to Implement Industrial Policies: Lessons from the Synfuels Experience*, 28 CAL. MGMT. REV. 98, 102-03 (1986); B. Yang, N.D. Burns & C.J. Backhouse, *Management of Uncertainty Through Postponement*, 42 INT’L J. OF PROD. RESEARCH 1049 (2004); Ben. S. Bernanke, *Irreversibility, Uncertainty and Cyclical Investment*, 98 Q. J. ECON. 85 (1983); Robert S. Pindyck, *Irreversibility, Uncertainty, and Investment*, 29 J. ECON. LIT. 1110 (1991).

⁴⁶⁷ See Nielson, *supra* note 18, at 131 (If Trump “wishes for his regulatory initiatives to have staying power (and so to encourage robust participation by regulated parties), he would be well served by going through the full rulemaking process.”).

⁴⁶⁸ See Mendelson, *supra* note 18, at 660-61.

⁴⁶⁹ See *supra* text accompanying notes 15-18.

⁴⁷⁰ See Saiyid, *supra* note 205 (describing industry opposition to changes in mercury air emission rules); David Reid, *Here’s Why Automakers Won’t Want Trump’s Plan to Freeze Efficiency Rules*, CNBC (May 11, 2018), <https://www.cnbc.com/2018/05/11/auto-makers-dont-want-trumps-plan-to-freeze-fuel-efficiency-rules.html>; David Roberts, *The Power Sector Craves Stability. Trump Has Brought it Chaos*, VOX (Mar. 9, 2018), <https://www.vox.com/energy-and-environment/2018/3/9/17099240/powersector-trump-regulatory-certainty>.

CONCLUSION

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

Now that the Trump administration has shown the success of using these tools, it is likely that future administrations following inter-party transitions will also seriously consider using them. The resulting impact on the ability of the Executive Branch to make policy through regulation is significant and will lead to a reconceptualization of the Executive Branch. This Article explores the characteristics of this transformation by looking both at electoral impact and regulatory impacts.

Our conclusions are based on an assumption that certain features of the regulatory landscape will remain unchanged for the foreseeable future. For example, this Article takes as a given that the legislative filibuster will remain in place. Without it, if the president’s party has even just a bare majority in Congress, she would not need to use regulations to accomplish her policies, because legislation would be a realistic option. But as long as the majority party in the Senate holds that majority by only a small margin, it would be hard to imagine the Senate voting to eliminate the filibuster. Indeed, there are bound to be at least a few outlier Senators who will want to keep the filibuster in place either because they are not as firmly aligned with the party’s ideology or because they believe in the institutional importance of keeping rules that promote consensus building.⁴⁷¹ Even if a party gains control of the Senate by a large margin, there may still be enough Senators who would recognize that the majority might be fleeting⁴⁷² and that the elimination of the filibuster might not serve the party’s long-term goals.⁴⁷³

In addition, the Article takes as a given that, at least for now, arbitrary and capricious review under the Administrative Procedure Act will remain relatively stable. With shifts in the courts towards more conservative judges under President Trump,⁴⁷⁴ there are two plausible, though we believe unlikely alternatives, which push in opposite directions. First, the more conservative judges may look for ways to loosen the requirements on agencies sufficiently to allow Trump-controlled agencies more leeway than they currently have. As a result, it could get easier to issue regulations more quickly in the president’s first term as well as to suspend

⁴⁷¹ For example, Senator John McCain famously refused to vote to repeal Obama’s health care bill because Republicans had not followed regular order in putting the bill together. Dylan Scott, *I’ll Never Forget Watching John McCain Vote Down Obamacare Repeal*, VOX (Aug. 28, 2018), <https://www.vox.com/policy-and-politics/2018/8/25/17782664/john-mccain-legacy-obamacare-repeal-thumbs-down>.

⁴⁷² Between 2008 and 2010, the Senate had close to sixty Democratic senators, but the Democratic majority slipped to 53 in 2010. Jennifer M. Granholm, *Debunking the Myth: Obama’s Two-Year Supermajority*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/jennifer-m-granholm/debunking-the-myth-obamas_b_1929869.html; Election 2010, N.Y. TIMES, <https://www.nytimes.com/elections/2010/results/senate.html>.

⁴⁷³ If the political parties move closer together, as discussed in Part II.B, the impact of the filibuster may be diminished.

⁴⁷⁴ See Matthew Weber et al., *Courting Change*, REUTERS (Sep. 20, 2018), <https://graphics.reuters.com/TRUMP-EFFECT-COURTS/010080E30TG/index.html>.

regulations without providing an explanation as required under the law as it currently stands.⁴⁷⁵ Second, to the contrary, some commentators believe that the courts might eliminate various deference doctrines for agencies, making it harder to engage in regulatory policymaking.⁴⁷⁶ But the changes would need to be quite dramatic to affect the arguments developed in this Article.⁴⁷⁷

Because the background norms of the regulatory state are likely to remain in place for the foreseeable future, the changes that the Trump administration's assault on President Obama's regulations will bring to regulatory policymaking are significant. A future president may need to be reelected to have a real hope of making significant policy that sticks. As this Article shows, low visibility actions, not apparent to the vast bulk of the American people or even to experts in regulatory policy, like Congressional Review Act disapprovals, abeyances, and suspensions, will lead to important changes in regulatory strategies and to a significant reconceptualization of the Executive Branch. Despite the lack of normative support, these changes are likely here to stay.

⁴⁷⁵ See Charles Cameron, *Courts to the Rescue?*, BOSTON REV. (Aug. 20, 2018), <http://bostonreview.net/law-justice/charles-cameron-courts-rescue> (predicting that “empowered conservatives could uphold almost anything from a Trump agency as lawful”).

⁴⁷⁶ See William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1369 (2018) (describing the possibility for this shift); Metzger, *supra* note 10, at 4 (describing academic and judicial “anti-administrativism”).

⁴⁷⁷ See Metzger, *supra* note 10, at 15 (“[T]he current political attack seems unlikely to dramatically transform the administrative state.”).