



# RETHINKING ADMIN LAW: From APA to Z

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**FOREWORD BY**  
Senator Sheldon Whitehouse

## **FEATURING**

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Jill Family  
Thomas McGarity  
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# Foreword

Sheldon Whitehouse  
U.S. Senator, Rhode Island

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The American Constitution Society's *Rethinking Admin Law: From APA to Z* comes at an important time. Regulatory agencies ensure that we have clean air to breathe and clean water to drink, that our workplaces are safe, that our retirement accounts are secure from risky speculation and self-dealing, and much more. Yet they are under a sustained political and legal attack. Progressives must respond.

Today's right-wing attacks on regulatory agencies must be seen in the larger context of the age-old contest between powerful influencers who seek to bend government to their will, and a general public that counts on government to protect it from those influencers. The power of the influencer class can be immense, as history shows. Whether it is the fossil fuel industry protecting its ability to pollute for free, Wall Street protecting tax favors for its titans, or the pharmaceutical industry defending an island of high U.S. drug prices from world competition, the last thing these actors want is a robust, operating democracy that honors the wishes of the people and regulates in the public interest.

Congress built administrative agencies to have both the time and expertise to balance public and private interests knowledgeably. It built into these agencies a bulwark of protections to ensure they would be fair and evidence-based, including procedural transparency, public notice and comment, and judicial review. Civil servants bring to

regulation a special combination of technical substantive expertise, focused persistence and adaptiveness in the face of complex problems, and relative independence from raw political pressure. For decades, this bulwark has held remarkably well. As a public official steeped in voter sentiment, I hear virtually no complaints about the existence of this so-called “administrative state.”

Instead, I hear the recurring complaint about “agency capture,” when the regulated industry comes to dominate its supposed regulator and ignores the public interest. Today’s influencers have significant sway with the Trump administration. From the Environmental Protection Agency to the Department of Education to the Department of the Interior and beyond, industry lobbyists and their highly paid experts now run the federal government and write, or repeal, regulations in service of their former – and likely future – clients.

The influencers are not content to wage their battle only within regulatory agencies and administrative law. Their longer-term project, backed by millions of dollars largely hidden from public view, is to unravel our regulatory system completely. Academic institutions and think tanks funded by these powerful influencers have seeded, watered, and fertilized a hothouse plant of anti-regulatory theory. Political lobbying groups and industry trade associations funded by these powerful influencers shop that hothouse theory to the public and to politicians. And amicus groups funded by these powerful influencers present the influencers’ preferred arguments to courts. It is artifice, from beginning to end.

Progressives need to wage battle against the influencers’ apparatus on two fronts. First, we must continue to engage

in protecting honest regulation. Usually, courts give significant deference to regulators, who are presumed to have scientific and technical expertise that Congress and the courts lack. When industry co-opts its regulator, it falls to lawyers to challenge agency decisions and require courts to apply the law to protect the public interest.

It's no longer enough just to argue the merits; effective advocacy now requires presenting evidence and argument that the agency has been captured. Close review of the evidentiary record, and of the credentials and bias of the experts, can help make these challenges successful. Open records requests and congressional oversight can expose agency bias, communications with interested parties, and procedural mischief. "Inalterably closed minds" must be exposed. The Administrative Procedures Act remains a strong tool to fight undue special influence; we ought to consider ways to strengthen it further. Traditional notions of judicial deference to agency decision-making may have to be reversed where there is evidence of regulatory capture, in order to protect the rule of law from private influence.

Second, we must not lose sight of the larger struggle and the encroachment of influence in our judiciary. The powerful elites who long to be free from public interest regulation are actively reshaping the federal judiciary as a way to achieve their political ends. Justices Gorsuch and Kavanaugh and the cavalcade of young, mostly male, mostly white judges that President Trump has nominated to the circuit and district courts often have their seats because they share the influencers' anti-regulatory world view. Republicans in the Senate have torched virtually every norm and rule of their chamber to speed these nominations through. The

interests, and money, behind these moves are the same as those looking to roll back the last eight decades of regulatory policies. Their fingers reach deeply, if anonymously, into the selection of nominees, the campaigns for confirmation, and the amicus briefs guiding decisions. This is a story that needs to be told, and part of our job is telling it in regulatory comments, in judicial proceedings, and in the public square.

# Revitalize the Bureaucracy

Jon Michaels<sup>†</sup>

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Only Nixon could open China and, quite possibly, only Donald Trump could inspire warm and fuzzy feelings about the American bureaucracy. Those feelings are not, as yet, universal. The president and his surrogates continue to thunder against civil servants.<sup>1</sup> Promises to drain the bureaucratic swamp and to deconstruct the administrative state abound. McCarthy-like—that is, baseless—allegations that large swaths of the career workforce are disloyal draw cheers among the MAGA faithful, as do pointed, personal attacks against particular civil servants in the State Department, FBI, and DOJ. What’s more, dangerous and disingenuous intimations that the president is being thwarted by a subversive Deep State are peppered about the cable news, talk radio shows, and social-media outlets and presented as gospel.<sup>2</sup>

Yet I think it is fair to say that many progressives, including some who have long taken bureaucracy for granted, have gained a greater appreciation for the

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<sup>1</sup>See Jonathan Allen, ‘Lock Them Up’? Trump’s Attention Turns to His Enemies List, *NBC NEWS* (Mar. 29, 2019); Jon D. Michaels, *The War on Federal Employees*, *AM. PROSPECT* (Dec. 11, 2017); Jon D. Michaels, *How Trump Is Dismantling a Pillar of the Administrative State*, *GUARDIAN* (Nov. 7, 2017).

<sup>2</sup>Jon D. Michaels, *Trump and the Deep State*, *FOREIGN AFF.* (Sept./Oct. 2017); Rory Cooper, ‘Deep State’ Fantasy Is Just as Dangerous as the ‘Fake News’ Myth, *DAILY BEAST* (Feb. 5, 2018); Evan Osnos, *Trump vs. the “Deep State”*, *NEW YORKER* (May 21, 2018); Jane Mayer, *The Making of the Fox News White House*, *NEW YORKER* (Mar. 11, 2019).



importance of a vibrant, professional, and independent bureaucracy.<sup>3</sup> That is to say, they've come to appreciate a civil service whose members have the legal authority, institutional mandate, and expert chops to stand up to a presidential administration bent on acting abusively, arbitrarily, or in a hyperpartisan fashion. After all, in modern times, with so much power delegated from Congress to executive agencies, the most important constraint on presidential power may well be an intra-branch one, with civil servants checking and balancing an otherwise unfettered presidential administration.

Perhaps a window to do something about the long-maligned, demoralized, and marginalized civil service will open after the election of 2020. After all, fresh in our memory will be the corruption and incompetence of Trump's Cabinet officials,<sup>4</sup> quite a few of whom are not in the least committed to the missions of the agencies they lead; the unreliability of a Congress perfectly comfortable prioritizing party over nation; and the exodus of any number of civil servants, unwilling or unable to carry water for an unethical and often unjust White House. If so, a plan to revitalize the bureaucracy should be in place, one of similar significance to the Green New Deal and Medicare for all. After all, a strong institutional foundation must underlie those and other programs, in order to ensure they're designed and administered fairly, thoughtfully, and energetically.

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<sup>3</sup> At least some center-right commentators have done the same. See, e.g., Jennifer Rubin, *The Unsung Heroes of the Shutdown*, WASH. POST (Jan. 29, 2018); Jennifer Rubin, *The Hollowing Out of the Federal Workforce*, WASH. POST (Sept. 7, 2018).

<sup>4</sup> David Leonhardt & Ian Prasad Philbrick, *Trump's Corruption: The Definitive List*, N.Y. TIMES (Oct. 28, 2018); *Trump Team's Conflict and Scandals: An Interactive Guide*, BLOOMBERG (last updated Mar. 14, 2019).

With that in mind, consider the following cornerstones of a 2021 Bureaucratic Revitalization:

### **Strengthen Civil Service Protections**

Most critically, efforts must be taken to strengthen the civil service. As it stands, political appointees are not permitted to fire or demote civil servants absent good cause.<sup>5</sup> Such prohibitions on adverse employment actions must be broadened to include a wider range of (adverse) geographic or portfolio reassignments, of which we've seen plenty during the Trump presidency; and the prohibitions must be tightened to facilitate appeals by aggrieved civil servants, in which evidence of a good-faith policy disagreement constitutes a rebuttable presumption in favor of immediate reinstatement.

To be sure, tightening tenure invites bureaucratic abuse, as it will be easier for some civil servants to slack off. But the aim of civil service protections is to promote robust, vigorous — and yes, sometimes contentious — bureaucratic engagement, and some slacking on the margins is a small price to pay to make the civil service an attractive, supportive professional environment for dedicated, expert lawyers, economists, social workers, and scientists. (One cannot help but note that the civil servants that the

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<sup>5</sup> See, e.g., Lloyd-La Follette Act, Pub. L. No. 62-336, 37 Stat. 555 (1912); Veterans Preference Act of 1944, Pub. L. No. 78-359, 58 Stat. 387 (1944). See also *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (upholding the Lloyd-La Follette Act's removal standard – “for such cause as will promote the efficiency of the service” – against an overbreadth and vagueness challenge); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 237 (2016).

president has targeted most aggressively are among the most accomplished and effective civil servants — not slackers, but those who are most threatening to his “deconstruction” and deregulation agenda.)

### **Insource Currently Privatized Government Responsibilities**

Such protections for civil servants are of little comfort if they can be readily circumvented by privatization initiatives. After all, the current default, endorsed by Democratic and Republican administrations alike, has been to contract out government services if and when it’s advantageous to do so. This decades-long policy has been criticized for inviting fraud and abuse on the part of greedy contractors.<sup>6</sup> But there is another, more constitutionally significant, reason for alarm: outsourcing helps marginalize an independent bureaucracy.

Contractors, who are hired and fired by an incumbent administration, necessarily pay fealty to those incumbents. They are, if anything, primed to be especially solicitous of the agency heads upon whom they depend for bonuses, renewal of contracts, and the awarding of additional contracts. That responsiveness has been portrayed as a net positive, especially when compared to tenured civil servants, invariably depicted as lethargic or obstreperous. But financial dependency breeds “yes” men and women, unwilling to challenge authority. Tenure, by contrast, gives

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<sup>6</sup> Steven Pearlstein, *The Federal Outsourcing Boom and Why It’s Failing Americans*, WASH. POST (Jan. 31, 2014); Derek Paulhus, *Waste, Greed, and Fraud: The Business that Makes the World’s Greatest Army*, HARV. KENNEDY SCH. (last visited Apr. 2, 2019).

the rank-and-file the legal authority to push back, and to resist overreach by the politicians running the agencies.<sup>7</sup> And, as we're currently witnessing, there are countless ways in which agency heads may act abusively, unlawfully, or capriciously.

With outsourcing as the default, even non-privatized pockets of the administrative state might lack the benefits associated with having strong, potentially contentious civil servants. That's because those civil servants may be deterred from challenging agency heads on matters of law or policy. They'll be deterred because they know how easy it would be for those agency heads to outsource their jobs, too.

Thus, any reform agenda must include an express commitment to switching the default, and instead *insourcing* heretofore privatized work as soon as feasible. Doing so will sharply reduce the ease with which agency heads can contract around an independent, forceful bureaucracy.

## **Recruit and Retain**

With due respect to the intrepid civil servants who have weathered any number of attacks on the civil service—engineered by the likes of Reagan, Clinton, and Trump<sup>8</sup>—the federal bureaucracy is hardly the most attractive destination for today's most able and passionate young professionals. That has got to change, especially given the current “brain drain” that has left the federal civil service

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<sup>7</sup> Jon D. Michaels, *An Enduring Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015).

<sup>8</sup> JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC (2017) (cataloging multi-generational, bipartisan efforts to weaken and shrink the federal bureaucracy); Landon R. Y. Storrs, *The Ugly History Behind Trump's Attacks on Civil Servants*, POLITICO (Mar. 26, 2017).

demoralized and understaffed. Better pay and greater job security will surely help, but that's just a start. Two additional steps are necessary.

First, on recruitment: we need a civilian version of ROTC, the military training program offered at hundreds of colleges and universities. A ROTC for civilian government would recruit, train, subsidize, and help place a new generation of government officials. Developing a direct pipeline of government employees has countless advantages. A splashy program of this sort would generate buzz, familiarity, and respect for government service, making it much harder for people to credibly portray such service as parasitic, alien, or subversive. Subsidizing college, just as ROTC does, would make it easier for would-be public servants to commit to government employment, rather than chase the big bucks of, say, Wall Street (if for no other reason than to pay off hefty student loans). Additionally, a civilian ROTC would help diversify the population of government workers. One popular conservative complaint with the bureaucracy is that it is overwhelmingly liberal. While these critics tend to exaggerate the civil service's liberal leanings, overstate the dangers, and conveniently ignore the rightward tilt of folks at the Pentagon and Homeland Security, there is some truth to the claim and some reason for concern. Recruiting at many colleges and universities, including those with rather conservative campus cultures, would surely help attract an even broader cross-section of the population at large.<sup>9</sup>

Second, on retention: we need to declutter the layers and layers of political appointees atop the agencies. It isn't

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<sup>9</sup> MICHAELS, CONSTITUTIONAL COUP, *supra* note 8, at 209-12.

just the head of the agency and various deputy, under, and assistant secretaries who serve at the pleasure of the president. It is also any number of political aides attached to each of those officials. There is much to lament, as a matter of policy and logistics, regarding political layering. For present purposes, the most pertinent reason to remove at least some of those layers is to ensure that the strongest, most capable civil servants have ample room to move upward — and thus ample incentive to stay in government for the long haul.

### **Celebrating Bureaucracy**

Bureaucracy gets a bum rap. We know all about the failures and shortcomings, but most of us rarely stop to think about how effective the civil service truly is, especially considering it is often operating under less-than-ideal circumstances. By and large, for a political economy as big and complicated as the United States, government runs well. That message needs to be conveyed — over and over again — so the public is reminded (or informed for the very first time). Reminding the public will be good for recruitment; it will be good for engendering greater political support; and it will be good for the president and Cabinet officials to be mindful of the public's newfound appreciation for bureaucracy.

Lest one think this is a crazy conceit, consider the military. The military has an absolutely enormous PR budget, and uses those funds to portray the Armed Forces

in the best, most heroic light.<sup>10</sup> Thus we see military ads infused with computer generated imagery that look like trailers for the latest Marvel summer blockbuster, military sponsorship of football and baseball games, and service branch collaboration on movie scripts and combat scenes. Not surprisingly, all this PR is good for recruitment, public support, and political cover. It is no doubt harder to make EPA and DOE officials look as sexy and heroic as Navy Seals and Army Rangers. But even if pro-bureaucracy public relations efforts accomplished nothing more than rebutting some negative stereotypes about the civil service, such programming would be immeasurably helpful in restoring a good deal of respect and appreciation for those who, among other things, safeguard our health and welfare.<sup>11</sup>

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Again, as progressives work to formulate an ambitious plan for 2021, it is essential that we remember that institutions matter, and that strong institutions provide the necessary foundation upon which great, substantive programs and policies can be built. Thus, bureaucratic reform and revitalization cannot be an afterthought. It must be front and center.

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<sup>10</sup> *Id.* at 215-16. Estimates from the early 2010s peg DoD advertising budgets around \$667 million per year. That's roughly \$100 million more than what Congress gives each year to OSHA, approximately twice as large as what Congress appropriates to the Wage and Hour Division of the Department of Labor, and about four times more than what the National Highway Traffic Safety Administration receives.

<sup>11</sup> *Id.* at 215-18.

# Presidential Actions Should Be Subject to Administrative Procedure Act Review

Alan Morrison<sup>†</sup>

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*“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”<sup>1</sup>*

There are many laws passed by Congress that define what the president may and may not do, but there is one very important law to which the president is not subject: the Administrative Procedure Act (APA),<sup>2</sup> and in particular its provision for judicial review. It is not as though Congress specifically excluded the president, as it did Congress and the federal courts. Rather, the Supreme Court has interpreted the term “agency” not to include the president (and vice president) and all the entities that report to them.<sup>3</sup> When the APA was enacted in 1946, it may have made sense to exclude the president entirely from the APA, including its provisions for making rules and conducting formal adjudications, but today, with the president taking so many actions of vital

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<sup>1</sup> *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

<sup>2</sup> 5 U.S.C. § 701.

<sup>3</sup> *Franklin v. Massachusetts* 505 U.S. 788, 800-01 (1992).



concerns to almost everyone who lives in the United States, the notion that the laws that constrain the president are not enforceable by the courts does not sit well with Chief Justice Marshall's promise in *Marbury v. Madison*.

Although the current president and at times some of his predecessors have asked the courts to make everything they do judicially unreviewable, they have been only partially successful. The effort to preclude the Supreme Court from deciding whether the president had acted within the confines of the applicable statutes failed in the travel ban case,<sup>4</sup> although the Court upheld the president's executive order on the merits. In addition, the Court has not accepted that claim in cases raising constitutional issues. In other cases, even though the order to take action came from the president, the head of an agency who carried it out was the named defendant, and so the courts did not have to decide whether there was a basis to sue the president.<sup>5</sup> But in today's world, with so many rights and obligations established by statutes or rules, and not the Constitution, enabling the president to escape judicial review of sub-constitutional claims is inconsistent with the concept of the rule of law. Here are a few examples.

Let's start with two cases that the Supreme Court decided in which Congress had assigned the final decision to the president, but the legality of his decisions turned on whether the Cabinet officer in one case and a special commission in another had followed the law. The first case, *Franklin v. Massachusetts*, related to the legality of the apportionment

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<sup>4</sup> *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

<sup>5</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

of members of the House of Representatives based on the results of the 1990 census.<sup>6</sup> The claim was that the Commerce Department had not complied with the applicable law, but under the statute, Commerce only made a recommendation, and the president made the final decision. Because the Court held that the president was not subject to the APA, and Commerce did not make a final decision, the legality of what was done under the law was never subjected to court review, despite the impact that it had on the number of Representatives that several states had in Congress.<sup>7</sup>

A few years later, the same kind of question arose in connection with the special statute designed to expedite the process of closing no-longer-needed military bases.<sup>8</sup> Congress created a commission to make recommendations, but it had to follow specific procedures and it was subject to other legal constraints. Again, the commission could only propose, and the president decided — and again the same APA analysis applied and the Court refused to pass on the claims that the statute had been violated.

Another area where APA review could be extremely helpful is in promoting government transparency and accountability. The Freedom of Information Act (FOIA) is a vital safeguard when federal agencies act contrary to the public interest, if not the law.<sup>9</sup> But FOIA does not apply to the president and most individuals and entities, such as the National Security Council, that are in the White House.<sup>10</sup> Interestingly, in 1978, Congress enacted the Presidential

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<sup>6</sup> *Franklin*, 505 U.S. at 788.

<sup>7</sup> *See id.*

<sup>8</sup> *Dalton v. Specter*, 511 U.S. 462 (1994).

<sup>9</sup> 5 U.S.C. § 552.

<sup>10</sup> *Armstrong v. Exec. Office of the President*, 90 F.3d 553 (D.C. Cir. 1996).

Records Act (PRA) which applies the principles of FOIA to presidential records, starting ten years after the president completes his term.<sup>11</sup> But, the courts have refused to apply the APA to permit almost any judicial review when the claim is that the president or his staff are violating the PRA by not keeping records as required by law,<sup>12</sup> or by refusing to create them in the first place in direct violation of the PRA.<sup>13</sup>

In a similar vein, the president, like all other high ranking officials in the executive branch, as well as members of Congress and federal judges, are required to file public financial statements annually.<sup>14</sup> But suppose that the president refuses to file one, or the statement that is filed is plainly inconsistent with other public information provided by the president himself. The unavailability of review under the APA would likely prevent any court from deciding whether the law had been violated, let alone ordering the president to comply.

Then there is the area of trade in which the president is given the final word, sometimes with specific limits, but other times with almost no substantive constraints. For example, under § 232 of the Trade Expansion Act of 1962, the president has imposed tariffs of 25% on the importation of steel products and 10% for aluminum, amounting to billions of dollars of taxes annually on the American economy. In the lawsuit challenging that law on the ground that it unconstitutionally delegates legislative power to the president, both plaintiffs and the Government agree that whatever the president decides is

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<sup>11</sup> 44 U.S.C. § 4401 *et seq.*

<sup>12</sup> *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991).

<sup>13</sup> *Citizens for Responsibility & Ethics in Wash. v. Trump*, 302 F. Supp. 3d 127 (D.D.C. 2018), *appeal docketed*, No. 18-5150 (D.C. Cir. argued Mar. 15, 2019).

<sup>14</sup> 5 U.S.C. app. 4 § 101.

not judicially reviewable. Similarly, the president has imposed tariffs on billions of dollars of imported goods from China under § 301, and although there appear to be limits on when the president can take such action, on what basis, and using what means, the president will surely claim that the courts must stand down, even in the face of a claim that he is blatantly violating the law. To be sure, as the challengers are doing in the § 232 case, plaintiffs can always raise a constitutional claim, but deciding cases under the Constitution should be avoided if the matter could be resolved on statutory grounds.

Proponents of a strong presidency will doubtless proclaim that such a change would seriously undermine the ability of the president to govern — but that charge is surely overstated, for several reasons. First, the absence of APA review has not kept all cases in which the president is the real, if not the named, defendant out of court — as the Trump administration will surely attest. Second, there are many presidential actions in the foreign affairs arena, such as whether to send troops into Syria or use drones in a way that mistakenly targets innocent citizens, which no one has standing to challenge. Article III of the Constitution places limits on the power of Congress to provide for increased standing, and so that doctrine would still protect the president, as it protects many other government officials today. Third, I am not urging that the entire APA, including its rulemaking and adjudication standards, be applied to the president, but only that Congress extend the provisions on judicial review to include the President and those who work for him. Even then, the APA has a number of general exceptions to judicial review, and Congress could add others for the president if it concluded that they were warranted. However, if the president were expressly covered

by the APA's judicial review provisions, the burden would be on the president to explain why a certain set of decisions should not be able to be challenged in court, instead of the other way around.

One other shibboleth will certainly be trotted out: the president is much too busy to be spending all his time defending lawsuits. Aside from the fact that he has an army of lawyers at the Justice Department, as well as the White House Counsel's office, to do the legal work, as they already do, these cases would not require the president to testify in court or in a deposition, or otherwise interfere with his other obligations. Other defenders of presidential immunity may argue that if his decisions are subject to judicial review, he will have to spend more time and be more careful with what he does and how he explains it, a change that seems like a reason to support this idea and not oppose it.

Much as I would like to see the APA amended tomorrow to make the president subject to judicial review under it, the idea is not ready for enactment. That will require a careful study of the kinds of actions that Congress has authorized the president to take and the laws that govern them to be sure that the proper balance is struck between assuring that the President obeys the law and tying his hands by unreasonably limiting his discretion to govern. But until Congress changes the presumption that the acts of the president are immune from judicial review to one in which the courts resume their role of assuring that the United States, including the president, is "a government of laws, and not men,"<sup>15</sup> the promise of Chief Justice Marshall will not be realized.

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<sup>15</sup> *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

# Limiting Corporate Bias in Rulemaking

Sharon Block<sup>†</sup>

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**Summary:** The Office of Advocacy has an outsized influence on the regulatory process. Its intervention amplifies and subsidizes the voice of corporations, while leaving other stakeholders to fend for themselves, without regard to the merit of their interest in the subject regulation. The law should be revised to either curtail the involvement of the Office of Advocacy or to provide similar subsidies to other affected stakeholders, such as workers.

**Background:** The Office of Advocacy is an agency within the Small Business Administration (SBA) that is tasked with advancing “the views and concerns of small businesses before Congress, the White House, federal agencies, the federal courts and state and local policymakers.”<sup>1</sup> The Office’s duties related to the regulatory process derive from two sources: the Regulatory Flexibility Act (RFA)<sup>2</sup> and Executive Order 13272.<sup>3</sup> Specifically, the Office of Advocacy undertakes the following

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<sup>1</sup> ROBERT JAY DILGER, CONG. RESEARCH SERV., SBA OFFICE OF ADVOCACY: OVERVIEW, HISTORY, AND CURRENT ISSUES (2016).

<sup>2</sup> 5 U.S.C. § 601 *et seq.*

<sup>3</sup> Exec. Order No. 13,272 (Aug. 13, 2002).

activities:<sup>4</sup>

- *Compliance Oversight*: Monitors agencies' compliance with the RFA requirement that all proposed and final regulations that will have significant impact on small businesses include a detailed analysis of the impact of the rule on small business and a discussion of why the agency did not choose a regulatory alternative that would "minimize the impact" on small business;
- *Litigation Participation*: Appears as an *amicus curiae* in any court action it chooses in order to raise concerns about agency compliance with RFA;
- *SBREFA Participation*: Chooses participants for panels required by the Small Business Regulatory Enforcement Fairness Act (SBREFA) along with representatives of the rulemaking agency and the Office of Information and Regulatory Affairs (OIRA). These panels review any significant regulations under consideration for proposal by the Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA), or the Consumer Financial Protection Bureau (CFPB);
- *Regulatory Process Intervention*: Reviews and comments on draft regulations that agencies are required to send to the Office prior to publication in

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<sup>4</sup> In 2017, the House of Representatives passed the Regulatory Accountability Act, which would have greatly expanded the responsibilities of the Office of Advocacy, empowering the Office to issue regulations regarding RFA compliance for all federal agencies and requiring pre-publication review of all draft regulations by the Office, not only those that meet RFA's significance threshold. In addition, the legislation would have extended SBREFA coverage to all federal agencies, including independent agencies. The bill was not acted upon by the Senate.

the Federal Register; agencies are required to respond to all Office of Advocacy comments in the proposed and final rules; and

- *Regulatory Outreach*: Conducts roundtables on rules proposed by federal agencies in order to solicit the views of small business on the impact of the rules and then submits summaries of the roundtable comments to the agencies.<sup>5</sup>

The Office of Advocacy is headed by a Chief Counsel, who is appointed by the president and whose appointment requires Senate confirmation. Although the Office of Advocacy is not technically an independent agency in that the Chief Counsel can be removed at the pleasure of the president, the Office does enjoy independence from the political leadership of the SBA. In 2010, Congress created a separate budget line for the Office of Advocacy, giving it autonomy over its appropriation and directed the SBA to provide the Office with adequate office space and equipment. Moreover, the Office of Advocacy does not have to get clearance from the SBA political leadership to submit its comments on regulations, file amicus briefs, issue reports, or make other public statements about agency activities.

For FY 2019, the Office of Advocacy has a budget of approximately \$9 million and employs approximately 55 full-time staff. In addition, the Office of Advocacy's direct appropriation is supplemented by SBA's expenditure of some of its appropriated funds to provide office space, communications services, and IT equipment for the Office.

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<sup>5</sup> DILGER, *supra* note 1.



During the Obama administration (2009-2016), the Office of Advocacy reviewed more than 500 draft regulations, submitted more than 250 formal comment letters, and conducted more than 200 regulatory roundtables.<sup>6</sup>

### The Problem

Even absent the role of the Office of Advocacy, the rulemaking process is not a level playing field in the contest between different stakeholders for influence. Decades of studies have documented that corporate interests have a much greater level of participation in the regulatory process than do other stakeholders, such as consumers, workers, or nonprofits. As noted by Cynthia Farina, Mary Newhart, and Josiah Heidt, “studies before and after the advent of e-rulemaking confirm that individual commenters and public interest advocacy groups participate less consistently in rulemaking than business commenters.”<sup>7</sup> As early as 1977, a Senate report found that “regulated industries spend from ten to one hundred times as much as public interest groups in rulemaking.”<sup>8</sup> In 2010, Senator Sheldon Whitehouse held a hearing on regulatory capture that came to the same conclusion, finding bipartisan agreement among the hearing’s witnesses that, “regulated entities usually have organizational and resource advantages in the regulatory process compared

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<sup>6</sup> OFFICE OF ADVOCACY, U.S. SMALL BUS. ADMIN., BACKGROUND PAPER ON THE OFFICE OF ADVOCACY 2009-2016: THE MISSION, ACTIVITIES, AND ACCOMPLISHMENTS FROM 2009 TO 2016 (2016).

<sup>7</sup> Cynthia Farina, Mary Newhart, & Josiah Heidt, *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 137 n.57 (2012).

<sup>8</sup> S. COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 3 STUDY ON FEDERAL REGULATION: PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS, S. DOC. NO. 95-71 17-22 (1st Sess. 1977).

to public interest groups.”<sup>9</sup> The consequence of outsized corporate influence on the regulatory process is to constrain the field of contestation. Generally, corporate interests push towards deregulation.<sup>10</sup>

The outsized role of the Office of Advocacy exacerbates this bias in the regulatory process. As reports issued by the Center for Effective Government and the Center for Progressive Reform found, the Office of Advocacy’s positions mimic those of big business.<sup>11</sup> There are two primary problems with its outsized role. First is that it is premised on the conclusion that regulations are burdensome for small businesses and should be minimized if possible. Absent from the Office of Advocacy’s mandate is any assessment of the benefits of regulations — for workers, consumers, or any other small business stakeholders. Thus, the Office’s interventions in the process all push regulations in one direction — towards less regulation.

The bias that these interventions inject into the regulatory process is magnified by the fact that the government pays for these interventions. Through the Office of Advocacy, small business interests can weigh in on any and all regulations that they do not like. Because they are not expending their own resources to draft comments or file briefs in litigation, they

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<sup>9</sup> SEN. SHELDON WHITEHOUSE, *CAPTURED: THE CORPORATE INFILTRATION OF AMERICAN DEMOCRACY* 123 (2017).

<sup>10</sup> Heidi Shierholz & Celine McNicholas, *Understanding the Anti-Regulation Agenda*, ECON. POL’Y INST. (Apr. 11, 2017); Robert Weissman, *The GOP’s Deregulation Obsession*, NATION (Oct. 12, 2011); Amit Narang, *Deregulating Big Business in the Name of Small Business*, HILL (Feb. 5, 2015).

<sup>11</sup> SIDNEY SHAPIRO & JAMES GOODWIN, CTR. FOR PROGRESSIVE REFORM, *DISTORTING THE INTERESTS OF SMALL BUSINESS: HOW THE SMALL BUSINESS ADMINISTRATION’S OFFICE OF ADVOCACY’S POLITICIZATION OF SMALL BUSINESS CONCERNS UNDERMINES PUBLIC HEALTH AND SAFETY* (2013); CTR. FOR EFFECTIVE GOV’T, *SMALL BUSINESS, PUBLIC HEALTH AND SCIENTIFIC INTEGRITY: WHOSE INTERESTS DOES THE OFFICE OF ADVOCACY AT THE SMALL BUSINESS ADMINISTRATION SERVE?* (2013).

have no need to set priorities. The Office of Advocacy's ability to compel agencies to take its comments into consideration gives small businesses a low- or no-cost option for influencing the regulatory process. They need only show up at an Office of Advocacy roundtable to express their views and inject them into the regulatory record. This channel for influencing the regulatory process essentially condones *ex parte*, non-record communication from just one stakeholder perspective — a dynamic counter to the spirit of the Administrative Procedure Act.<sup>12</sup> Or, small business interests may do nothing at all, resting on the assurance that the Office of Advocacy will reflect their general anti-regulatory perspective on its own.

All other stakeholders must expend their own resources to participate in the regulatory process and many public interest stakeholders often must forego commenting on all but the most important rules because of limited resources. This inequity creates a regulatory record that does not reflect the real breadth or intensity of the public's view of proposed regulations.

Public interest stakeholders cannot rely on other agencies within the Executive Branch to advance their interests, even if such interests are aligned. The Office of Advocacy has a broad mandate to comment on the impact of rules on small businesses and can act on its own initiative. The involvement of other federal agencies in the rulemaking of other agencies, however, is more limited. Executive Order 12866 gives OIRA the gatekeeper role — it is up to OIRA to inform agencies if it believes that they may have an interest in another

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<sup>12</sup> 5 U.S.C. § 500.

agency's rulemaking.<sup>13</sup> There is no mechanism to ensure that agencies on their own are aware of what other agencies are proposing. Moreover, E.O. 12866 defines the purpose of the interagency review process as being to avoid regulations that are inconsistent, incompatible, or duplicative with other regulations. This purpose is much more constrained than the mandate given to the Office of Advocacy, which is to make a policy judgment on whether a proposed regulation is good for small businesses.

## **The Solution**

There are two possible solutions to the bias created by the current role of the Office of Advocacy. One option would be to limit the Office of Advocacy's activities to outreach and education, but exclude the Office from participating directly in the regulatory process. This approach would take some of the imbalance out of the regulatory process but would not address the bigger underlying problem of the disproportionate resources expended by corporate interests in the process and the resulting influence those resources buy.

Moreover, regardless of whether we think that creating the Office of Advocacy was a good idea or not, taking it out of the regulatory process now would at least be perceived as reducing the amount of information in the regulatory process. Reducing input runs counter to the values that underlie the APA. As the D.C. Circuit noted in *Chamber of Commerce v. OSHA*, the purpose of the APA is to facilitate and encourage public participation in the rulemaking process, which greatly

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<sup>13</sup> Exec. Order No. 12,866 (Oct. 4, 1993).

benefits the quality of agency decision-making.<sup>14</sup> Scholars and practitioners from as diverse ideological backgrounds as Eugene Scalia<sup>15</sup> and Cass Sunstein<sup>16</sup> have extolled the value of the public's participation.

A better option than removing the Office of Advocacy from the rulemaking process is to use its existence to justify the creation of countervailing voices.<sup>17</sup> As Sabeel Rahman has noted, it simply is not possible to “sterilize” or “insulate” the rulemaking process from moneyed political interests, so the only viable option is to “expand[] the ability of diverse constituencies to engage in a democratic process of contestation and debate.”<sup>18</sup> One proposal,<sup>19</sup> from Bill Funk, an administrative law professor at Lewis & Clark Law School, is to create an “Ordinary Citizens Administration,” to complement the role of the SBA.

Another option would be to create similarly focused support for other stakeholder groups. For example, Congress could create Offices of Advocacy within key regulatory agencies. In doing so, it would make sense to start with those departments or agencies that have the most robust regulatory programs of their own, as they are likely to have the most expertise with the regulatory process and have broad mission statements. I would recommend starting with the Department

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<sup>14</sup> *Chamber of Commerce v. OSHA*, 636 F.2d 464 (D.C. Cir. 1980).

<sup>15</sup> Eugene Scalia, *The Value of Public Participation in Rulemaking*, REG. REV. (Sept. 25, 2017).

<sup>16</sup> Cass Sunstein, *Democratizing Regulation, Digitally*, DEMOCRACY J. (2014).

<sup>17</sup> See William I. Novak, *A Revisionist History of Regulatory Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 25, 48 (Daniel Carpenter & David A. Moss eds., 2014) (the answer to regulatory capture is not deregulation but by “piling on ‘all the checks and balances that human ingenuity can devise’” (quoting Charles Francis Adams)).

<sup>18</sup> K. Sabeel Rahman, *Policy-Making as Power Building* (Ford Foundation Convening, June 2016).

<sup>19</sup> Bill Funk, *The Public Needs a Voice in Policy. But is Involving the Public in Rulemaking a Workable Idea?*, CTR. FOR PROGRESSIVE REFORM (Apr. 13, 2010).

of Labor (DOL), the EPA, and the Department of Health and Human Services.

I will focus here on the role that an Office of Advocacy could play at the DOL, because that is the Department with which I am most familiar. A DOL Office of Advocacy would be tasked with intervening in the regulatory process of agencies across the government to highlight the benefits to the economic and physical well-being of workers of proposed regulations (or in the case of deregulatory efforts, the cost to workers). For example, when the Department of Veterans Affairs promulgates its regulation on implementation of the VA Mission Act of 2018,<sup>20</sup> which will set the rules for how eligible veterans access care through non-VA providers, if DOL had an Office of Advocacy, it could submit comments on how the choices made by VA in its regulations will impact the wages of health care providers within the VA system and in the private sector. It could also hold a roundtable to give unions that represent VA employees an opportunity to express their views on the proposed rules. It should be noted that under Executive Order 12866, DOL may not be included in the interagency review process for this regulation and, even if it were to be included, its contribution would be limited to noting whether the regulation posed any conflict with an existing DOL regulation.

Similarly, when the EPA issues proposed regulations implementing the Clean Air Act, a DOL Office of Advocacy could share its views on whether the proposal goes far enough in protecting the quality of air for workers whose jobs require them to work outside in high pollution areas. Again,

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<sup>20</sup> *Statement of Regulatory Priorities*, DEP'T VETERANS AFF. (last visited Apr. 1, 2019).

it is unlikely that absent a new mandate, OIRA would include DOL in the interagency review process on Clean Air Act regulations.

The advantages of replicating the Office of Advocacy model are several:

- *The on-budget cost is limited.* As noted above, the SBA Office of Advocacy's appropriation is about \$9 million. That appropriation, however, leverages much greater resources in that it requires other agencies to expend their appropriated funds in addressing the issues raised by the Office of Advocacy. A proposal with such a small explicit price tag should be politically viable.
- *Equity is a strong political argument.* Moving progressive regulatory reform in the current environment is politically a heavy lift. The advantage, however, of replicating the SBA Office of Advocacy model is that it sets up a simple equity argument in support of the proposal: If a quasi-independent voice in the regulatory process is good for small business interests, why wouldn't it be good for worker interests?
- *Having a blueprint catalyzes adoption.* Relying on the SBA Office of Advocacy model would make drafting legislation, messaging the purpose of the legislation, and implementing the legislation once it passed easy. Many other progressive regulatory reform proposals will entail more complex structural changes to the administrative law system. This proposal could be considered a relatively lighter lift and thereby could serve as an early, quick win.

# Creating Agencies that Default to Action

Sam Berger<sup>†</sup>

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Congress delegates authority to agencies, in part, because they can more quickly adapt to new situations. But over time, even broad agency authorities can prove unable to accommodate changing circumstances. In our age of partisan gridlock, Congress passes fewer regulatory statutes, meaning that agency authorities are more likely to be outdated.<sup>1</sup> As a result, agencies are frequently left trying to awkwardly fit old statutes to new problems, leading to mixed results or no action at all.<sup>2</sup> This problem can be compounded by agencies that are unwilling to act for their own reasons, including concerns about court challenges, capture by special interests, or disagreement with Congress over policy.

Rather than accept congressional and agency inaction, we should consider where policymakers can create regulatory structures that default to action. Doing so does not require reinventing the regulatory wheel, as there are examples that Congress created to address thorny issues such as Medicare spending and military base closures. Important features of

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<sup>1</sup> Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 8-17 (2014).

<sup>2</sup> *Id.*



a default-to-action approach are: (1) a clear trigger for action; (2) a clear goal; (3) significant agency discretion to take action to accomplish that goal; and (4) a direction to implement that action unless Congress uses a fast-track procedure to modify or overturn it.

Defaulting to action in certain areas would improve agencies' ability to address new problems, speed up the rulemaking process, make it harder for hostile courts to overturn important regulatory protections, and could serve as an impetus for members of Congress to work together, given that inaction would no longer benefit opponents of regulation.

This essay first discusses two instances of default-to-action approaches: the Independent Payment Advisory Board (IPAB) and the Base Realignment and Closure (BRAC) Commission. Next it examines how a default-to-action model could be applied in other contexts and then identifies areas for further discussion to determine how best to deploy this approach in a broader range of circumstances.

### **The IPAB Model**

The IPAB was enacted into law by the Affordable Care Act, but the growth in Medicare spending never triggered the IPAB to take action before it was repealed by Congress in 2018. IPAB was an independent 15-member commission whose purpose was to “reduce the per capita rate of growth in Medicare spending.”<sup>3</sup> The Chief Actuary of the Centers for Medicare & Medicaid Services was required to calculate

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<sup>3</sup> 42 U.S.C. § 1395kkk(b) *repealed by* Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 298 (2018).

the projected per capita growth rate for Medicare and, if it exceeded the target growth rate set forth in the statute, the IPAB was required to develop and submit a proposal to Congress and the president for reducing the Medicare per capita growth rate to the level required by statute.

The IPAB in many ways resembled other independent commissions. Its members were to be appointed by the president to six-year terms with the advice and consent of the Senate. There were restrictions on the types of recommendations it could make; it could not ration health care, raise revenues, raise Medicare beneficiary premiums or cost-sharing, or otherwise restrict benefits or eligibility criteria. The IPAB was directed to prioritize certain types of concerns in making its recommendations, such as extending Medicare solvency and improving health outcomes, and it was directed to consult with the Medicare Payment Advisory Commission and the Secretary of Health and Human Services (HHS). The IPAB also had detailed instructions for how recommendations should be presented to Congress and the president, including preparing a legislative proposal that would implement its recommendations.

The more unique aspect of the IPAB's structure was the process for implementing its recommendations. If the IPAB submitted a recommendation to Congress, any member of Congress in either house could introduce the legislation implementing it. There was a fast-track procedure that prevented the proposal from being filibustered in the Senate. Congress could make amendments to the recommendations, but only if those amendments achieved the same minimum level of savings required by the statute. In the absence of congressional action to pass an alternative, the HHS

Secretary was required to implement IPAB's proposals.<sup>4</sup>

This process would have allowed the IPAB to make determinations that would otherwise be made through statute, such as changes to formulas for payments to providers or for prescription drugs. Unlike with many other regulatory statutes, the IPAB was free to recommend changes that altered existing law, provided that those changes did not exceed statutory limitations on its authority. These determinations would be implemented without a notice-and-comment process under the Administrative Procedures Act, and the statute specifically stated that: "[t]here shall be no administrative or judicial review...of the implementation by the Secretary under this subsection of the recommendations contained in the proposal."

The law did provide checks on the IPAB's authority. In addition to the restrictions on the types of recommendations it could make, the savings targets it was directed to reach, and the ability of Congress to amend recommendations through fast-track procedures, there was also a means for Congress to utilize fast-track procedures prior to August 15, 2017 to discontinue the IPAB by enacting a joint resolution. However, refusal to appoint members to the IPAB was not an available option; the HHS Secretary would issue recommendations in the absence of action by the IPAB.

### **BRAC: The Model in Practice**

A real concern with recommending that the IPAB model be adopted in other regulatory contexts is that the IPAB

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<sup>4</sup> 42 U.S.C. § 1395kkk(e)(5).

itself never made any recommendations. From 2013 to 2017, the growth in Medicare spending never exceeded the target that triggered recommendations. Moreover, the IPAB never had any members. Congressional Republicans made clear that they would not submit recommendations for board members, and the Obama administration never nominated anyone.<sup>5</sup> The IPAB did not receive much support in Congress, even from Democrats, and was eventually repealed in early 2018.<sup>6</sup>

But while the IPAB never took any action, it was modeled after commissions with a similar structure that did act repeatedly: the BRAC commissions.<sup>7</sup> These commissions were created to deal with the tough issue of closing military bases; and virtually every base had specific members of Congress opposed to its closure. To solve the problem, Congress created a bipartisan commission in 1988 to make base closure recommendations for an up-or-down vote with no amendments.<sup>8</sup> The process was subsequently amended in 1990 and utilized in 1991, 1993, 1995, and 2005.<sup>9</sup>

The BRAC commissions worked similarly to the IPAB. Members were appointed by the president with the advice and consent of the Senate.<sup>10</sup> The commission would make recommendations for base closures to Congress. Those closures would be implemented by the Department of

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<sup>5</sup> Brett LoGiurato, *Republicans Are Refusing to Appoint Members to Obamacare's Most Notorious Panel*, BUS. INSIDER (May 9, 2013).

<sup>6</sup> Margot Sanger-Katz, *Another of Obamacare's Unloved Provisions Is Gone*, N.Y. TIMES (Feb. 9, 2018).

<sup>7</sup> Ian Spatz, *IPAB RIP*, HEALTH AFF. (Feb. 22, 2018).

<sup>8</sup> DAVID E. LOCKWOOD & GEORGE SIEHL, CONG. RESEARCH SERV., *MILITARY BASE CLOSURES: A HISTORICAL REVIEW FROM 1988 TO 1995* (2004).

<sup>9</sup> MARK CANCIAN, *DEFENSE 360, AUTHORIZING BASE REALIGNMENT AND CLOSURE (BRAC)* (2016).

<sup>10</sup> Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2901(a), 104 Stat. 1808 (codified as amended at 10 U.S.C. § 2687 (1990)).

Defense (DOD) unless Congress passed a resolution of disapproval pursuant to fast-track procedures.

However, the BRAC commissions differed from the IPAB in certain important ways. Each commission was only established for a single session of Congress, at which point it ended. In addition, the process for making determinations was much more regimented. First, DOD published criteria for selecting bases for closure that were subject to notice-and-comment. Then, DOD used that criteria to make its own recommendations. The commission was required to hold public hearings on DOD's recommendations and could only deviate from them where it determined "the Secretary [of Defense] deviated substantially from the force-structure plan and final criteria [for base closures] in making recommendations."<sup>11</sup> Later amendments required the commission to hold hearings for any changes to DOD's recommendations.<sup>12</sup> The recommendations would then be reviewed by the president, who could approve or reject them. Only if the president approved all the recommendations would they be sent to Congress. In the absence of presidential approval, no recommendations would be implemented.

In practice, the process worked as intended. While there were amendments made to refine the process from its initial use through the last BRAC commission in 2005, the core structure was not changed.<sup>13</sup> As noted by the Government Accountability Office, "[t]he expired 1990 BRAC legislation,

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<sup>11</sup> *Id.* § 2903(d)(B).

<sup>12</sup> Defense Base Closure and Realignment Act of 1990 Amendments, Pub. L. No. 102-190, § 2821, 105 Stat. 1544 (1991).

<sup>13</sup> George Schlossberg, *How Congress Cleared the Bases: A Legislative History of BRAC*, 1 J. DEF. COMMUNITIES 1 (2012).

as amended, established a sound process for identifying bases for closure and realignment, and it is widely viewed as a model for any future BRAC legislation.”<sup>14</sup> Although the commission has not been reauthorized since 2005, the concerns that have been raised are particular to base closings, and not to the general structure of the commission.<sup>15</sup> As some national security experts noted: “the [BRAC] process was controversial, not because it was flawed, but because it actually worked and closed excess bases.”<sup>16</sup>

## **Extending the Default-to-Action Model to Other Agencies**

The IPAB and the BRAC commissions were designed to deal with particularly thorny political issues that Congress did not believe could be resolved without special procedures. But these models could prove useful in addressing other areas plagued by regulatory and congressional inaction.

The critical components of a default-to-action model are that the agency have a clear event that triggers action, a clear target it is seeking to achieve, broad discretion to pursue a range of options to reach that target, and a mandate to implement those recommendations in the absence of congressional action.

The first two components ensure and shape agency

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<sup>14</sup> U.S. GEN. ACCOUNTING OFFICE, *MILITARY BASES: LESSONS LEARNED FROM PRIOR BASE CLOSURE ROUNDS 4* (1997).

<sup>15</sup> See, e.g. CANCIAN, *supra* note 9.

<sup>16</sup> MARK CANCIAN & RAYMOND DUBOIS, CTR. FOR STRATEGIC & INT’L STUDIES, *BASE REALIGNMENT AND CLOSURE (BRAC) ROUNDTABLE 2* (2017).

action. Without clear triggering events, an agency could repeatedly put off action or engage in lengthy and unnecessary deliberation. Targets also ensure that the agency acts to achieve the intended result, rather than making minor changes. Moreover, well-defined triggering events and targets can constrain otherwise broad powers, obviating concerns that Congress is delegating too much authority to the agency.

The triggering event and target need not be as complicated or precise as that set forth for IPAB. But they should have some reasonable level of specificity. For example, consider royalty rates for resource extraction from public lands, where “outdated laws and regulations governing energy and natural resource extraction on U.S. public lands provide few protections for the fiscal interests of U.S. taxpayers.”<sup>17</sup> When royalties charged to an industry fall below a certain level, a commission could adjust the rates to ensure appropriate returns for taxpayers.

The default-to-action model also provides broad discretion to act, which is necessary to ensure agencies can escape the legislative and regulatory morass that prevents them from dealing with new and challenging matters. Providing a means for congressional review of agency actions reduces concerns of excessive delegation while ensuring democratic input in the absence of full notice-and-comment rulemaking. But any such review must be designed to default to agency action, rather than inaction.

By specifying timetables for action and expediting the

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<sup>17</sup> GREG ZIMMERMAN ET AL., CTR. FOR AM. PROGRESS, FAIR SHARE SCORECARD: ENSURING TAXPAYERS RECEIVE A FAIR SHARE FOR AMERICA’S PUBLIC RESOURCES 1 (2015).

rulemaking process, the default-to-action model would speed up agency action. It would also make it harder for courts to overturn its actions, since Congress would have an opportunity to weigh in, and the criteria for judging the agency's compliance with the statute would be less open to interpretation. The question would focus less on whether the agency properly applied general authorities in specific instances and more on whether its actions met the specified target. Finally, there could be an impetus for Congress to work together, since the anti-regulatory forces that utilize congressional inaction to prevent regulation would now have strong impetus to seek consensus on alternative actions that were more palatable to them.

Other aspects of the default-to-action model could be tweaked as appropriate. While both the IPAB and the BRAC commissions were structured as independent agencies, the model could be adapted to executive agencies. IPAB and the BRAC commissions had a role for executive agencies; in the case of the IPAB, the HHS Secretary acted if it did not, and in the case of the BRAC commissions, they utilized DOD recommendations. Similarly, different levels of public input could be required prior to agency action to ensure stakeholders have a voice in the process. Neither the IPAB nor BRAC commissions were required to utilize notice-and-comment rulemaking before acting, but DOD did utilize the process in establishing its criteria for making base closure recommendations.



### Limitations to the IPAB Model

The most significant concern about exporting the default-to-action model is the tepid support that the IPAB received on the Hill—after all, it’s Congress that would have to enact legislation applying IPAB-like structures to other issues. While opposition to the IPAB came predominantly from Republican opponents of the Affordable Care Act, there were some congressional Democrats who expressed reservations as well.<sup>18</sup> In general, they expressed concerns that Congress was not taking responsibility for making important decisions and that future administrations would abuse this authority.

In the first instance, it is hard to separate concerns about the *structure* of the IPAB and the BRAC commissions from concerns related to the substantive issues that they were designed to address, which by their nature were ones for which Congress did not want to make the hard decisions necessary to achieve desired results. It’s unclear the extent of the opposition that would remain if the model were to be adopted more broadly in less controversial areas.

But with respect to concerns that the structure removes important decisions from Congress, the model would be deployed only in areas in which Congress has already failed to act. Where Congress has enacted robust new laws or updated regulatory structures to adapt to changing circumstances, there is little reason to introduce default-to-action structures. But where Congress has continually failed to update the law, it is difficult to argue that nothing should

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<sup>18</sup> Robert Pear, *Obama Panel to Curb Medicare Finds Foes in Both Parties*, N.Y. TIMES (Apr. 11, 2019).

be done to reset the dynamic towards action, rather than inaction.

As regards the second concern, the Trump administration has shown the dangers posed by excessive executive branch power. But the default-to-action structure contains safeguards that may limit the potential for abuse. There are specific triggers for action and specific standards to be met. The clarity of these triggers and standards help to limit the potential for abuse by restricting the executive branch to options that measurably address the regulatory problem. In addition, clarity in triggers and standards can provide opportunity for appropriate judicial review.

The current default to inaction ultimately favors those who oppose regulation, so even if the default-to-action model may be susceptible to potential abuse by anti-regulatory presidents, over the sweep of time it will lead to improved regulatory outcomes by ensuring that agencies are not handcuffed by outdated standards and inactive legislatures.

Another important issue is the types of regulatory issues for which the default-to-action model is most useful. The clear triggers and standards that the default-to-action model relies upon may be readily available in areas such as environmental protection and workplace safety. But they may be more challenging to deploy where the effects of a particular agency action are harder to isolate and quantify.

Given the relatively few instances in which default-to-action models have been utilized, further scholarship and experimentation are needed to determine where triggers and standards can be effectively applied, as well as whether other approaches to shaping the scope of agency action are

equally effective. The critical step is to begin discussing such models as part of the standard package considered by policymakers when designing regulatory systems. The need for a change is clear. The current system privileges inaction over action and doing so can undermine efforts by administrative agencies to provide important protections to the American people.

# Injecting Independence and Proportionality into Immigration Adjudication

Jill Family<sup>†1</sup>

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The problems with immigration adjudication have gone from bad to worse. Substantive immigration law continues to limit immigration adjudicators from dispensing proportional consequences. The independence of immigration adjudicators has been further diminished. Immigration judges are increasingly treated as another immigration prosecutor in the room.

In an immigration courtroom, the government is represented by a Department of Homeland Security attorney and the decisionmaker, the immigration judge, works for the Department of Justice. There is no statutory right to government-funded counsel for noncitizens. As employees of the Department of Justice with no special job protections, immigration judges face pressure to reach decisions that conform to the views of their boss, one of the nation's highest law enforcement officials, the attorney general, and

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<sup>1</sup> This piece is based on a previous posting on the Yale Journal on Regulation's Notice and Comment blog. Jill Family, *Even Worse, Again*, 36 YALE J. ON REG.: NOTICE & COMMENT (2019).

the views of his boss, the president.<sup>2</sup>

The Trump administration questions the need for due process and strongly prioritizes removal. President Trump has stated, “When somebody comes in, we must immediately, with no Judges [sic] or Court Cases [sic], bring them back from where they came.”<sup>3</sup> He also said, “Hiring many thousands [sic] of judges, and going through a long and complicated legal process, is not the way to go - will always be dysfunctional [sic]. People must simply be stopped at the Border [sic] and told they cannot come into the U.S. illegally.”<sup>4</sup> President Trump emphasized his position by stating that “we should get rid of judges.”<sup>5</sup> The Trump administration has expressed its preference for removal by expanding its priorities for removal enforcement, essentially making all undocumented noncitizens priorities for removal.<sup>6</sup>

The preferences of those at the top have manifested in policies that instruct immigration judges not to slow down to make sure justice is done. The Trump administration has implemented new case completion quotas for immigration

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<sup>2</sup> Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 389 (2006) (analyzing a lack of decisional independence resulting from “the threat of personal consequences for the adjudicator” in the form of “general threats, real or perceived, that decisions which displease an executive official could pose professional risks for the adjudicator”).

<sup>3</sup> Donald J. Trump (@realdonaldtrump), TWITTER (June 24, 2018, 10:02 AM), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

<sup>4</sup> Donald J. Trump (@realdonaldtrump), TWITTER (June 25, 2018, 7:43 AM), <https://twitter.com/realDonaldTrump/status/1011228265003077632>; see also Brett Samuels, *Trump Rejects Calls for More Immigration Judges: ‘We Have to Have a Real Border, Not Judges’*, HILL (June 19, 2018).

<sup>5</sup> Colby Itkowitz, *Trump: Congress Needs to ‘Get Rid of the Whole Asylum System’*, WASH. POST (Apr. 5, 2019).

<sup>6</sup> Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017). See also, Lazaro Zamora, *Comparing Trump and Obama’s Deportation Priorities*, BIPARTISAN POL’Y CTR. (Feb. 27, 2017); AM. BAR. ASS’N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM 1-26 (2019).

judges.<sup>7</sup> Under the new case completion quotas, an immigration judge has a personal incentive to favor removal if it allows her to meet her case completion goals and therefore protect or improve her conditions of employment, including pay and location of employment.

The administration also has curtailed administrative closure, which immigration judges previously used to suspend removal cases.<sup>8</sup> Administrative closure froze a removal case until it became clear whether the noncitizen respondent was entitled to a legal status, such as through marriage to a U.S. Citizen. Similarly, the administration has narrowed the use of continuances.<sup>9</sup> One immigration judge has filed a grievance against the Department of Justice alleging that it reassigned cases away from him because he continued a case to determine whether a noncitizen received proper notice of the proceeding.<sup>10</sup>

Despite its preference for faster decisions to remove, the case backlog in the immigration courts has grown substantially under the Trump administration. In 2016, the backlog was over 500,000 cases. The current backlog could top 1 million.<sup>11</sup> The backlog affects independence because it can place pressure on immigration judges to move more quickly and it leaves little time for immigration judges to study developments in the law or to research novel legal

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<sup>7</sup> Letter from Jill Family, Commonwealth Professor of Law and Government, et al., to Jeff Sessions, U.S. Att’y General (Aug. 14, 2018).

<sup>8</sup> *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018).

<sup>9</sup> *Matter of L-A-B-R- et al.*, 27 I. & N. Dec. 405 (A.G. 2018).

<sup>10</sup> Jeff Gammage, *Immigration Judges File Grievance Over Justice Dept’s Remove of Philly Jurist Who Delayed Man’s Deportation*, PHILA. INQUIRER (Aug. 8, 2018).

<sup>11</sup> *Immigration Court Backlog Surpasses One Million Cases*, TRAC IMMIGR. (Nov. 6, 2018). The recent government shutdown delayed 60,000 hearings. *Partial Shutdown Delayed 60,000 Immigration Court Hearings*, AP (Feb. 8, 2019).

theories advanced by counsel.<sup>12</sup>

A further concern is that the Trump administration has emphasized metering — controlling access to immigration adjudication — in old and new ways. It has continued to use diversions from the immigration courts that pre-date the administration,<sup>13</sup> but it has also developed new diversions. The Trump administration is metering access to the border for asylum seekers,<sup>14</sup> and now, even when individuals do get a turn to ask for protection from persecution, the administration intends to force those individuals to remain in Mexico while they wait for a hearing before an immigration judge.<sup>15</sup> Remaining in Mexico decreases access to U.S.-based attorneys, and a lack of security in Mexico may encourage individuals to give up viable claims.

The independence of immigration adjudicators has deteriorated and the lack of proportionality in the substantive law remains a major problem. There is no graduated system of consequences. The only possibilities for proportionality come from relief from the ubiquitous punishment of removal. The statutory prerequisites to relief from removal present steep hurdles, however. For example, to be eligible for cancellation of removal, an individual must show that their removal will cause “exceptional and extremely unusual hardship” to a qualifying U.S. citizen or green card-holding close relative.<sup>16</sup> Exceptional and extremely unusual hardship is hardship that is substantially

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<sup>12</sup> AM. BAR. ASS’N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM 2-26 (2019).

<sup>13</sup> Jill Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIG. L. J. 595 (2009).

<sup>14</sup> See ELLIE EZZELL ET AL., ROBERT STRAUSS CTR., ASYLUM PROCESSING AND WAITLISTS AT THE U.S.-MEXICO BORDER (2018).

<sup>15</sup> Memorandum from Kirstjen M. Nielsen to L. Francis Cissna, et al. (Jan. 25, 2019).

<sup>16</sup> 8 U.S.C. § 1229b(b)(1)(D).

beyond what is expected when a family is separated because of immigration law.<sup>17</sup> In other words, the separation of a parent from a U.S. citizen is meaningless.

Immigration law needs a graduated system of consequences. Not every noncitizen deserves removal as a consequence for his or her actions.<sup>18</sup> Depending on the nature of the immigration violation and consideration of other interests, Congress could legislate different punishments instead of removal, such as fines or delaying eligibility for other immigration benefits.<sup>19</sup>

Immigration adjudication needs to break out of a cycle of decline. Congress should demand decisional independence by moving immigration judges out of the Department of Justice and into an Article I court subject to judicial review. Prominent organizations have endorsed the creation of an Article I court.<sup>20</sup> Such a move would increase legitimacy by removing immigration adjudication from the executive branch and letting it run itself, with fair, accurate and efficient adjudication as its goals. An Article I court would be focused on adjudication only; its adjudicators would not feel as much pressure to rubber-stamp the preferences of immigration law prosecutors because their continued employment would not be at risk should they reach a conclusion contrary to the administration's wishes. Injecting proportionality into immigration law is also a key reform. Increasing the independence of immigration adjudicators

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<sup>17</sup> *Matter of Monreal*, 23 I & N Dec. 56 (BIA 2001).

<sup>18</sup> Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1728-40 (2009).

<sup>19</sup> *Id.* at 1739-40.

<sup>20</sup> AM. BAR. ASS'N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM 6-3 (2019); Christine Lockhart Poarch, *The FBA's Proposal to Create a Federal Immigration Court*, FED. LAW. (Apr. 2014); AM. IMMIGRATION LAWYERS ASS'N, RESOLUTION ON IMMIGRATION COURT REFORM (2018).



will have the greatest effect if the substantive law they apply is less harsh and allows adjudicators to exercise their independent judgment.

# Want More Public Participation in Rulemaking? Fix the Paperwork Reduction Act

Rajesh Nayak<sup>†</sup>

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Progressives should embrace public participation in rulemaking, going beyond the notice-and-comment process required by the Administrative Procedure Act (APA) for legislative rules in many cases.<sup>1</sup> One way to facilitate public participation would be to *eliminate* obstacles to seeking public feedback. We should start by amending the Paperwork Reduction Act (PRA)<sup>2</sup> to allow agencies to seek certain voluntary feedback from the public without triggering that law's requirements.

## Public Participation Is Important for Progressive Reforms

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<sup>1</sup> See 5 U.S.C. § 553(c). Agencies regularly use notice-and-comment to issue certain interpretive rules and other guidance documents that do not strictly require this process. See *Perez v Mortgage Bankers Association*, No. 13-1041, slip op. 1, 3 (U.S. Mar. 9, 2015) (citing 5 U.S.C. § 553(b)(A)). The Obama administration used notice-and-comment to issue certain high-profile interpretive rules or guidance documents, for example, involving state-sponsored automatic retirement savings programs, 81 Fed. Reg. 59,464 (Aug. 30, 2016), and enumerating key definitions from an executive order prohibiting persistent labor and employment law violators from receiving federal contracts, 81 Fed. Reg. 58,653 (Aug. 25, 2016).

<sup>2</sup> 44 U.S.C. §§ 3501-3559; see 5 C.F.R. §§ 1320.1-1320.18.

Agencies in progressive administrations already have strong incentives to engage the public in high-profile rulemaking, even beyond the APA's baseline requirement. Public engagement is an important tool to build the public case for progressive rulemaking efforts when they are challenged — in the media, in Congress, and even in the courts. In the Obama administration, for example, the U.S. Department of Labor (DOL) ultimately embraced public engagement as a key strategy for bolstering rules sure to trigger opposition from industry groups or sometimes even other government agencies.

For its overtime,<sup>3</sup> silica,<sup>4</sup> and fiduciary<sup>5</sup> rules, for example, in addition to gathering hundreds of thousands of public comments, DOL held dozens of listening sessions with diverse stakeholders and sometimes even convened public hearings for the latter two. Public feedback both shaped final rules and served as a roadmap for prioritizing resource-intensive compliance assistance to facilitate implementation.<sup>6</sup> Generally speaking, stakeholders appreciated these additional opportunities for involvement and input.

### **The Paperwork Reduction Act is a Key Obstacle to Public Engagement**

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<sup>3</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391 (May 23, 2016).

<sup>4</sup> Occupational Exposure to Respirable Crystalline Silica, 81 Fed. Reg. 16,285 (Mar. 25, 2016).

<sup>5</sup> Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016).

<sup>6</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391, 32,436 (May 23, 2016). While the final rule was enjoined by a federal judge in Texas (in a ruling that even the Trump Justice Department appealed), businesses around the country were on track to come into timely compliance, and many did so regardless of the court's decision. *See* Letter from Nat'l Emp't Law Project, to Melissa Smith, Director, Div. of Regulations, Legislation, and Interpretations (Sep. 25, 2017).

In order to facilitate public engagement, we should focus on eliminating a key obstacle: the Paperwork Reduction Act's arduous requirements for seeking even voluntary public information. This reform could facilitate public participation in rulemaking and other government policymaking activities.

The PRA was enacted in 1980 to "minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government."<sup>7</sup> The law defines "collection of information" broadly (in relevant part) as "obtaining, causing to be obtained, soliciting, requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format," calling for "answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States..."<sup>8</sup> Federal regulations explain that the PRA applies regardless of whether collections of information are mandatory or voluntary.<sup>9</sup>

In effect, if an agency is asking ten or more individuals or entities substantially similar questions, and thereby creating a "collection of information," it must first seek PRA approval from the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget

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<sup>7</sup> 44 U.S.C. § 3501(1) (emphasis added).

<sup>8</sup> 44 U.S.C. § 3502(3).

<sup>9</sup> 5 C.F.R. § 1320.3(c).

## Rethinking Admin Law: From APA to Z

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(OMB). OIRA summarizes the general PRA clearance process graphically with this chart:<sup>10</sup>



The agency must generally develop its information collection instrument, estimate the burden-hours that it will take for the public to answer that collection, and seek public comments on both the instrument itself and the burden estimate.<sup>11</sup> The agency must also seek public comments on whether the agency is collecting “necessary” information, whether it has practical utility, how to enhance the questions, and how to minimize the burden.<sup>12</sup> After 60 days of public comment, the agency then re-publishes the PRA package for another 30 days of public comment as it submits the document to OMB for review.<sup>13</sup> Federal agencies estimate that the whole PRA process generally takes 6-9 months.<sup>14</sup>

### Efforts to Streamline the PRA Process

The PRA process is, in other words, both thorough and time-consuming for agencies — and is so by design. It deters agencies from compelling stakeholders to submit overly burdensome information in many cases. But even

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<sup>10</sup> Memorandum from Cass R. Sunstein to the Heads of Executive Dep’ts and Agencies and Indep. Regulatory Agencies (Apr. 7, 2010).

<sup>11</sup> 35 U.S.C. § 3506(c)(1)(b).

<sup>12</sup> 35 U.S.C. § 3606(c)(2).

<sup>13</sup> 35 U.S.C. § 3507.

<sup>14</sup> See, e.g., *Traditional Clearance Process for Information Collection*, USABILITY.GOV (last visited Apr. 1, 2019).

OIRA — the agency charged with administering the PRA — strategically deployed guidance in the Obama administration in recognition of the need to streamline the process in certain circumstances, for example:

- OIRA issued its “social media” guidance in 2010, clarifying that many agency social media postings are the equivalent of “general solicitations” that are exempt from the PRA.<sup>15</sup> “[P]ublic meetings” or “like items” could also be excluded from the PRA. Agencies can and do widely publish general solicitations in social media (or their own websites) in reliance on this guidance.
- OIRA created a “generic clearance” process in 2010 to streamline voluntary, low-burden, and uncontroversial clearances including “methodological testing, customer satisfaction surveys, focus groups, and website satisfaction surveys.”<sup>16</sup>
- OIRA established in 2011 a “fast-track” process for seeking customer service feedback in narrow circumstances for “voluntary and non-controversial” responses with a low burden and no intent for public dissemination of the results.<sup>17</sup>

OIRA published a compendium of these processes and

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<sup>15</sup> *Id.*

<sup>16</sup> Memorandum from Cass R. Sunstein to the Heads of Executive Dep’ts and Agencies and Indep. Regulatory Agencies (May 28, 2010).

<sup>17</sup> Memorandum from Cass R. Sunstein and Jeffrey D. Zients to the Heads of Executive Dep’ts and Agencies and Indep. Regulatory Agencies (June 15, 2011).

other statutory flexibilities in 2016 as well.<sup>18</sup>

These policy clarifications have undoubtedly made it easier for agencies to seek public feedback in certain circumstances, but none provides agencies with straightforward authority to launch a relatively structured survey, with specific questions, to more than 10 individuals or entities without going through an approval process that takes months. That means that an agency cannot expeditiously survey a variety of small businesses to understand how a regulatory threshold would affect their bottom lines. Likewise, they can't follow up on specific questions raised in rulemaking with more than a handful of stakeholders — even those who have previously commented and who would gladly volunteer additional answers to shape a rule or other policy decision — without OMB approval. Agencies may even shy away from asking overly specific questions in listening sessions with key stakeholders for fear of violating the PRA.<sup>19</sup> In other words, a law that was meant to *limit* burdens on the public instead has the effect of limiting their *input* into the policymaking process — input that many stakeholders desperately desire.

### **The Solution: A Narrow Exemption for Voluntary Engagement**

We should enhance public participation in agency

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<sup>18</sup> Memorandum from Howard Shelanski to the Heads of Executive Dep'ts and Agencies and Indep. Regulatory Agencies (July 22, 2016).

<sup>19</sup> Agencies regularly structure listening sessions that involve multiple stakeholders around general, open-ended questions seeking feedback in order to avoid triggering PRA requirements. Listening sessions could be far more useful on both sides if they were untethered from these requirements.

policymaking — and make better policy — simply by amending the PRA to establish a narrow, carefully crafted exemption for voluntary public engagement. Agencies should be authorized to seek feedback from the public in any forum or form (including more structured questionnaires) if the agencies meet certain requirements:

- Most importantly, this exemption should only apply to *voluntary* responses, and the exemption should employ clear, uniform language that agencies must include to notify the public that their responses are indeed voluntary (a type of “Miranda warning” for seeking voluntary responses). Fear of retaliation is a real concern, and the PRA’s existing prohibition on penalties for failure to comply with a collection of information should be extended to apply to failures to comply with information sought under this exemption as well.<sup>20</sup> Of course, stakeholders who decline to participate also lose their opportunity to shape the policymaking process, but they nonetheless retain any rights they would otherwise have to challenge agency action or inaction under the Administrative Procedure Act.<sup>21</sup>
- Likewise, any input received should be treated just as any other agency communications would be under other applicable laws, including the Freedom of Information Act’s<sup>22</sup> public disclosure requirements and any APA requirements to place ex

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<sup>20</sup> See 44 U.S.C. § 3512; 5 C.F.R. § 1320.6(a).

<sup>21</sup> See 5 U.S.C. § 704.

<sup>22</sup> 5 U.S.C. § 552.



parte contacts into the administrative record.<sup>23</sup> This will protect against unintended consequences, such as agencies seeking to use this exemption to avoid other laws.

- The exemption could be limited to policymaking activities rather than be open-ended exemption for any “voluntary” engagement, e.g., routine statistical surveys (which are incredibly important, but which can often be designed with more lead time for review).<sup>24</sup> The exemption may be further limited to inform notice-and-comment rulemaking (or potential rulemaking), rather than more general policymaking, if needed, though that would curtail valuable engagement on the range of agency guidance and interpretation matters that could be better shaped by stakeholder input.

As outlined above, many of the specifics of any such exemption are worthy of further discussion, but even a narrow exemption for agency policymaking efforts would be an improvement. Agencies would be freed to seek the specific public input that they need to shape important rules with streamlined procedures — a win-win for public participation and progressive reforms alike.

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<sup>23</sup> Cf. “*Ex Parte*” *Communications in Informal Rulemaking*, ADMIN. CONF. U.S. (June 10, 2014).

<sup>24</sup> The PRA can make it difficult for agencies to pre-test their survey instruments for major statistical studies, though. A voluntary exemption wide enough to allow for at least this pre-testing would be welcome.

# Protecting Agency Science from Political Interference

Thomas McGarity<sup>†1</sup>

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One of the most powerful justifications for creating regulatory agencies is the need to bring expertise to bear on complex social problems. Agencies like the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the various natural resource agencies in the Department of Interior hire staff with expertise in the issues with which they deal on a daily basis. At the same time, many of the issues that health, safety, and environmental agencies address involve questions that are not fully resolvable by science, either because insufficient scientific data are available to draw firm scientific conclusions or because an important aspect of the question requires policy input.

A classic example of an issue that has both scientific and policy components is the level at which EPA must set a primary national ambient air quality standard (NAAQS). EPA must set the standard at the level that is “requisite” to protect public health with an adequate margin of safety. The width of a margin of safety is a policy question the

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<sup>1</sup> This paper is based on a larger article published in the *Duke Law Journal*. Thomas O. McGarity & Wendy E. Wagner, *Deregulation Using Stealth “Science” Strategies*, 68 *DUKE L. J.* (forthcoming 2019).

resolution of which depends on how precautionary the agency policymakers want the standard to be. The level of exposure that protects public health is largely a scientific question that involves analysis of dozens of clinical and epidemiological studies and the application of various risk assessment models to the existing scientific data. But it also involves judgments about how much weight to give to particular studies and which models to employ — decisions that depend on policy issues like whether the agency should err on the side of safety. These decisions should be driven by the policies underlying the statutes that empower the agencies to act, most of which are precautionary in nature.

Agencies often receive considerable pressure from regulated entities and their allies in think tanks and Congress to reach outcomes that are inconsistent with the precautionary policies underlying their statutes or with public opinion favoring a precautionary approach to administering the statutes. In such situations, the politically appointed policymakers at the top of the agency hierarchy have a tendency to engage in a “science charade” that involves a manipulation of the science to support predetermined deregulatory outcomes. Rather than remain accountable for the deregulatory policy direction they are pursuing, they claim that the deregulatory outcome was compelled by the science.

This strategy of stealth deregulation through science, however, requires the assistance of the nonpolitical experts on the agency’s staff who are responsible for assembling the scientific record supporting the agency’s action. Committed to professional norms of scientific integrity, the staff may push back against demands from upper level

decision-makers that they bend the science in a direction that supports their deregulatory policy agenda. There are, however, three broad strategies available to upper level policymakers, including those in the Office of Management and Budget and the White House, for overcoming staff resistance or bypassing the staff altogether.

## **Methods of Political Interference**

First, politically appointed policymakers can attempt to manipulate science directly by exercising their power to direct or ignore staff scientists. They can accomplish this by preventing the staff from disseminating scientific information that is in the agency's possession. For example, they can deny agency scientists permission to publish their work in scientific publications or to present it at meetings or congressional hearings. They can also achieve predetermined results by diluting, limiting, or ignoring input from the agency's scientific and technical staff. In addition, they can manipulate model inputs, assumptions, outputs, and interpretations in ways that withstand public and even scientific scrutiny, but are in fact nothing more than ends-oriented decision-making.

One subtle way that upper-level policymakers can achieve deregulatory ends is to forestall government action by highlighting scientific uncertainties in the underlying scientific data and putting off decisions until more research can be undertaken to reduce those uncertainties. In the context of precautionary statutes, this has the practical effect of raising the burden of proof with respect to facts that must be grounded in the rulemaking record. Upper-

level policymakers can doctor agency reports to make them appear less supportive of regulatory action. For example, during the Trump administration, politically appointed officials in the National Park Service deleted every reference to anthropogenic greenhouse gas emissions as a cause of climate change from a draft report on the risks that rising sea levels posed to national parks.

Perhaps the most pervasive strategy for direct deregulation through science is for upper-level political appointees to quietly substitute deregulatory policy for science as they interact with staff scientists during the decision-making process. Political appointees in the White House can also substitute policy for science in nontransparent ways when agencies send drafts of regulations to the Office of Management and Budget for review.

Second, politically appointed agency policymakers can delay or affect the outcomes of regulatory initiatives by adjusting internal agency procedures to make it more difficult for the staff to generate and use the science underlying those initiatives. They can accomplish this by forcing the staff through multiple time- and resource-consuming analytical exercises that are of marginal relevance to the agency's statutory responsibilities, cutting the budgets and reducing the staff of the offices responsible for providing scientific and engineering input into regulatory initiatives, and changing organizational charts to render staff scientists and engineers subject to supervision by political appointees. Presidents and agency heads can also reduce the role that science plays in agency decisions by reducing the resources available to agency scientists, making it more difficult for

the staff to promulgate regulations, and arranging decision-making procedures to ensure that the work product of agency scientists is subject to review and modification by politically appointed officials.

A third tactic, which is gaining considerable momentum under the Trump administration, is to alter the procedural rules within the agency for conducting the technical analysis and peer review of scientific information. Existing rules for more open-ended, scientifically-grounded practices can be altered in ways that lead to more politically-desirable outcomes by stacking scientific advisory committees or altering the role of expert peer review panels or, even more invasive, dictating how agency staffers are allowed to consider and use evidence in their technical analyses.

### **Strategies for Pushing Back Against Political Interference**

Several tools are available under existing law to expose and counteract attempts by politically appointed policymakers to manipulate science toward deregulatory ends. Reviewing courts could provide a direct check on the politicization of science in regulatory decision-making, but they are very reluctant to get involved in the internal dynamics of agency decision-making. Congressional hearings could shine a light on manipulation, but deep congressional investigations are rare when the president and both houses of Congress are under the control of a single party. We can hope for more diligent oversight in the 116th Congress with a Democrat-controlled House of Representatives. During the Obama administration, several

agencies implemented scientific integrity policies aimed at protecting against political manipulation of science by encouraging agency scientists to report instances of abuse. Those policies are still in place, but they are unevenly enforced throughout the executive branch. The scientific community and the media can also play a role in exposing and shaming attempts by upper-level policymakers to bend science toward illegitimate ends. But scientists are usually preoccupied with their own work, and media forays into internal agency decision-making are episodic at best.

### 1. Start Early

The essence of the problem is, in the words of Professor Holly Doremus, “the absence of barriers between political appointees who view their mission as the single-minded advancement of the president’s policy agenda and career employees charged with providing scientific advice or analysis.”<sup>2</sup> Nearly all of the above-described stealth science strategies involve political manipulations during the early stage of agency analysis, when the staff synthesizes the existing scientific literature that bears on the issues that arise in a rulemaking and selects and applies the models that the agency uses to assess risks. In these scientific manipulations, staffers are censored, edited, constrained, or depleted, or their work is reviewed by potentially biased experts. The object is to shape the scientific record supporting the regulatory action so that the “facts” are consistent with

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<sup>2</sup> Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601, 1640 (2008).

de-regulatory policies in ways that do not encounter legal impediments or serious public opposition.

The solution must take the form of stronger barriers between the technical analysts and political appointees at this early step when the scientific and technical analysis is being conducted. Virtually every regulatory decision of any consequence in an agency involved in health, safety, or environmental regulation begins with a literature search and synthesis of the available information that speaks to issues relevant to the decision. This step — whether separated explicitly in the agency decision process or not — involves characterizing the existing scientific literature and highlighting any remaining gaps, uncertainties and open questions relevant to the issues raised by the regulation. This is not a novel suggestion. Many scientific reports and academic studies advocate the creation of a “firewall” between an agency’s scientific staff and its politically appointed leadership during the time that the staff is building the scientific record supporting an agency action.

## **2. Build a Firewall and Create Science Integrity Offices**

Institutional boundaries around agency experts to preserve the integrity of their initial scientific assessment is necessary. In any covered agency action, the professional staff’s literature search and analysis of the existing scientific literature would be published as a separate report before the agency’s policy analysis begins. The work of the agency staff in producing this report would also be firewalled from all political communications. Both features of this reform should be



legislated and codified in enforceable rules that create severe sanctions for meddling with this stage of the agency analysis.

*Framing the Charge.* The “charge” or factual questions the technical staff needs to research would be driven by the agency’s statute or the subject matter of the regulation being promulgated. The agency could hold a scoping meeting to assist in crafting the charge for the technical assessment. The technical staff’s input at this stage would be placed on the record.

*Publishing the Staff’s Technical Report.* After receiving the agency’s charge, the career scientific staff would be solely responsible for conducting a comprehensive literature search and analysis of the information relevant to the questions. The career staff’s initial report would synthesize the literature as it pertained to the questions at hand, highlighting not only the points of convergence but the remaining open questions, uncertainties, and variability. This analysis could also include developing computational models that provide different scenarios and identify underlying assumptions. This work would be insulated from any ex parte contact from policy officials and political appointees. Written documentation of any communications between technical staff and others within or outside the agency would be placed in the record. The staff’s final analysis would be published as a publicly available report. To increase accountability and to motivate staff experts, authorship and attribution should be afforded all analysts for individual contributions in the report. Dissenters could provide their assessments in writing for the record.

*Peer Review of the Technical Report.* The staff’s report would then be peer reviewed by top experts with as few

ties as possible to the overarching policy outcomes. For particularly significant questions, the report could be reviewed by an advisory board. For smaller projects, the agency could solicit individual reviewers to provide reviews.

*Enforcement.* Government officials who violated the terms of the firewall would be subject to severe sanctions ranging from public admonishment to termination of employment or even civil fines. Congress or the agencies might also task science-integrity offices with actively monitoring interactions between politically appointed officials (including White House officials) and scientific and technical staff to ensure staff independence at this initial technical stage. Because staff self-reporting of inappropriate political interventions is likely to remain an important ingredient to meaningful reform, agencies should vigorously maintain whistleblower protections. Finally, agency scientific assessment programs should be audited periodically by some independent observer like the National Academies of Sciences. In addition to identifying problems, these independent assessments should help improve how the agencies design and implement firewalls.

*The Management Firewall.* The entire operation of the scientific and technical staff and the agency's scientific integrity office should be located inside the firewall to protect them from political interference. The management of these technical personnel — their budget, their assignments, and their hiring and firing — should also be protected by the firewall. Career managers would do the hiring and firing, make the assignments, and propose annual budgets that could be considered, alongside the administration's proposal, by Congress. These managers would not report to

personnel within the agency, but instead to an independent unit, perhaps even a new agency in the Congressional Research Service or General Accounting Office that retains independence from the executive branch. This outside, independent agency would also manage the hiring of these key career managers. Managers would be protected from disciplinary action except through the office that hired them.

The notion of a firewall around an initial technical assessment may seem radical and even fanciful. There is, however, considerable precedent for the concept. In one of EPA's most successful programs, the NAAQS standard-setting process, EPA has broken the scientific analysis of the relevant scientific research into four separate reports that fit neatly within this suggested process. Each of these reports provides a different, focused analysis of the existing literature and is prepared by EPA's technical staff. And each of the reports are both publicly reviewed and peer reviewed, and published independently. The scientific staff is also firewalled from political and policy interference; no *ex parte* contact is allowed from political officials while the staff conducts the literature search and analysis (although there can be meetings on the record).

Politicians playing with scientific information can be dangerous. More rigid rules are in order for how regulatory agencies employ science in their decision-making processes. This includes a legally enforceable institutional design that bars some of the basic work of scientific and technical staff from influence by politically appointed officials. Until there are external controls on the manipulation of science by the executive branch, we can expect the problems identified above to steadily worsen.

# The Procedure Fetish

Nicholas Bagley<sup>†1</sup>

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Here's a puzzle. Knowing full well that onerous procedural rules will hamstring federal agencies, Republican policymakers have pushed "regulatory reform" bills like the Regulatory Accountability Act,<sup>2</sup> the REINS Act,<sup>3</sup> and the Separation of Powers Restoration Act.<sup>4</sup> By tilting the scales against agency action, Republicans hope to end "job-killing regulations" and invigorate the free market. It's a libertarian's dream.

Democrats get it. They understand that the tangle of new procedural rules, if adopted, would bind the administrative state as effectively as Lilliputian ropes bound Gulliver. And they've generally (though not universally) opposed what they view as brazen anti-statist measures, which would frustrate their efforts to forestall environmental degradation, protect consumers, and empower workers.

So here's the puzzle. If adding new administrative procedures will so obviously advance a libertarian agenda, might not relaxing existing administrative constraints advance liberal ones? What if Gulliver is already bound?

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<sup>1</sup> This article is based on a larger article published in the Michigan Law Review. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. (forthcoming 2019).

<sup>2</sup> Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017).

<sup>3</sup> Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. (2017).

<sup>4</sup> Separation of Powers Restoration Act of 2017, H.R. 76, 115th Cong. (2017).

Yet there is no energy on the left behind the idea that relaxing administrative constraints will advance progressive goals. In today's political landscape, "regulatory reform" is strictly the province of Republican policymakers, so much so that the anodyne phrase has acquired an anti-regulatory connotation. Republicans have a reform agenda. Democrats don't.

It's not for want of targets. In prior work, for example, I've argued that the Office of Information and Regulatory Affairs imposes a drag on regulation without adequate justification;<sup>5</sup> that the presumption of reviewability,<sup>6</sup> and particularly the presumption in favor of pre-enforcement review, should be abandoned; and that the reflexive invalidation of defective agency action is wasteful and unnecessary.<sup>7</sup> The list goes on. The judicially imposed rigors of notice-and-comment rulemaking, the practice of invalidating guidance documents that are "really" legislative rules, the Information Quality Act, the logical outgrowth doctrine, nationwide injunctions against invalid rules — all could, and perhaps should, be reconsidered.

Why aren't progressives clamoring to loosen administrative law's constraints? The answer, I think, can be traced (at least in part) to two stories that have become deeply embedded in our legal culture. Fidelity to procedures, one story runs, is essential to sustain the fragile legitimacy of a powerful and constitutionally suspect administrative state. On the other story, procedures

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<sup>5</sup> See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006).

<sup>6</sup> See Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014).

<sup>7</sup> See Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253 (2017).

assure public accountability by shaping the decisions of an executive branch that might otherwise be beholden to factional interests. Taken together, these stories suggest we should be thankful for the procedures we have and nervous about their elimination.

But this legitimacy-and-capture narrative is overdrawn — indeed, it is largely a myth. Proceduralism has a role to play in preserving legitimacy and discouraging capture, but it advances those goals more obliquely than is commonly assumed and may exacerbate the very problems it aims to address. In building this argument, I aim to call into question the administrative lawyer’s instinctive faith in procedures, to reorient discussion to the tradeoffs at the heart of any system designed to structure government action, and to soften resistance to a reform agenda that would undo procedural rules that do more harm than good.

In this, I hope to bring the practice of administrative law into conversation with a line of revisionist academic work that questions the left’s embrace of court-centric legalism. That work, among other things, recovers how Progressive and New Deal state-builders consciously embraced a results-oriented, non-legalistic approach to administrative power. They understood — more clearly than we do now — that strict procedural rules and vigorous judicial oversight could be mobilized to frustrate their efforts to curb market exploitation, to protect workers, and to press for a fairer distribution of resources.

The left’s anti-proceduralist orientation shifted in the wake of *Brown v. Board of Education*, when the fight for civil rights moved into a legalistic register — a shift that, in the revisionist telling, both narrowed the scope of the civil rights

movement's ambitions and hampered its efforts to address yawning racial inequalities. Inspired by the civil rights example, however, progressive reformers in the 1960s and 1970s embraced antagonistic legalism in an effort to spur the vigorous enforcement of new environmental and consumer protection laws. That legalism, which opponents of state action avidly supported, is our inheritance from that era.

On net and over time, however, the legalistic approach to governance may exacerbate the wealth and power imbalances that liberals wish to root out. I recognize that now may not be the most auspicious time to press the point, when liberals have seized on administrative law as a means to resist the Trump administration. But President Trump is temporary; administrative law is not. And an administrative law oriented around fears of a pathological presidency may itself be pathological — a cure worse than the disease.

In the meantime, the endless hand-wringing over agency legitimacy and accountability breeds contempt for governance. Instead of the instruments of public aspirations, agencies become the bastard stepchildren of a damaged constitutional system, rife with corruption and inside dealing. That dyspeptic vision aligns neatly with suspicion of the state; it is, however, difficult to harmonize with a progressive belief in the promise of government to achieve collective goals.

We should revive a strain of thinking that connects the legitimacy of the administrative state to its ability to satisfy public aspirations: to enable a fairer distribution of wealth and political power; to protect us from the predations of private corporations; and to minimize risks to our health, financial security, and livelihoods. A decade after a financial

crisis roiled the financial markets, in a century where climate change threatens environmental catastrophe, and in an era of growing income and wealth inequality, the wisdom of allowing procedural rules to hobble federal agencies is very much open to question.

Administrative law may be about good governance, but it is also about power: about the power to maintain the existing state of affairs, and the power to change it. It's well past time for more skepticism about procedure.



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