

# Reforming ‘Regulatory Reform’: A Progressive Framework for Agency Rulemaking in the Public Interest\*

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**F**or over three decades, “regulatory reform” has been an aspiration chiefly for opponents of regulation. “Better regulation” is a goal nearly everyone would embrace. But changes in the federal administrative process since the 1980s have frequently had the foreseeable, and often intended, effect of hindering efforts to protect the environment, public health, civil rights, and other well-established public interest goals.

The purpose of this Issue Brief is to envision what regulatory reform could look like from a different direction. Our specific focus is on administrative rulemaking, the primary target of contemporary law reform efforts. We ask, what if reformers started with full recognition of the value of administrative regulation in the public interest? Progressives have always argued for strengthening the law’s substantive requirements in advancing the public good, such as stronger rules against pollution or more robust protections for worker safety. But beyond any specific substantive agenda, it is worth asking whether there are potential changes in agency process and in the oversight of agencies that would improve the administrative state. Are there changes that could make regulation more evidence-based, more transparent, more inclusive, more accountable, and more efficient? If so, then progressives should take up the cause of regulatory reform as our own.

Our immediate aim is not to propose a specific text for the ideal progressive regulatory reform platform, but rather to set out a framework and illustrative suggestions to demonstrate that such a platform is plausible and significant. In Part I, we discuss ways of improving notice-and-comment rulemaking. In Part II, we cover the role of the White House Office of Information and Regulatory Affairs (OIRA). We seek to improve OIRA’s processes and reset its mission to better align with congressional mandates. We then analyze, in Part III, the rules governing judicial review of agency actions, with the aim of clarifying the law and making judicial review more effective and efficient. Finally, in Part IV, we advocate the repeal of the Congressional Review Act, to eliminate this avenue for special interests to ambush important regulations in Congress.

By focusing on rulemaking, we do not mean to slight the importance of other administrative activities such as issuing permits, distributing benefits, overseeing state regulatory programs, or enforcing legal requirements and issuing sanctions. But the biggest controversies over administrative law have involved rulemaking, which involves the most important and visible policy decisions. For that reason, we view this topic as the appropriate starting point for an agenda of progressive regulatory reform.

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### I. IMPROVING NOTICE-AND-COMMENT RULEMAKING

When Congress enacted the 1946 Administrative Procedure Act (APA), it gave far less attention to rulemaking than it did to the relatively detailed processes for formal on-the-record agency hearings. That is no doubt because—insofar as agencies used any kind of procedurally elaborate tools for statutory implementation—administrative adjudication rather than rulemaking was the preferred process for policy elaboration. Lawyers and clients seeking to understand, for example, what the National Labor Relations Board considered an “unfair labor practice,” what the Federal Trade Commission considered an “unfair or deceptive trade practice,” or what the Federal Communications Commission considered broadcasting “in the public interest” had to synthesize those agencies’ views chiefly through analysis of their orders in individual proceedings.

In the 1960s and 1970s, however, informal rulemaking became the predominant tool of agency policy implementation as Congress vested authority in a host of new agencies to carry out ambitious missions in the public interest. Rules in general, and the APA rulemaking process in particular, held the promise of important gains in both fairness to the public and enhanced agency effectiveness:<sup>1</sup>

- Rulemaking would provide wide and advance notice of legal requirements, thus increasing transparency (which facilitates oversight and accountability), while enhancing fairness to regulated parties;
- Rulemaking would facilitate broader public participation, which would produce more comprehensive fact-finding and public deliberation;
- Rules would help assure more uniformity in enforcement;
- Rulemaking would give agencies greater flexibility in structuring how information is gathered and vetted;
- Rulemaking would give agencies more control over the direction and scope of their policy making agenda, enabling them to focus on “social” or “legislative” facts rather than the idiosyncrasies of individual cases as they might be presented in case-by-case adjudication.

The advantages of rulemaking over adjudication seemed all the more tantalizing because the APA framework for the informal rulemaking process appeared to be both streamlined and straightforward.<sup>2</sup> An agency would first issue a notice of proposed rulemaking that describes “either the terms or substance of the proposed rule” or “the subjects and issues involved.” Next, with certain limited (although important) exceptions, the agency would provide an opportunity for interested persons “to participate in the rulemaking through submission of written data, views, or arguments, with or without opportunity for oral presentation.” Lastly, in issuing final rules, the agency would incorporate “a concise general statement of their basis and purpose,” and it would ordinarily publish its final rules at least thirty days before their effective date.

As the volume and significance of administrative rulemaking exploded, however, courts substantially elaborated these basic requirements, effectively requiring agencies (a) to issue notices of proposed rulemaking that genuinely enabled public deliberation and (b) to fashion statements of “basis and purpose,” which, far from being concise and general, now typically catalogue virtually every significant issue

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<sup>1</sup> A still-useful discussion of the points that follow is Richard K. Berg, *Re-Examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 163-164 (1986).

<sup>2</sup> 5 U.S.C. § 553(b), (c) (2016).

entailed in a rulemaking and the agency's course of action in addressing each issue. Congress likewise diminished the apparent simplicity of the process by requiring rulemaking agencies to provide additional layers of analysis (such as evaluating the impact of proposed rules on small businesses),<sup>3</sup> to clear new information-reporting requirements with the Office of Management and Budget (OMB),<sup>4</sup> and to meet guidelines on data quality that OMB would duly promulgate.<sup>5</sup> And every president from Reagan onward has complicated the process further through a process of centralized OMB review of regulatory policymaking, which we discuss in Part II. Some of these changes have been helpful in improving agency deliberations; others have been sources of delay and influence by special interests.

Amidst all this complexity, the challenge for progressive reformers is to find ways of enabling the notice-and-comment process to fulfill its potential for enhancing agency transparency, accountability, and inclusiveness without simply adding to unproductive delay. In this part of the Issue Brief, we describe ways of improving the agency rulemaking process itself, focusing on the enhancement of direct public participation, a broader and more accountable use of advisory boards, disciplining *ex parte* contacts in rulemaking, and expanding the use of the petitioning process.

#### A. ENHANCING DIRECT PUBLIC PARTICIPATION

Aside from fulfilling the APA requirement for allowing public input, agencies have two direct incentives to engage the public in their rulemaking processes: (1) enriching the information-gathering process with regard to problems presented, available regulatory alternatives, and the likely impacts of proposed interventions, and (2) enhancing the public's acceptance of both the agency and its regulations as legitimate. Input, of course, may come from two very different kinds of sources—sophisticated and well-resourced stakeholders often represented through trade associations or civil society groups, and engaged, but not formally organized individuals who, despite their interest, may have fewer resources and less experience to draw on.

In theory, new information and communications technologies should enhance public participation of both kinds. The federal government has devoted substantial effort to the design of so-called "E-rulemaking," which may usefully be defined as:

the use of technology (particularly, computers and the World Wide Web) to: (i) help develop proposed rules; (ii) make rulemaking materials broadly available online, along with tools for searching, analyzing, explaining and managing the information they contain; and (iii) enable more effective and diverse public participation.<sup>6</sup>

It does not yet appear, however, that even the most creative e-rulemaking efforts have significantly increased meaningful public participation by individual members of the public. The great barriers to broader-based participation by members of the public are lack of awareness that rulemakings are occurring, lack of knowledge that

<sup>3</sup> Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* (2016).

<sup>4</sup> Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.* (2016).

<sup>5</sup> Data Quality Act, Pub. L. No. 106-554, § 515 Appendix C (2000).

<sup>6</sup> Committee on the Status and Future of Federal E-Rulemaking, *Achieving the Potential: The Future of Federal E-Rulemaking 3* (2008), <https://scholarship.law.cornell.edu/facpub/1237/>.

participation is possible, lack of understanding about how to participate effectively, and—for those who overcome these initial barriers to participation—“information overload from the length and complexity of rulemaking documents.”<sup>7</sup>

Professor Cynthia Farina and the Cornell eRulemaking Initiative have done the most extensive analysis of the kinds of innovation in the rulemaking process that could potentially improve both the inclusiveness of the process and the value of public participation to the rulemaking agency.<sup>8</sup> Their detailed investigation, based in part on case studies of three rulemakings in which they partnered with federal agencies to facilitate public input, yields two critical insights. The first is that no single design for a public comment process will fit all needs. Different rulemakings are likely to vary so greatly with regard to public awareness, scope of potential impact, and sheer complexity that it makes little sense to advocate a single detailed template for how agencies should attempt to identify, inform, and engage “missing stakeholders.” On the other hand, the comment process might well become more useful if agencies were required consciously to plan a comment process for any significant rule—a planning exercise that would seek to identify those groups of individuals most likely to be interested in or affected by a forthcoming rule, the subset of those individuals most likely to face barriers to participation in the rulemaking, and the forms of outreach and engagement most likely to yield additional information that could be of genuine use to the agency.

Through its December 2009 Open Government Directive,<sup>9</sup> the Obama administration tried to put in place a foundation for “participatory” and “collaborative” government that would prompt a variety of such experiences. OMB could usefully be tasked to coordinate such efforts more systematically. For progressive regulatory reformers, it would be helpful if agencies were at least nudged to consider models of engagement that would truly be more meaningful in terms of value to both the agency and public participants. To take but one of many available possibilities, one could imagine an agency supplementing its conventional comment process with a “deliberative poll,” a technique that uses scientific random sampling to generate a group of participants who both engage with experts and assemble for small group discussion to provide decision-makers with evidence of public attitudes based on actual study and deliberation.<sup>10</sup> There are also a variety of online tools available to agencies to facilitate and promote genuine citizen deliberation online.<sup>11</sup> The

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<sup>7</sup> Cynthia R. Farina & CeRI, *Rulemaking 2.0: Understanding What Better Public Participation Means, and Doing What It Take to Get It* (2013), [https://www.americanbar.org/content/dam/aba/events/administrative\\_law/2013/04/administrative\\_lawandregulatorypracticeinstitute/Rulemaking.auth-checkdam.pdf](https://www.americanbar.org/content/dam/aba/events/administrative_law/2013/04/administrative_lawandregulatorypracticeinstitute/Rulemaking.auth-checkdam.pdf). See also Scott Wright, *The Participatory Journey in Online Consultations*, in STEPHEN COLEMAN AND PETER M. SHANE, EDs., *CONNECTING DEMOCRACY: ONLINE CONSULTATION AND THE FLOW OF POLITICAL COMMUNICATION* 149 (2012).

<sup>8</sup> *Id.*; see also Cynthia R. Farina, *Achieving the Potential: The Future of Federal E-Rulemaking* (2009) and *Report of the Committee on the Status and Future of Federal E-Rulemaking*, 62 ADMIN. L. REV. 279 (2010).

<sup>9</sup> Presidential Memorandum for the Heads of Executive Departments and Agencies on Transparency and Open Government (Jan. 21, 2009), <https://www.archives.gov/files/cui/documents/2009-WH-memo-on-transparency-and-open-government.pdf>; Memorandum from OMB Director Peter R. Orszag for the Heads of Executive Departments and Agencies re: Open Government Directive (Dec. 8, 2009), <https://obamawhitehouse.archives.gov/open/documents/open-government-directive>.

<sup>10</sup> The technique was developed by Professor James Fishkin, currently the Director of the Center for Deliberative Democracy at Stanford University.

<sup>11</sup> Matt Leighninger, *Using Online Tools to Engage—and be Engaged by—The Public* (2011), <https://www.communityplanningtoolkit.org/sites/default/files/Using%20Online%20Tools%20to%20Engage%20-%20%20Deliberative%20Democracy.pdf>.

Administrative Conference of the United States (ACUS) might usefully stage trainings for relevant agency officials on the tools available for facilitating input and the advantages they may offer for different kinds of rulemaking. The aim would not be expanding the volume of public comments simply for the sake of volume, but rather engaging groups and individuals who might otherwise overlook or be overlooked by the rulemaking process, but whose participation would be genuinely meaningful in terms of value to both the individual and the agency.

#### B. MAXIMIZING THE UTILITY OF AGENCY ADVISORY BOARDS

As part of their public outreach strategy, agencies frequently draw upon the expertise and advice of advisory committees in doing their work. Indeed, some statutes require consultation with advisory committees prior to the issuance of rules,<sup>12</sup> and such groups might be used yet more widely both to ensure representation for significantly affected potential stakeholders and to give the agency the benefit of additional knowledge and experience. Using such committees to help with both agency agenda-setting and specific regulatory proposals could help overcome public perception that engaging with agencies is a waste of time because policymakers announce only rulemaking “proposals” to which they are already pre-committed. Progressives should encourage more and earlier use of such public boards.

To ensure that the advice and recommendations of advisory committees are credible and reliable, however, federal statutes and regulations must also require that the members of advisory committees be free from significant conflicts of interest.

The federal criminal code’s provisions on bribery, graft, and conflicts of interest of federal employees apply to advisory committee members as “special government employees.”<sup>13</sup> These employees may not participate in any matter that has a direct and predictable effect on their financial interests, absent case-specific approval by a designated federal official.<sup>14</sup> Regulations implementing these statutory provisions, issued by the Office of Government Ethics, establish uniform ethics rules for the federal government. They provide that a member of an advisory committee may participate despite a financial interest, “provided that the matter will not have a special or distinct effect on the employee or employer other than as part of a class.” The Federal Advisory Committee Act (FACA) requires that advisory committees be “fairly balanced” and that their advice and recommendations not be “inappropriately influenced by the appointing authority or any special interest.” Individual statutes creating and empowering federal advisory committees likewise protect against conflicts of interest.

Recently, this structure has been turned on its head by decisions of the administrator of the Environmental Protection Agency (EPA). In a directive issued in October 2017, now-former Administrator Scott Pruitt barred all recipients of EPA grants from serving on any EPA advisory committee and removed from advisory committees individuals who had received such grants. The EPA then replaced those individuals with individuals who work for or receive financial support from industries regulated by the EPA. Administrator Pruitt took the position that receiving a grant from the EPA created an unacceptable conflict of interest, precluding membership on the agency’s advisory committees, while receipt of financial support from regulated industries created no such conflict.

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<sup>12</sup> Clean Air Act, 42 U.S.C. § 7409(d)(2) (2016).

<sup>13</sup> 18 U.S.C. § 202(a) (2018).

<sup>14</sup> 18 U.S.C. § 208(a); 208(b)(1)-(3) (2018).

Administrator Pruitt's directive departs from decades of agency practice, and it has been challenged in court.<sup>15</sup> To eliminate all doubt, we recommend that federal statutes on advisory committees and conflicts of interest be amended to make clear that receipt of government grants does not in and of itself constitute a conflict of interest precluding service on federal advisory committees. The contrary position taken by Pruitt deprives agencies of the expertise and advice of many employees of universities and other institutions that depend on government financial support. Moreover, when this position is paired with Pruitt's view that industrial financial support creates no such wholesale conflict of interest, advisory committees become skewed against academic participants and in favor of committees composed of industry-supported members. We believe this situation upends the federal structure of advisory committees and warrants legislative attention.

### C. INCREASING TRANSPARENCY FOR EX PARTE CONTACTS IN INFORMAL RULEMAKING

Of course, not all the information relevant to administrative rulemaking comes to agency attention through structured forms of input. Information that comes to an agency behind closed doors can be valuable to the agency and need not be detrimental to the public. Yet public confidence, agency accountability, and the quality of policy deliberations are all put at risk when influential consultations occur that are not publicly docketed. For this reason, we recommend adjustments to the legal structure for ex parte contacts in rulemaking. This proposal is synergistic with our recommendations in Part II for increased transparency within the executive branch.

By general usage, an "ex parte" contact is a contact "on or from one side or party only."<sup>16</sup> It is a contact that does not occur in the presence of other interested persons and is not disclosed to them.<sup>17</sup> The APA prohibits ex parte contacts in formal adjudicatory hearings and "formal rulemaking" (a seldom-used mechanism), and it requires their disclosure if they do occur. The APA does not even mention ex parte contacts in the context of informal rulemaking.

For a brief period in the 1970s, the D.C. Circuit embraced constraints on ex parte contacts even in the context of informal rulemaking that did not involve what the court had previously called "resolution of conflicting private claims to a valuable privilege."<sup>18</sup> However, the court quickly stepped away from these constraints in the context of informal rulemaking.<sup>19</sup> Indeed, it came to believe that, in the informal rulemaking context, where there are no formal "parties" or even well-defined "sides," communications between persons outside the agency and persons inside the agency are not only proper, but healthy.<sup>20</sup>

The benefits thought to accrue from undocketed and informal oral or written communications from outside parties to agency personnel include drawing upon

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<sup>15</sup> Complaint, *Physicians for Social Responsibility v. Pruitt*, No. 1:17-cv-02742 (D.D.C. Dec. 21, 2017), [https://earthjustice.org/sites/default/files/files/01\\_Plaintiffs\\_Complaint\\_12-21-2017.pdf](https://earthjustice.org/sites/default/files/files/01_Plaintiffs_Complaint_12-21-2017.pdf).

<sup>16</sup> ESA L. SFERRA-BONISTALLI, ADMIN. CONFERENCE OF U.S., *EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING* 8 (2014) [hereinafter ACUS REPORT], [https://www.acus.gov/sites/default/files/documents/Final%20Ex%20Parte%20Communications%20in%20Informal%20Rulemaking%20%5B5-1-14%SD\\_0.pdf](https://www.acus.gov/sites/default/files/documents/Final%20Ex%20Parte%20Communications%20in%20Informal%20Rulemaking%20%5B5-1-14%SD_0.pdf).

<sup>17</sup> 5 U.S.C. § 551(14) (2018).

<sup>18</sup> *Home Box Office (HBO) v. FCC*, 567 F.2d 9 (D.C. Cir. 1977). The "conflicting claims" formulation comes from *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959).

<sup>19</sup> *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977).

<sup>20</sup> *Sierra Club v. Costle*, 657 F.2d 298, 400-401 (D.C. Cir. 1981).

the expertise of these parties, engaging the participation of interested parties in the agency's work, making the government open and accessible to the public, and allowing the candid transmission of potentially sensitive information and views.<sup>21</sup> The detrimental features of such communications include undue influence, inability to comment on the information and views presented, and development of a nonpublic docket parallel to the public docket.<sup>22</sup> For example, this is why reports that Interior Secretary Ryan Zinke, like former Administrator of the EPA Scott Pruitt, has held frequent, off-the-record meetings with the industries he regulates<sup>23</sup> have drawn such public concern: such private consultations create the possibility of one process for regulated entities, and one for the rest of us.

Although some agencies have voluntarily embraced policies of disclosing or even limiting oral and written communications made during or after public comment periods,<sup>24</sup> few statutes contain such requirements or limitations. The Clean Air Act is a notable exception. It does not limit such communications, but it does require disclosure. The Act requires the EPA to docket "all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period" and "[a]ll documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking."<sup>25</sup> These communications are also to be made part of the record for judicial review.<sup>26</sup> We favor a similar approach for rulemakings conducted under other statutes.

We are concerned that the current practice of leaving the acceptance and disclosure of ex parte contacts mostly to agency discretion threatens the core values underlying our reform project. First, transparency and equal access to information suffer greatly when there is effectively a "parallel nonpublic docket[]" in administrative decision-making.<sup>27</sup> As the D.C. Circuit put it in its early case law in this area, "the elaborate public discussion...has been reduced to a sham" when there is "one administrative record for the public and this court and another for the [agency] and those 'in the know.'"<sup>28</sup> Second, alignment of agency decisions with the evidence before them is threatened when private parties may present information to the agency without subjecting it to the public vetting that accompanies publicly available information and views.

We propose amending the APA to incorporate the disclosure requirements of section 307 of the Clean Air Act, with two adjustments. First, the Clean Air Act refers only to "written comments and documentary information" and to "documents," thus

<sup>21</sup> ACUS REPORT, *supra* note 16, at 16-19.

<sup>22</sup> *Id.* at 19-24.

<sup>23</sup> Margaret Talbot, *Scott Pruitt's Dirty Politics*, NEW YORKER (Apr. 2, 2018), <https://www.newyorker.com/magazine/2018/04/02/scott-pruitts-dirty-politics>. Recently disclosed emails, exchanged between the EPA officials and industry representatives, further attest to the cozy relations between the agency and regulated industry. Juliet Eilperin, *Emails reveal close rapport between top EPA officials, those they regulate*, WASH. POST (July 1, 2018), [https://www.washingtonpost.com/national/health-science/emails-reveal-close-rapport-between-top-epa-officials-those-they-regulate/2018/07/01/6c5a62b6-7642-11e8-805c-4b67019f4e4\\_story.html?noredirect=on&utm\\_term=.b171ea824a1](https://www.washingtonpost.com/national/health-science/emails-reveal-close-rapport-between-top-epa-officials-those-they-regulate/2018/07/01/6c5a62b6-7642-11e8-805c-4b67019f4e4_story.html?noredirect=on&utm_term=.b171ea824a1).

<sup>24</sup> ACUS REPORT, *supra* note 16, at 41-42, 53-64.

<sup>25</sup> See 42 U.S.C. § 7607(d)(4)(B)(i) (2018).

<sup>26</sup> *Id.* at § 7607(d)(7)(A).

<sup>27</sup> ADMIN. CONFERENCE OF U.S., REQUEST FOR PROPOSALS—MAY 23, 2013, *EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING*, at 1 (2013), <http://www.acus.gov/sites/default/files/documents/Ex%20Parte%20RFP%205-23-13.pdf>.

<sup>28</sup> *HBO v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977).

apparently excluding oral communications from the docketing requirement. As the D.C. Circuit has observed, however, “unless oral communications of central relevance to the rulemaking are also docketed in some fashion or other, information central to the justification of the rule could be obtained without ever appearing in the docket, simply by communicating by voice rather than by pen...”<sup>29</sup> We recommend that oral communications be included in the docketing requirement we propose.

The second adjustment we would make to the Clean Air Act’s docketing requirements, for purposes of amending the APA, would be to require agencies to include in the docket every post-comment-period communication, whether or not the agency deemed any such communication to be “of central relevance” to the rulemaking. Lack of “central relevance” would generally lead an agency to exclude a public communication from its rulemaking docket. Communications to the agency concerning a proposed or final rule, made privately rather than publicly, should be treated just like public comments are.<sup>30</sup>

#### D. PROMOTING RULEMAKING PETITIONS

Just as the public is likely underinformed with regard to regulatory actions that administrative agencies undertake on their own initiative, most citizens are presumably unaware also of their legal right to petition for new agency regulations. A 2014 report by ACUS concluded that “few agencies have in place official procedures for accepting, processing, and responding to petitions for rulemaking.”<sup>31</sup> ACUS recommended that agencies simplify and regularize their practices for receiving and processing petitions, including enhanced communications between agencies and

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<sup>29</sup> *Sierra Club v. Castle*, 657 F.2d 298, 402 (D.C. Cir. 1981).

<sup>30</sup> Even with respect to comments submitted to the public docket, accommodations are made for the confidential provision of protected information such as trade secrets. We do not take on the fight over these accommodations here.

Likewise, because this White Paper is focused on the process of promulgating regulations, we do not review in detail possible improvements in administrative transparency with regard to regulatory compliance. We would endorse the following statement in President Obama’s January 18, 2011 Memorandum to the Heads of Executive Departments and Agencies re: Compliance:

Greater disclosure of regulatory compliance information fosters fair and consistent enforcement of important regulatory obligations. Such disclosure is a critical step in encouraging the public to hold the Government and regulated entities accountable. Sound regulatory enforcement promotes the welfare of Americans in many ways, by increasing public safety, improving working conditions, and protecting the air we breathe and the water we drink. Consistent regulatory enforcement also levels the playing field among regulated entities, ensuring that those that fail to comply with the law do not have an unfair advantage over their law-abiding competitors. Greater agency disclosure of compliance and enforcement data will provide Americans with information they need to make informed decisions. Such disclosure can lead the Government to hold itself more accountable, encouraging agencies to identify and address enforcement gaps.

President Barack Obama, *Presidential Memoranda—Regulatory Compliance*, THE WHITE HOUSE (Jan. 18, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-compliance>. Agencies can advance these goals by “mak[ing] readily accessible to the public, information concerning their regulatory compliance and enforcement activities, such as information with respect to administrative inspections, examinations, reviews, warnings, citations, and revocations.” *Id.*

<sup>31</sup> ADMIN. CONFERENCE OF U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2014-6, PETITIONS FOR RULEMAKING (2014), <https://www.acus.gov/sites/default/files/documents/Final%2520Petitions%2520for%2520Rulemaking%2520Recommendation%2520%255B12-9-14%255D.pdf>.

petitioners, creating opportunities for the public to comment on petitions, formulating better agency responses to petitions, and “maintain[ing] a summary log or report listing all petitions, the date each was received, and the date of disposition or target timeline for disposition.”<sup>32</sup> The petitioning process could prove a significant tool for progressive reform if the process were more widely appreciated and pursued not just by “sophisticated stakeholders,” but also by community groups and engaged citizens generally.

## II. CONSTRAINING WHITE HOUSE REVIEW OF AGENCY RULES

In addition to recommending changes in the notice-and-comment stage of informal rulemaking, we propose major changes in the practice of White House review of significant agency rules, to promote greater transparency, timeliness, and consistency with statutory commands.

Presidents since Ronald Reagan have, by executive order, required agencies to submit significant regulatory actions to the White House for review.<sup>33</sup> The review is overseen by the White House Office of Information and Regulatory Affairs (OIRA) within the OMB. OIRA enlists the opinions of other executive branch agencies on the policies embodied in the actions under review and evaluates “significant” regulatory actions by reference to cost-benefit analyses prepared by agencies and submitted to OIRA. The current executive order on OIRA review defines a “significant” regulation action as one that has an annual economic effect of \$100 million or more; creates inconsistency with or otherwise interferes with an action of another agency; materially alters the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of their recipients; or raises “novel legal or policy issues.”<sup>34</sup> Although rules may thus be deemed significant because of their anticipated economic impact, they are, in actual practice, most often designated for review because of the novelty or sensitivity (in OIRA’s eyes) of the policy issues they raise.

This process has operated since 1993 under an executive order issued by President Bill Clinton.<sup>35</sup> That order sets out the basic structure under which White House review is conducted, even though several subsequent executive orders have refined the process to some extent.<sup>36</sup> Under the Clinton executive order, OIRA decides which regulatory actions must be submitted to it for review. The order provides that disputes between OIRA and the acting agency will be elevated, if need be, to the president, who will notify the agency and OIRA of “the President’s decision with respect to the matter.”<sup>37</sup> The order also sets out deadlines within which OIRA’s review is to be completed<sup>38</sup> and mandates specific elements of transparency in the review process.<sup>39</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> For the Reagan order, see Exec. Order No. 12,291, 3 C.F.R. § 127 (1981).

<sup>34</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51734, § 3(f) (1993).

<sup>35</sup> *Id.* § 7.

<sup>36</sup> E.g., Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

<sup>37</sup> See Exec. Order No. 12,866, *supra* note 34.

<sup>38</sup> *Id.* § 6(b).

<sup>39</sup> *Id.* §§ 4(c)(5), 6(b)(4)(C)(i), 6(b)(3), 6(b)(3)(E)(ii-iii).

OIRA's oversight of the rulemaking process has provoked a number of criticisms. These have focused on persistent delays of rules,<sup>40</sup> rejection of rules by OIRA without explanation, inconsistency of the cost-benefit criterion with many statutory mandates, displacement of the authority of the agency charged by Congress with acting, and a general lack of transparency. Despite these critiques, every president since Ronald Reagan has endorsed the process of requiring White House approval of significant regulatory actions. Even President Obama, who announced very early in his first term that he was conducting a top-to-bottom review of the OIRA process,<sup>41</sup> ultimately embraced strict White House control over the rulemaking proceedings of the executive agencies.<sup>42</sup>

OIRA systematically violates the Clinton executive order under which its review takes place. OIRA has interpreted the provisions setting out 90- or 120-day deadlines not to impose real constraints on its timing; its position is that it may simply ask an agency to ask for an extension—a request the agency will find hard to refuse, given OIRA's control over its rules—and this will allow OIRA to continue review of a rule indefinitely.<sup>43</sup> OIRA also does not comply with a number of the executive order's provisions requiring transparency. OIRA does not, for example, prepare a publicly available log detailing when and by whom any disputes between OIRA and the agency were elevated, nor does it always provide the agency with a written explanation of why OIRA rejected a rule.<sup>44</sup> In addition, the actual process for elevating issues to the president has, in contrast to the orderly process envisioned by the executive order, been unstructured.<sup>45</sup> Thus, one way to address several recurring criticisms would be for OIRA to hew more closely to the actual provisions of the Clinton executive order. Closer adherence to the existing executive order's provisions on review deadlines, transparency, and an orderly process for elevation of issues to the president would address some of the criticisms about undue delays, a lack of transparency, and a chaotic decision-making process.

We believe such reforms to the actual process of White House review are necessary, but not sufficient. Such procedural reforms would not address the basic criticisms that the process unlawfully supplants the authority of the agency Congress has charged with making the relevant decisions and that the cost-benefit criterion the executive order imposes is inconsistent with many of the regulatory statutes under which the agencies operate. In addition, the transparency-related provisions of the existing executive order, even if closely followed, would not be sufficient to achieve the degree of transparency we would propose. To address these concerns, we propose four additional, and more fundamental, reforms.

Our first proposal is to return the White House review process to the understanding articulated when President Reagan issued the first executive order creating a systematic process of White House review. In 1981, soon after he entered office, President Reagan issued an executive order providing for an approval process quite

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<sup>40</sup> CURTIS W. COPELAND, *LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS* (2013), <https://www.acus.gov/sites/default/files/documents/Copeland%20Report%20CIRCULATED%20to%20Committees%20on%2010-21-13.pdf>.

<sup>41</sup> Presidential Memorandum of January 30, 2009: Regulatory Review, 74 Fed. Reg. 5977 (Jan. 30, 2009).

<sup>42</sup> Exec. Order No. 13,563, 76 Fed. Reg. at 3821.

<sup>43</sup> Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 359 (2014).

<sup>44</sup> *Id.* at 362.

<sup>45</sup> *Id.* at 369.

similar to the one provided for by the Clinton executive order. The Office of Legal Counsel (OLC) in the Department of Justice reviewed Reagan's executive order for legality. In its opinion confirming the legality of the executive order, OLC emphasized that the executive order did not purport to displace the authority of the acting agency.<sup>46</sup> OLC stated that "a wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official."<sup>47</sup> Notably, however, even though Section 9 of the Clinton order purports to preserve agency decision-making authority, that promise is undermined by the explicit provision that the president will be the decider when issues are elevated to the president as a result of OIRA review.<sup>48</sup>

We believe the Reagan order had it right (although we recognize that, in practice, under that order, too, the President and his aides actually displaced the authority of the relevant agency).<sup>49</sup> Just as Congress's instructions as to the *decisions* an agency makes should be followed and not countermanded by the president and aides in the White House, so, too, should Congress's instructions as to the *decision-maker* be followed. Some statutes explicitly delegate decision-making authority to the president; most do not.<sup>50</sup> Yet the Clinton executive order on regulatory review treats all laws delegating authority to executive agencies as if they delegate decision-making authority to the president. We think the presumption should be reversed: that laws delegating decision-making authority to executive agencies do not delegate decision-making authority to the president.<sup>51</sup>

The review process as currently structured allows evasion of legislative instructions about delegation in another way as well. They allow other agencies to play a decisive role in shaping the policies of an agency charged by Congress with making those policies.<sup>52</sup> When a rule of the EPA, for example, is sent to the White House for review, it is circulated to all other agencies that might have an interest in it, including the Department of Agriculture, the Department of Energy, and other agencies that Congress did not choose as the decision-maker. These agencies have interests and constituencies that are often opposed to the basic mission of the EPA. To allow them to have a decisive influence on the rule that emerges from the White House review process is to disrespect the choice Congress made in giving decision-making authority to the EPA. Under our approach, no agency other than the one (or ones) chosen by Congress as the decision-maker would have decisive power over a rule. Agencies may still consult with other agencies in the rulemaking process; indeed,

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<sup>46</sup> Proposed Executive Order Entitled "Federal Regulation," 5 Op. O.L.C. 59 (1981).

<sup>47</sup> *Id.* at 62-63.

<sup>48</sup> Exec. Order No. 12,866, *supra* note 34, at § 7 (when OIRA and agency disagree, issue will be elevated and these actors will be notified of "the President's decision with respect to the matter"). In a case challenging OIRA's role in reviewing rules under Exec. Order No. 12,866, the court noted potential constitutional concerns with OIRA's interference with agencies' statutory duties but did not rule on these issues. *Environmental Defense Fund v. Thomas*, 627 F.Supp. 566, 570 (D.D.C. 1986).

<sup>49</sup> Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 *FORDHAM L. REV.* 2487, 2502-05 (2011).

<sup>50</sup> Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 *COLUM. L. REV.* 263 (2006).

<sup>51</sup> Peter L. Strauss, *Foreword: Overseer or "The Decider" The President in Administrative Law*, 75 *GEO. WASH. L. REV.* 695 (2007). We disagree with then-professor Elena Kagan's proposed presumption that such laws delegate decision-making authority to the president. See Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2246 (2001).

<sup>52</sup> Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 *HARV. L. REV.* 1838, 1941-43 (2013).

some statutes require such consultation. But the final decision would rest with the decision-maker chosen by Congress.

Our second proposal is to reorient the White House review process to focus on whether a proposed regulatory action is consistent with the underlying statute, and away from the current focus on satisfying a quantified cost-benefit standard. Very few federal regulatory statutes establish formal cost-benefit analysis as the decision-making criterion. Injection of a formal cost-benefit standard into the White House review process drives a wedge between statutory standards and the standards the White House applies. Most environmental statutes do require some consideration of costs, and courts have called for quantification of risks to the extent possible. Some statutes may also call for some kind of consideration of whether costs are disproportionate to benefits, but monetizing benefits is, so far as we are aware, required by only one statute, the 1996 amendments to the Safe Drinking Water Act. The current approach inevitably leads to overemphasis on factors that can be easily quantified, encourages dubious efforts to convert all benefits to monetary terms, conflicts with the precautionary approach embodied in many statutes, and disfavors regulatory programs that aim to protect against future harms. This impairs the integrity of Congress's delegation of authority to the agency, contrary to separation of powers principles. For these reasons, we believe that rather than asking, "Does this rule satisfy cost-benefit analysis?" OIRA should ask, "Does this rule establish a policy that is consistent with the underlying statutory framework and the evidence before the agency? Has the agency engaged in a rigorous analysis of the evidence?" Under this approach, White House review would not inject a new, extra-statutory consideration—satisfaction of a quantified cost-benefit criterion—into the decision-making process on rules.

Our third proposal is to beef up the existing provisions on the transparency of regulatory review. The Clean Air Act offers a good model in this regard. The Clean Air Act requires the EPA to place in the rulemaking docket all drafts of proposed and final rules submitted to OIRA, documents accompanying them, and written comments by other agencies along with the EPA's responses to them.<sup>53</sup> We would propose that these requirements be applied to all agencies and that the documents not only be added to the public docket but be included in the administrative record for judicial review.

These reforms could come about in two different ways. Reform could come from a new president, through issuance of an executive order modifying the process of White House review to put our reforms into place. However, given the enthusiasm of all presidents to date, across decades and across political parties and philosophies, for the version of regulatory review we are proposing to change, we are not optimistic that reform will come through a future president.

Reform could also come from Congress. Congress could prescribe a regulatory review process that embodies the reforms we recommend. Although adherents of the unitary executive theory—holding that the president alone controls the "executive power" provided in the Constitution—might balk at a legislative adjustment of the White House review process, we do not believe the Constitution forbids Congress from specifying decision-makers and decision-making criteria in a way that binds the president.

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<sup>53</sup> 42 U.S.C. § 7607(d)(4)(B)(ii) (2016).

Our final recommendation would be the repeal of Executive Order 13,771, issued by Donald Trump on January 30, 2017.<sup>54</sup> That order goes well beyond the information gathering and coordination roles on which earlier presidents relied to support the OIRA review process. Executive Order 13,771 purports to require agencies, in order to issue new rules, to identify two existing rules appropriate for revocation. It also purports to authorize OIRA to impose on rulemaking agencies an annual ceiling on the gross costs to the economy that may be imposed by new regulations. These provisions, which effectively amend agencies' existing statutory authorities, go well beyond any constitutionally rooted presidential role; the president's duty is to faithfully execute the law, not to amend the law by executive order.<sup>55</sup> Executive Order 13,771 is not only unwise as a matter of policy, but also in violation of the separation of powers as it would all but inevitably require agencies in deciding how to implement their statutory mandates to consider factors that Congress has not made legally relevant. The order is unlawful and should be overturned, if not voluntarily abandoned.<sup>56</sup>

### III. IMPROVING JUDICIAL REVIEW OF RULEMAKING

Judicial review of agency action helps ensure that the agency is responsibly implementing its governing statute. Although we do not advocate radical changes in current law, we believe certain reforms could provide useful clarification and correct some judicial missteps. Judicial review can either assist in the production of good regulation or serve as a source of delay, ill-advised second-guessing, or simply error. In this section, we discuss a number of technical issues that would cumulatively increase the benefits and diminish the drawbacks of judicial review.

#### A. ENHANCING REVIEWABILITY AND PROCEDURE

We propose reforms in this section to deal with four problems: (1) improper foot-dragging by agencies in implementing statutory mandates, (2) uncertainty in the judicial treatment of agency guidance, (3) delays and procedural problems in cases where initial review of a regulation is by a trial court rather than court of appeals, and (4) unnecessary nullifying of agency actions when flaws can be easily corrected on remand.

##### 1. Clarifying the Standard of Review for Agency Inaction

Judicial review is routinely available when an agency acts, but what if the agency fails to take action? As we have seen under President Trump, refusal to implement the law can be a serious threat to public health and welfare.

The legal safeguard against agency inaction is found in section 706(1) of the APA, which provides that a court may "compel agency action unlawfully withheld or unreasonably delayed." It is worth noting that the APA explicitly defines "agency action" to include "failure to act."<sup>57</sup> Courts have been reluctant to utilize this section, however, because agencies sometimes have legitimate reasons for inaction. In our view, rather than using formalistic distinctions between action and inaction in

<sup>54</sup> 82 Fed. Reg. 9339 (2017).

<sup>55</sup> See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("[N]o provision in the Constitution... authorizes the President to enact, to amend, or to repeal statutes.").

<sup>56</sup> Public interest groups have filed a lawsuit challenging the constitutionality of the executive order. The district court dismissed the case for lack of standing. *Public Citizen v. Trump*, 297 F. Supp. 3d 6 (2018). The plaintiffs have amended their complaint to add new allegations on standing.

<sup>57</sup> 5 U.S.C. § 551(13) (2018).

justifying either intervening or abstaining, courts should undertake a more pragmatic inquiry.

There are three legitimate reasons why an agency might decline to act or might delay acting: (a) rightly or wrongly, it may view the proposed action as legally unsupported; (b) it may view the action as undesirable on policy grounds (which is impermissible unless the statute permits consideration of the relevant policy); or (c) the agency may have higher priorities (and of course limited resources). The first two reasons are equally relevant whether a court is reviewing a regulation or a refusal to regulate, and should be subject to review on the same basis in either case. The third reason however, is unique to agency inaction.<sup>58</sup> The government's discretion to decide how to budget its resources is obviously very broad.

Nevertheless, priorities must be consistent with an agency's legal responsibilities and subject to congressional directives. For instance, the existence of a statutory deadline clearly communicates Congress's desire to prioritize an action and correspondingly reduces agency discretion. Likewise, a statutory mandate to take action upon a particular agency finding—for instance, whether a substance presents a serious risk of harm—may imply a duty to investigate further if there is genuine evidence of risk, a duty that should not be lightly set aside. Moreover, in an agency charged with safeguarding the public against risks, the agency should have a heavy burden in justifying a refusal to even consider regulating a risk when there is plausible evidence of its seriousness.

Under the APA, citizens can petition an agency to engage in a rulemaking, and the agency must give grounds for denying the petition. A key question is what grounds are permissible. The Supreme Court addressed this issue in *Massachusetts v. EPA*,<sup>59</sup> which involved a petition to the EPA under President George W. Bush to regulate greenhouse gases. Under the applicable statute, the EPA must regulate pollutants if it finds that they endanger human health or welfare.<sup>60</sup> The EPA denied the rulemaking petition. Among other reasons, the EPA said that even if it had legal authority to regulate greenhouse gases, it would not do so because other approaches such as international negotiation were preferable.<sup>61</sup> The Court ruled, however, that the EPA's decision about whether to regulate had to be based solely on its ability to make the required statutory finding.<sup>62</sup> Thus, it could consider only whether the statutory requirements for regulation were met, not other discretionary factors.

Lower courts have read the *Massachusetts* decision narrowly,<sup>63</sup> as is illustrated by the Second Circuit's decision in *NRDC v. FDA*,<sup>64</sup> which involved a statute with close parallels to that in the Supreme Court case. Similarly, the D.C. Circuit has upheld denial of a rulemaking petition relating to protection of whales where "[t]he agency made a policy decision to focus its resources on a comprehensive strategy, which in light of the information before the agency at the time, was reasoned and adequately

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<sup>58</sup> See Eric Biber, *Two Sides of Same Coin: Judicial Review of Administrative Action and Inaction*, 26 VA. ENVTL. L.J. 461 (2008); Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1 (2008).

<sup>59</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>60</sup> *Id.* at 505.

<sup>61</sup> *Id.* at 513.

<sup>62</sup> *Id.*

<sup>63</sup> See Sunstein and Vermeule, *infra* note 86, at 160 n.10.

<sup>64</sup> 760 F.3d 151 (2d Cir. 2014).

supported by the record.”<sup>65</sup> Although an agency cannot be expected to pursue every rulemaking within its legal authority, we fear that the lower courts have too readily accepted agencies’ invocation of resource constraints and “comprehensive strategies” as reasons justifying inaction; resource constraints are pervasive, and comprehensive strategies can take a lifetime to achieve. The problem is to strike a balance between the agency’s need to allocate its resources to greatest effect and the public’s right to the implementation of congressional policies. It is difficult to provide cut-and-dried rules in this setting, but it would be helpful to clarify the relationship between review of action and inaction. One option would be to amend § 706(1) to read: “compel agency action unlawfully withheld or unreasonably delayed, under the same standards of review applied to an agency action under subsection (2).” This statutory amendment would make clear that agency inaction must meet the same requirement as agency action: there must be a nonarbitrary, reasoned explanation.

## 2. Resolving When Reviewability of Agency Guidance Documents is Proper

There are currently few areas of public law doctrine as confusing as the rules surrounding so-called administrative “guidance.” As usefully defined by OMB, guidance refers to “an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue.” In APA terms, the category of guidance thus comprises two subcategories of rules, which the statute refers to as “interpretative rules” and “general statements of policy.”<sup>66</sup> The fundamental feature of both forms of guidance that distinguishes them from substantive rulemaking is that they do not change anyone’s legal rights or duties. Policy statements are pronouncements as to how an agency intends to use its resources to implement the law. Interpretive rules aim to clarify what an agency takes a statute or substantive rule to mean.

There are manifest benefits to guidance documents. They increase transparency about an agency’s views and intentions, to the benefit of regulated parties, the general public, Congress, and the White House. They also help to ensure that lower-level agency officials will follow a uniform approach, promoting consistency and fairness. Judicial review could discourage the beneficial use of informal guidance by threatening the agency with additional litigation. On the other hand, guidance is often thought to have the same impact on the public as substantive rulemaking. Regulated parties may interpret agency guidance as implicitly creating “safe harbors” for their behavior, thus effectively coercing compliance. Completely insulating guidance from judicial review thus seems inappropriate.

The classification of a rule as either an interpretive rule or policy statement currently has two important legal consequences. The first is that, under the APA, agencies may promulgate such rules without following notice-and-comment

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<sup>65</sup> *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913,921 (D.C. Cir. 2008). See also *WildEarth Guardians v. EPA*, 751 F.3d 649,655 (D.C. Cir. 2014) (upholding an agency’s resource allocation decision because “the statute affords agency officials discretion to prioritize sources that are the most significant threats to public health to ensure effective administration of the agency’s regulatory agenda.”) To similar effect, see *id.* at 653-656 (D.C. Cir. 2014). The EPA more recently relied on this argument in rejecting a petition to list concentrated animal feedlots as sources of air pollutants, based on measurement difficulties and the diversity of the operations within this category. See *EPA Denies Petition to Regulate CAFOs Under CAA*, ENVIRO.BLR.coM (Dec. 29, 2017), <https://enviro.blr.com/environmental-news/water/agricultural-waste/EPAdenies-petition-to-regulate-CAFOsunder-CAA>.

<sup>66</sup> 5 U.S.C. § 553 (2016).

procedures. Hence, there is no mandated public participation in the formulation of guidance. The second is that, because the APA provides for judicial review only of “final agency action,” guidance may be deemed unreviewable precisely because it creates no new legal obligations.<sup>67</sup>

We believe the law surrounding agency guidance practice could be significantly improved if the issues regarding notice-and-comment and “final agency actions” were disentangled. With regard to policy statements that genuinely bind no one, including the agency itself, the policies underlying the APA finality requirement—respect for agency autonomy and the conservation of judicial resources for concrete disputes—counsel against judicial review in all but exceptional cases. Agencies nonetheless should recognize that certain policies, while reserving administrative discretion in case-by-case application, may still raise genuine public concerns or have important foreseeable impacts that warrant inviting public participation in their formulation. We thus would encourage an agency to engage in notice-and-comment rulemaking for policy statements deemed significant on economic or other grounds.

On the other hand, we think that interpretive rules should categorically be treated as “final agency action,” and thus be reviewable as such, even if exempt from the APA’s notice-and-comment requirements. Under current law, courts faced with what they regard as an unsound interpretive rule may find it tempting to characterize the rule as substantive in order to induce the agency to rethink its approach within a notice-and-comment rubric. It would be more sensible, when an agency announces an authoritative interpretation in the form of a rule, to straightforwardly treat the interpretation as reviewable, subject to the same deference regime as would apply if it were a substantive rule.

### *3. Determining the Proper Venue for Review*

There has been considerable confusion in some recent cases about whether regulations are subject to review in the court of appeals or district court. Review in district court can have the undesirable consequence of allowing a single judge to decide on the validity of an important regulation having nationwide significance. The main practical reason for review to be in a district court would be the need to allow the plaintiffs to provide more evidence in situations where they have not had the opportunity to enter evidence in the record previously.

As a general matter, this need does not apply when an action is based on an administrative record that affected parties were able to contribute to. For that reason, we recommend that judicial review be placed in the court of appeals in the case of any administrative action taken after public notice and comment, in any case involving a colorable claim that notice and comment should have been used, or in any case involving a regulation of nationwide applicability.

Admittedly, there are cases in which additional evidence is necessary, as when there is preliminary evidence of administrative bad faith. In those cases, the court of appeals should appoint a special master to oversee discovery, conduct a hearing if necessary, and report to the court.

### *4. Legitimizing Remands Without Vacatur*

A special remedial issue is presented when a court is engaged in judicial review of rulemaking and finds a flaw in the agency’s justification for the rule. Must the court vacate the rule, or may it leave the rule in place pending a response from the agency?

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<sup>67</sup> 5 U.S.C. § 704 (2018).

The vacatur issue has been controversial.<sup>68</sup> The issue was first aired in a prominent D.C. Circuit case, *Checkovsky v. SEC*.<sup>69</sup> Two judges, Judge Silberman<sup>70</sup> and Judge Reynolds (sitting by designation) argued for a remand without vacating the agency decision.<sup>71</sup> The “remand without vacatur” practice has become firmly ensconced in the D.C. Circuit and has now been adopted by several other circuits.<sup>72</sup> The standard test is found in *Allied-Signal, Inc. v. NRC*,<sup>73</sup> which focuses on the seriousness of the defects in the rule and the disruptive consequences of vacating (and possibly later reinstating) the rule.<sup>74</sup>

Vacating an agency regulation seems like a particularly perverse remedy when the party challenging an order argues that it should have been more stringent but is rewarded by an order taking away even the less stringent order. On the other side, advocates of vacatur argue that if rules remain in effect pending adequate justification, the agency has no incentive to give an adequate justification in the first place. Notably, however, even those who oppose “remand without vacatur” are open to alternative routes to achieving the same result such as allowing the court to stay the mandate in the case, leaving the order vacating the agency action hanging in limbo.<sup>75</sup>

We recommend that the APA be amended to formally recognize the legitimacy of remand without vacatur. It may also be worth considering inclusion of the *Allied-Signal* test in the statute in order to clarify the circumstances when this remedy is appropriate.

#### B. CLARIFYING AND LEGITIMATING JUDICIAL DEFERENCE

There are sound reasons for courts to defer to agencies, but if deference goes too far, it becomes a license for administrative abuses. In this section, we propose reforms to (1) clarify and legitimate judicial deference to an agency’s interpretations of its governing statute, (2) provide similar guidance on an agency’s interpretations of its own regulations, (3) make clear that a change of administration is not an adequate basis standing alone for changing policies, and (4) require courts to invalidate regulations when the public explanation is a pretext for a decision based on improper considerations.

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<sup>68</sup> For a more recent review of the case law and scholarship, see Benjamin W. Tettlebaum, “Vacation” at the Farm: Why Courts Should Not Extend “Remand Without Vacation” to Environmental Deregulation, 97 CORNELL L. REV. 406, 410-417 (2012).

<sup>69</sup> *Checkovsky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994).

<sup>70</sup> *Id.* at 454.

<sup>71</sup> *Id.* at 496.

<sup>72</sup> For a sampling of cases, see *NACS v. Bd. of Governors of Fed. Reserve Sys.*, 746 F.3d 474, 493 (D.C. Cir. 2014); *Nazareth Hosp. v. Sec’y U.S. Dep’t of Health & Human Serv’s*, 747 F.3d 172, 185 (3d Cir. 2014) (“general remedy for failure to adequately respond to rulemaking comments is not complete vacatur of an agency rule, but rather remand for additional consideration”).

<sup>73</sup> *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1992).

<sup>74</sup> *Id.* at 150-151. The test was first announced in *International Union, United Mineworkers of America v. Federal Mine Safety and Health Administration*, 920 F.2d 960, 966-967 (D.C. Cir. 1990).

<sup>75</sup> For instance, in the opinion where he protests vehemently against remand without vacatur, Judge Randolph opined that the SEC could apply for a stay of the court’s mandate, which he considered the “usual and appropriate method of handling such matters.” *Checkovsky*, 23 F.3d at 493.

### 1. Embracing Chevron for Questions of Statutory Interpretation

In *Chevron, U.S.A., Inc. v. NRDC*,<sup>76</sup> the Court held that the agency's interpretation of the statute was entitled to deference because it was reasonable and because "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."<sup>77</sup> The Court emphasized that "Congress intended to accommodate both interests [implicated by its mandate], but did not do so itself on the level of specificity presented by these cases."<sup>78</sup> *Chevron* was limited by *United States v. Mead Corp.*<sup>79</sup> The *Mead* Court held that *Chevron* deference should apply only where "Congress delegated authority to the agency generally to make rules carrying the force of law, and... the agency interpretation claiming deference was promulgated in the exercise of that authority."<sup>80</sup>

After *Mead*, the *Chevron* test now has at least three steps:

*Step Zero.* Does the agency have authority to issue rules or make adjudicative decisions that have the force of law? If the answer is "no," *Chevron* does not apply, but the agency may still receive some lesser degree of deference because of its expertise<sup>81</sup> under the older *Skidmore* test.<sup>82</sup> If the answer is "yes," the analysis moves to Step One.

*Step One.* Is the statute legally ambiguous? If not, the Court simply decides the interpretation of the statute by itself. Otherwise, the analysis moves to Step Two.

*Step Two.* Is the agency's interpretation reasonable (even if the court itself would have chosen a different interpretation)?<sup>83</sup>

Step One of *Chevron* enables reviewing courts to preserve their traditional authority over determining statutory meaning. When the court finds the meaning of the statute clear, it need not defer to an agency's contrary view. If the court

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<sup>76</sup> *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Regarding the complexities of implementing *Chevron*, see Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 188 *YALE L.J.* 64 (2008). There seems to be considerable uncertainty in the lower courts about how to implement *Chevron*.

<sup>77</sup> *Id.* at 865.

<sup>78</sup> *Id.*

<sup>79</sup> *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>80</sup> *Id.* at 226–27.

<sup>81</sup> When *Chevron* does not apply, the agency receives the lower level of deference described in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1940), based primarily on the agency's expertise and experience.

<sup>82</sup> See Cass R. Sunstein, *Chevron Step Zero*, 92 *VA. L. REV.* 187 (2006) (arguing that *Chevron* should be applied more broadly than it was even before *Mead*, to allow decisions to be made by institutions more expert and more politically accountable than the courts).

<sup>83</sup> The reader may notice that we said "at least" three steps, because later decisions are hard to classify between the steps and have arguably added at least one and perhaps two more steps.

See *King v. Burwell*, 576 U.S. \_\_\_\_ (2015) (declining to apply *Chevron* test in major Obamacare case); *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("enormous and transformative expansion in EPA's regulatory authority" would be required by agency interpretation).

proceeds to step two, the agency's interpretation has typically been upheld unless it is clearly unreasonable.

The *Chevron* doctrine has become increasingly complex over time, and many issues relating to its application remain mired in confusion. We recommend simplifying and clarifying *Chevron*. The Court has sometimes declined to apply *Chevron* to issues of great societal importance.<sup>84</sup> We recommend eliminating this "major questions" exception to *Chevron* deference, which simply gives courts an excuse to appropriate for themselves policy questions that Congress gave to the agency. Moreover, as many courts have done, we would suggest that Step Two analysis generally be conducted under the arbitrary-and-capricious test (taking into account any canons of interpretation or statutory presumptions that might apply at this stage).<sup>85</sup> Judges are familiar with this test, and it encompasses the crucial requirement of reasoned explanation. Because some conservatives are calling for severely curtailing judicial deference, it would be desirable to amend the APA to eliminate any doubt about the legitimacy of *Chevron*.

### 2. Granting Deference to Interpretation of Agency Regulations

An agency's interpretation of its own regulation also receives judicial deference under what is known as the *Auer* doctrine.<sup>86</sup> Like *Chevron*, *Auer* has also been under recent attack from conservatives, who claim without empirical evidence that agencies deliberately issue ambiguous rules so they will have a free hand to fix their meanings later. In our view, the argument for deference is at least as strong here, since the agency itself best understands its own regulations. There is also a strong need for uniformity in the application of regulations. For that reason, provided an interpretation is publicly available, we think it should be entitled to judicial deference, as current law recognizes.

### 3. Requiring Reasoned Analysis for Policy Reversals

The Trump administration's assaults on Obama-era regulations highlights a recurring issue: to what extent should courts defer to policy reversals stemming from political shifts?

The issue first surfaced in *Motor Vehicle Manufacturers Association v. State Farm*,<sup>87</sup> which overturned the Reagan administration's decision to rescind an earlier regulation requiring air bags or passive restraints in new cars. The Court's reasoning is encapsulated in the closing section of Justice White's majority opinion: "An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis."<sup>88</sup> In contrast, the dissenters argued that a "change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and

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<sup>84</sup> A notable example is the Obamacare case cited in the preceding note.

<sup>85</sup> See Kent Bartlett and Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. (forthcoming 2018); Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359 (2018).

<sup>86</sup> *Auer v. Robbins*, 519 U.S. 452 (1997). Cass Sunstein and Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297 (2017), provides a full explanation of the doctrine and its critics while offering a compelling argument for *Auer*.

<sup>87</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983).

<sup>88</sup> *Id.* at 57.

regulations.<sup>89</sup> More recently, in *FCC v. Fox Television Stations, Inc.*,<sup>90</sup> the Court upheld the decision of the FCC to abandon a previous policy regarding “fleeting obscenity” by broadcasters. Justice Scalia’s opinion for the Court held that the FCC’s change in stance was not arbitrary or capricious. In parts of the opinion, Scalia embraced Chief Justice Rehnquist’s dissenting opinion in *State Farm* wherein Rehnquist accepted the legitimacy of “political” considerations in regulatory decisions. But those portions of the *Fox Television* opinion represented only a plurality of justices.

In our view, it is inevitable that changes in presidential administrations or agency personnel will lead to differing policy views. We do not see such changes as relevant, however, in determining whether an agency has reasonably interpreted a statute or whether its policy decisions are adequately supported by the record. We suggest that the APA be amended to incorporate the *State Farm* approach explicitly and exclude the Scalia/Rehnquist approach.

#### 4. Assessing White House Intervention into Agency Decision-making

The issue of policy reversals relates to the issue of White House interventions on agency decisions. In the leading case, the D.C. Circuit refused to consider evidence that the EPA had shifted its position because of White House pressure.<sup>91</sup> There has been a vigorous debate among legal scholars over this issue.<sup>92</sup> On the one hand, presidential involvement in important policy decisions seems inevitable and healthy in a democracy. Moreover, fishing expeditions into the behind-the-scenes decision-making process can easily turn into harassment. On the other hand, to the extent that the real decisions are made in the White House for reasons unrelated to the agency’s statutory mandate and public explanations, the agency rulemaking process seems like a charade.<sup>93</sup>

Review based on the administrative record and the agency’s public explanation do at least serve to ensure that a decision is not legally or scientifically unsupportable, even if the agency was under White House pressure to take one side or another of a disputable question. When the outside pressure is severe, the agency has less ownership of the decision, and in principle, courts should be less willing to apply deference doctrines based on agency expertise or on congressional delegation to the agency.

White House involvement is most questionable when it is based on impermissible factors. For instance, the White House might direct the agency to take a proposed action on the basis of cost, when the statute requires a decision based purely on public health. The Supreme Court has made it clear that this is a basis for invalidating an agency decision. In *Whitman v. American Trucking Associations*,<sup>94</sup> after first

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<sup>89</sup> *Id.* at 59.

<sup>90</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

<sup>91</sup> *Sierra Club v. Castle*, 657 F.2d 298 (D.C. Cir. 1981).

<sup>92</sup> Some of the important contributions to the literature on this issue include Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683 (2016); Sidney A. Shapiro and Richard Murphy, *Constraining White House Political Control of Agency Rulemaking Through the Duty of Reasoned Explanation*, 48 U.C. DAVIS L. REV. 1457 (2015); Lisa Heinzerling, *A Pen, A Phone, and the U.S. Code*, 103 GEO. L.J. ONLINE 59, 64 (2014); Peter M. Shane, *Chevron Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679, 691 (2014); Mark Seidenfeld, *The Irrelevance of Politics to Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141 (2012); Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 19 FORDHAM L. REV. 2487 (2011).

<sup>93</sup> One example is the incident discussed in Lisa Heinzerling, *The FDA’s Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927 (2014).

<sup>94</sup> *Whitman v. American Trucking Ass’n*, 531 U.S. 457 (2001).

holding that cost was not a factor that the EPA could consider in setting National Ambient Air Quality Standards (NAAQS), Justice Scalia went on to say:

Respondents' speculation that the EPA is secretly considering the costs of attainment without telling anyone is irrelevant to our interpretive inquiry. If such an allegation could be proved, it would be grounds for vacating the NAAQS, because the Administrator had not followed the law.<sup>95</sup>

Courts should not inquire into the decision-making process without a strong showing based on publicly available information. But in some cases, this barrier might be overcome. For instance, a president might announce his views in a tweet or public statement, or the transparency rules proposed in Part II might require public disclosure of OIRA communications to the agency. When further inquiry confirms that the agency's decision was based on legally irrelevant factors, the court should send the rule back to the agency for reconsideration.

The case for deference is also weakened when a decision is not truly made by the expert agency selected by Congress. *Chevron* deference is primarily based on the presumption that Congress intends the agency to have primary responsibility for resolving ambiguities. This rationale does not apply when the record reveals that the White House has vetoed an agency's interpretation that would have been deference-worthy and at least as sound (in the court's view) as the White House view now being offered as the agency's own. In such cases, the court should consider remanding to the agency for further consideration.<sup>96</sup>

#### IV. REPEALING THE CONGRESSIONAL REVIEW ACT

The latitude with which Congress frequently delegates authority to administrative agencies has been a major source of strength for the modern regulatory state, but also a source of anxiety. On one hand, the model of conferring broad, but limited, authority to expert agencies that are controlled by presidential appointees, yet subject to judicial review, has produced a regulatory system that is highly deliberative and accountable, while still being appropriately politically responsive. On the other hand, as the membership of Congress changes, groups of legislators may become dissatisfied with how agencies are exercising the discretion that earlier Congresses conferred—measures which, even if lawful under the original statutory delegation, may be at odds with policy sentiment in the more recent Congress. Each Congress retains the legislative authority to amend earlier statutes and thus to narrow the scope of administrative authority they confer. Congress may even revoke specific regulations, as they did in amending the Motor Vehicle Traffic and Safety Act of 1976 to prohibit passenger restraint regulations that would rely on so-called “interlock devices,” which prevent a vehicle from starting or result in a persistent alarm noise until seat belts are fastened.

The process of statutory enactment is, however, cumbersome given the number of “vetogates” entailed in the ordinary legislative process. Moreover, even legislators successful at placing a regulatory issue on their colleagues' agenda and obtaining passage of an amendment to an earlier Act will still need the president's signature or a two-thirds majority in both Houses in order to formally limit through new law

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<sup>95</sup> *Id.* at 471.

<sup>96</sup> See Shane, *supra* note 92, at 702.

the agency's policy making discretion. This explains Congress's frequent move before the 1980s to incorporate into administrative statutes so-called "legislative veto" provisions, which purported to enable Congress to nullify certain agency regulations without traversing the full process of statutory enactment and presentation to the president. The Supreme Court held such legislative vetoes unconstitutional in the 1983 case of *INS v. Chadha*.<sup>97</sup>

Congress's eventual response to *Chadha* was the enactment in 1996 of the Congressional Review Act (CRA).<sup>98</sup> Recognizing it could not end-run the presidential signature requirement, Congress attempted to ensure at least that significant rule-makings would get legislative attention and, further, that the process of overturning regulations by statute could be streamlined.

The strategy might seem straightforward enough. Agencies promulgating rules are required to report them to Congress and to the Government Accountability Office (GAO). The GAO, within 15 days, reports to Congress whether the agency complied with a variety of analytic and procedural requirements. With regard to "major" rules, Congress gives itself authority to fast-track in each house a joint resolution that might be introduced to overturn the regulation.<sup>99</sup> Should any such resolution be enacted and signed, the disapproved rule:

may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.<sup>100</sup>

Presumably, this limit on reissuance is to give the resolutions of disapproval the effect of *pro tanto* amendments to the underlying regulatory statutes, although the scope of the limitation on future regulations is unclear.

Despite what may have been good intentions on the part of the drafters, the results of the CRA have been mischievous. Congress can use the fast-track period only for a specified period of time.<sup>101</sup> Should the review period for a particular rule expire during the administration of the same president who oversaw the issuing agency, there is virtually no chance that the president would sign a resolution of disapproval or that a two-thirds majority could be assembled in each house to overturn a presidential veto. Unsurprisingly, the only occasions on which the CRA has been used have occurred when a president from one of the major parties is succeeded by a president from the other major party, and the new president's party also controls

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<sup>97</sup> *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>98</sup> 5 U.S.C. § 801 *et seq.* (2018).

<sup>99</sup> Defined by the Small Business Regulator Enforcement Fairness Act, the term "major rules" means "any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in: (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets." 5 U.S.C. § 804(2) (2018).

<sup>100</sup> *Id.* § 801(b)(2) (2018).

<sup>101</sup> The period is not, however, insubstantial. The sixty days that the CRA confers is expressed in terms of Senate "session days" or House "legislative days." Given the legislative calendar, sixty "session" or "legislative" days can easily extend over more than half a year.

both houses of Congress. Prior to the election of Donald Trump, the only regulation actually overturned under the CRA was a regulation that became final toward the very end of the Clinton administration, which concerned the ergonomics of workplace equipment and processes. A Republican-controlled Congress disapproved the rule, with George W. Bush's signature, shortly after President Clinton left office.

The 2016 election of Donald Trump and the persistence of Republican majorities in both Houses, however, made the CRA a powerful weapon against regulatory initiatives by the Obama administration. As of February 2018, fifteen such rules have been overturned.<sup>102</sup> Although Republicans portrayed these efforts as democratically healthy responses to last-minute regulations by an outgoing administration, they were no such thing. A perfect example was the Stream Protection Rule, designed to keep runoff from surface mining out of America's waterways. Although it took effect as a final rule on President Obama's last day in office, it emerged from a process of analysis, public comment, and deliberation that started almost as soon as Obama took office eight years earlier.<sup>103</sup>

In November 2009, the Department of the Interior published an "advance notice of proposed rulemaking," which described ten plausible alternative approaches "to significantly reduce the harmful environmental consequences of surface coal mining operations in six Appalachian states."<sup>104</sup> The Department then took over five years to analyze nearly 33,000 public comments and analyze the environmental and regulatory impact of the alternatives. The final rule didn't emerge until December 2016, intended to take effect a month later. Yet using its fast-track process, Congress voided eight years of work in just three days, January 31 through February 2, 2017, without any hearings or committee deliberation whatsoever. The disapproval was debated for an hour in the House and for portions of two days' business in the Senate.

The CRA looks yet more troublesome when one considers a handful of critical problems posed by its text. First, it is not completely clear whether the "rules" covered by the CRA are only the legislative rules adopted pursuant to notice-and-comment rulemaking, or also policy statements and interpretive rules. If the latter, the CRA's impact is completely unclear. Because policy statements and interpretive rules, by definition, cannot change the underlying law, it is somewhat puzzling what it would mean to veto them. Nevertheless, the GAO has concluded that a nonbinding general statement of policy is a rule subject to the CRA,<sup>105</sup> and Congress has for the first time issued a resolution of disapproval for a guidance document, the Consumer Financial Protection Bureau's guidance on discrimination in auto lending.

A second problem arises because, as it turns out, the Clinton, George W. Bush and Obama administrations were less than perfect in reporting new rules to Congress, as the CRA requires.<sup>106</sup> It has been proposed that Congress should thus be able to use

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<sup>102</sup> Thomas O. McGarity, *The Congressional Review Act: A Damage Assessment*, AMERICAN PROSPECT (Feb. 6, 2018), <http://prospect.org/article/congressional-review-act-damage-assessment>.

<sup>103</sup> Peter Shane, *The GOP's Radical Assault on Regulations Has Already Begun*, WASH. MONTHLY (Feb. 27, 2017), <https://washingtonmonthly.com/2017/02/27/the-gops-radical-assault-on-regulations-has-already-begun/>.

<sup>104</sup> Notice of Intent to Prepare a Supplemental Environmental Impact Statement (SEIS), 74 Fed. Reg. 228 (proposed Nov. 30, 2009), <https://www.gpo.gov/fdsys/pkg/FR-2009-11-30/html/E9-28513.htm>.

<sup>105</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, B-329129, BUREAU OF CONSUMER FINANCIAL PROTECTION: APPLICABILITY OF THE CONGRESSIONAL REVIEW ACT TO BULLETIN ON INDIRECT AUTO LENDING AND COMPLIANCE WITH THE EQUAL CREDIT OPPORTUNITY ACT 1 (2017).

<sup>106</sup> CURTIS W. COPELAND, CONGRESSIONAL REVIEW ACT: MANY RECENT FINAL RULES WERE NOT SUBMITTED TO GAO AND CONGRESS 46 (2014), [https://www.eenews.net/assets/2017/02/22/document\\_pm\\_01.pdf](https://www.eenews.net/assets/2017/02/22/document_pm_01.pdf).

the CRA indefinitely to revoke rules that should have been reported under the CRA, but which never were.<sup>107</sup> Of course, this could include rules of very long standing to which regulated parties have long adapted and on which the public now relies.

Finally, the ban on reissuing rules that are “substantially the same” as rules disapproved under the CRA is utterly mysterious. Consider, to take perhaps the most obvious example, a resolution disapproving a regulation that amended or revoked an earlier rule. If Rule B revoking Rule A is disapproved under the CRA, does that mean that Rule A can never be revoked by the agency in the future? That improbable result seems to follow directly from the statutory text.

Perhaps some of the uncertainties posed by the CRA could be cured by more careful drafting. We recommend instead its repeal.<sup>108</sup> The effort to short-circuit the ordinary legislative process in deciding how to treat recent regulatory or deregulatory activity is deeply misguided. The resolutions adopted early in the Trump administration laid waste to untold numbers of staff hours and agency expenditure over the course of the Obama administration. They did so without anything approaching real analysis or careful deliberation.

In sum, there is simply no good way of short-circuiting normal legislative procedures once Congress is confronted with the painstaking and often resource-intensive product of agency rulemaking activity. As the Supreme Court observed in *Chadha*, both the constitutional text and the debates that resulted in its drafting and ratification, reflect an “unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.”<sup>109</sup> This is no less true when Congress is reacting to an agency’s implementation of a statutory mandate already enacted than when Congress is enacting a new delegation of administrative authority in the first place.

## CONCLUSION

No human institution is perfect, including administrative agencies. In its wisdom, however, Congress over a period of many decades has created a network of administrative bodies and a sound process for regulatory policymaking that have produced rules of incalculable value to American families, consumers, workers, patients, students—everyone. To the extent the process can be made yet more inclusive, transparent, accountable, and evidence-based, regulatory reformers should pursue those goals. We believe that the measures we have described to improve agency rulemaking processes, discipline White House review of rules, clarify the law governing judicial review of agency action, and repeal the Congressional Review Act represent a starting agenda for regulatory reform that progressives can and should embrace.

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<sup>107</sup> Lydia Wheeler, *Window Closing for Congress to Roll Back Obama-Era Regulations*, HILL (Apr. 1, 2017), <http://thehill.com/regulation/326812-window-closing-for-congress-to-roll-back-obama-era-regulations>; Philip A. Wallach and Nicholas W. Zeppos, *Is the Congressional Review Act About to Supercharge Deregulation?*, BROOKINGS (Apr. 4, 2017), <https://www.brookings.edu/blog/fixgov/2017/04/04/will-congressional-review-act-supercharge-deregulation/>.

<sup>108</sup> A recent report by the Center for Progressive Reform discusses in detail the arguments for repeal of the CRA. THOMAS O. MCGARITY ET AL., CENTER FOR PROGRESSIVE REFORM, *THE CONGRESSIONAL REVIEW ACT: THE CASE FOR REPEAL* (2018), [http://progressivereform.org/articles/CRA\\_Repeal1\\_Case\\_050218.pdf](http://progressivereform.org/articles/CRA_Repeal1_Case_050218.pdf).

<sup>109</sup> *INS v. Chadha*, 402 U.S. at 959.

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