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# STRUCTURAL DEREGULATION

*Jody Freeman & Sharon Jacobs*

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## STRUCTURAL DEREGULATION

*Jody Freeman\* & Sharon Jacobs\*\**

*Modern critics of the administrative state portray agencies as omnipotent behemoths, invested with vast delegated powers and largely unaccountable to the political branches of government. This picture, we argue, understates agency vulnerability to an increasingly powerful presidency. One source of presidential control over agencies in particular has been overlooked: the systematic undermining of an agency's ability to execute its statutory mandate. This strategy, which we call "structural deregulation," is a dangerous and underappreciated aspect of what then-Professor, now-Justice Elena Kagan termed "presidential administration."*

*Structural deregulation attacks the core capacities of the bureaucracy. The phenomenon encompasses such practices as leaving agencies understaffed and without permanent leadership; marginalizing agency expertise; reallocating agency resources; occupying an agency with busywork; and damaging an agency's reputation. Structural deregulation differs from traditional "substantive" deregulation, which targets the repeal of particular agency rules or policies. While substantive deregulation may have serious consequences, it is relatively transparent, limited in scope, and subject to legal challenge. By contrast, structural deregulation is stealthier. It is death by a thousand cuts.*

*We argue that structural deregulation is in tension with constitutional, administrative, and democratic norms. Nevertheless, public law is remarkably ill-equipped to address it. Constitutional and administrative law both have blind spots when it comes to presidential management of the bureaucracy, especially when the President's mission is incapacitation. Specific statutes meant to protect the civil service or inoculate agency budgets from presidential control do not help much either — they are vulnerable to workarounds. These blind spots and workarounds have allowed structural deregulation to flourish as a method of presidential control, with serious consequences for the future of the administrative state. We therefore propose legislative and regulatory reforms that could help to control the risks of structural deregulation.*

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## INTRODUCTION

Critics of the modern administrative state characterize the federal bureaucracy as an imperious and unaccountable behemoth that threatens core principles of democratic governance.<sup>1</sup> This portrayal misses the extent to which agencies are vulnerable to an increasingly powerful President capable of undermining them in unappreciated ways. This undermining, what we call “structural deregulation,” targets an agency’s core capacities. Structural deregulation erodes an agency’s staffing, leadership, resource base, expertise, and reputation — key determinants of the agency’s capacity to accomplish its statutory tasks.

Structural deregulation has serious long-term consequences for the administrative state, and a President committed to it can do lasting damage. The Supreme Court has enabled structural deregulation by simultaneously countenancing a strong presidency while expressing skepticism about the legitimacy of administrative power.<sup>2</sup> This combination

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<sup>1</sup> See, e.g., *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 91 (2015) (Thomas, J., concurring in the judgment) (“We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus . . .”); *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (“The Framers could hardly have envisioned today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now hold over our economic, social, and political activities.” (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010))); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (observing that executive bureaucracies “swallow huge amounts of core judicial and legislative power and concentrate federal power” and thus that “[m]aybe the time has come to face the behemoth”); PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* 4 (2017) (“Administrative power is . . . all about the evasion of governance through law, including an evasion of constitutional processes and procedural rights.”); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 19 (1995) (describing delegation to agencies as the phenomenon by which Congress “broadens the federal government’s regulatory jurisdiction over our lives, even while it reduces government’s capacity . . . to protect us from the harms about which we care the most”); Charles J. Cooper, *Confronting the Administrative State*, *NAT’L AFFS.*, Fall 2015, at 96, 97 (“It is fitting that we refer to the administrative state as a ‘state,’ for it has become a sovereign power unto itself, an *imperium in imperio* regulating virtually every dimension of our lives.”).

<sup>2</sup> See, e.g., *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2211 (2020) (holding that the President must have plenary authority to remove the single head of an executive agency because such removal is a key component of “the executive Power” delegated to the President in Article II); *id.* at 2218–19 (Thomas, J., concurring in part and dissenting in part) (opining that independent agencies are unconstitutional because their heads are shielded from presidential removal); *Lucia v. SEC*, 138 S. Ct. 2044, 2051–54 (2018) (concluding that administrative law judges at the Securities and Exchange Commission (SEC) were “Officers” and therefore that their appointment by SEC staff members was unconstitutional and that they could be appointed only by the President, heads of department, or the courts). On statements from members of the Court that suggest skepticism about the administrative enterprise, see cases cited *supra* note 1.

of enthusiasm for presidential authority and animus toward the administrative state<sup>3</sup> helps to create the ideal conditions for structural deregulation to take root.

Structural deregulation is distinct from what we call “substantive” deregulation, which aims to weaken or rescind particular agency rules or policies but falls short of a wholesale attack on agency capacity. Substantive deregulation might include regulatory rollbacks that weaken health, safety, financial, or labor standards;<sup>4</sup> shifts in an agency’s enforcement priorities;<sup>5</sup> or legal interpretations that shrink an agency’s authority or jurisdiction.<sup>6</sup> These decisions typically must comply with legal procedures requiring transparency and afford opportunities for judicial review, and are thus relatively straightforward for an incoming administration to reverse. By contrast, structural deregulation tears at an agency’s foundation and does so largely out of view and beyond legal redress, causing potentially enduring harm.<sup>7</sup>

The Trump Administration presents perhaps the most extreme example of structural deregulation in recent history,<sup>8</sup> but it is not the only one. Other Presidents, including both Richard Nixon and Ronald Reagan, also sought to weaken agencies by undermining their capacity

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<sup>3</sup> Professor Gillian Metzger has observed that this combination of opposition to bureaucracy and enthusiasm for presidential power is a hallmark of “contemporary anti-administrativism.” Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3–7 (2017).

<sup>4</sup> See, e.g., *Tracking Deregulation in the Trump Era*, BROOKINGS INST. (Jan. 19, 2021), <https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era> [<https://perma.cc/H3Q2-48SF>] (collecting delayed, repealed, and new rules across environmental, health, labor, and other categories).

<sup>5</sup> Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 796 (2010).

<sup>6</sup> For a treatment of this last approach, see generally William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509 (2019). Typically, instances of substantive deregulation take the form of notice-and-comment rulemaking, but sometimes they occur via interpretive rules, guidance, or other policy vehicles.

<sup>7</sup> While an *extreme* campaign of substantive deregulation may converge with structural deregulation at some point, we treat them as conceptually distinct. Structural deregulation is not about any one, or even a handful, of particular regulatory policies. And it does not include standard policy differences, or enforcement priorities, which are expected to swing somewhat from administration to administration. It is concerned rather with steps Presidents can take to incapacitate institutions and prevent them from fulfilling their statutory mandates.

<sup>8</sup> The Trump Administration aggressively pursued both substantive and structural deregulation. It sought to repeal or weaken regulations related to environmental protection, civil rights, education, health care, and immigration, among other areas. While not the first administration to employ such tactics, the Trump Administration used them more aggressively, comprehensively, and in a more coordinated fashion than its predecessors. See sources cited *infra* notes 29–33 and accompanying text. These instruments are likely to remain appealing to deregulatory Presidents. The history of regulation shows that new tools, once exercised, tend to remain in the deregulatory arsenal. See, e.g., Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 64–65 (2019).

to do their work, through strategies ranging from impoundment to intentional understaffing.<sup>9</sup> And while Republican Presidents historically have been more likely to engage in structural deregulation, that pattern may not always hold true. The same tools we identify can be used by a President of any party, who for whatever reasons wishes to destroy the institutional capacity of particular agencies or of the administrative state as a whole.

In Part I, we offer a typology of structural deregulation, with examples organized into several broad categories. The examples show that presidential undermining can be piecemeal and incremental, with the cumulative impact becoming clear only over time. In essence, it is death by a thousand cuts.

Our account has several important implications, which we discuss in Part II. First, structural deregulation exemplifies a different, more troubling side of “presidential administration.” It shows that while Presidents may sometimes embrace agency achievements for political gain — the trend then-Professor, now-Justice Elena Kagan identified in her iconic article<sup>10</sup> — they also can seek political advantage by undermining agency capacity. Justice Kagan’s portrayal assumed a good faith chief executive on the hunt for credit-claiming opportunities that would amplify agency competence and, inevitably, tie the agency tightly to the President.<sup>11</sup> Rather than aligning the President with his agencies, however, structural deregulation drives a wedge between them.<sup>12</sup>

Second, structural deregulation has repercussions for the separation of powers. By making it harder for agencies to fulfill their statutory

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<sup>9</sup> See Jeff Gerth, *Absent Watchdogs—A Reagan Legacy; Regulators Say 80’s Budget Cuts May Cost U.S. Billions in 1990’s*, N.Y. TIMES (Dec. 19, 1989), <https://www.nytimes.com/1989/12/19/us/absent-watchdogs-reagan-legacy-regulators-say-80-s-budget-cuts-may-cost-us.html> [<https://perma.cc/DB48-REW8>]; David E. Rosenbaum, *The Savings Debacle: A Special Report: A Financial Disaster with Many Culprits*, N.Y. TIMES (June 6, 1990), <https://www.nytimes.com/1990/06/06/business/the-savings-debacle-a-special-report-a-financial-disaster-with-many-culprits.html> [<https://perma.cc/3CDP-H4T5>]; *infra* notes 139–140 and accompanying text (discussing President Nixon’s impoundment practices).

<sup>10</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>11</sup> See *id.* at 2252.

<sup>12</sup> The literature on presidential control of agencies is both broad and deep. See, e.g., Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49 (2006) (interviewing agency officials to develop a portrait of presidential control as more complex and less positive than Justice Kagan’s account suggests); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 234–35 (2015) (identifying the President’s ability to pool resources across agencies as a key tool of presidential control); Peter L. Strauss, Foreword, *Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704–05 (2007) (concluding that the President should oversee the bureaucracy but not make decisions on agencies’ behalf unless Congress has assigned that authority to him by statute); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 734–35 (2016) (expressing optimism about the potential for transparency and process to constrain the worst aspects of presidential control).

mandates, a campaign of structural deregulation can be seen as both an encroachment on Congress's lawmaking authority and, arguably, a dereliction of the President's constitutional duty to faithfully execute the laws.

Third, structural deregulation's relative obscurity and informality — the very qualities that make it appealing to Presidents as a tool of control — mean that it contravenes longstanding administrative law norms of procedural regularity, transparency, rationality, and accountability. If these norms continue to represent desirable features of American government, their systematic erosion is troubling.

Finally, structural deregulation can be difficult to undo. It forces a President's successor to take time away from governing in order to rebuild what has been torn down. Structural deregulation is thus in tension with democratic norms disfavoring political and policy entrenchment.

Preventing or remediating structural deregulation presents a considerable challenge — especially when “presidential administration” is at its apex, courts are unwilling to check executive power, and Congress is gridlocked.<sup>13</sup> To pose the question starkly: If the other branches are disinclined, who can stop a President from dismantling the administrative state? In Part III, we explore legal strategies for redressing structural deregulation but conclude that existing public law does not offer much of a foothold.

Constitutional law seems unavailing: even if the President's constitutional duty to faithfully execute the laws includes a commitment to maintain the core capacities of agencies, it is not clear that there is a judicial remedy for its violation.<sup>14</sup> Existing statutes are similarly unhelpful. In most instances, substantive statutes do not provide the basis for a lawsuit challenging presidential undermining of agencies. The various procedural protections in the Pendleton Civil Service Reform Act,<sup>15</sup> Federal Vacancies Reform Act of 1998,<sup>16</sup> and Impoundment Control Act of 1974<sup>17</sup> do not effectively block Presidents from manipulating agency resources, despite being designed to do so.<sup>18</sup> The

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<sup>13</sup> See, e.g., Sarah A. Binder, *Going Nowhere: A Gridlocked Congress*, BROOKINGS INST. (Dec. 1, 2000), <https://www.brookings.edu/articles/going-nowhere-a-gridlocked-congress> [<https://perma.cc/GZJ9-7NP3>]; Lisa L. Miller, *Too Little Too Late: The Supreme Court as a Check on Executive Power*, MOTHER JONES (Feb. 16, 2006), <https://www.motherjones.com/politics/2006/02/too-little-too-late-supreme-court-check-executive-power> [<https://perma.cc/8PFF-DPVQ>].

<sup>14</sup> See Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1847 (2016) (arguing courts have understood the Take Care Clause as creating “exclusive presidential authority to assure government officials' fidelity to law”).

<sup>15</sup> Ch. 27, 22 Stat. 403 (1883), amended by Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111.

<sup>16</sup> 5 U.S.C. §§ 3345–3349.

<sup>17</sup> 2 U.S.C. §§ 601–688.

<sup>18</sup> See *infra* section III.B.2, pp. 644–48.

Administrative Procedure Act<sup>19</sup> (APA) is not much help either. Although Congress defined “agency” broadly in the APA,<sup>20</sup> the President is generally considered exempt from its scope.<sup>21</sup> Congress also expressly exempted from the statute’s rulemaking requirements “matter[s] relating to agency management or personnel.”<sup>22</sup> “[R]ules of agency organization, procedure, or practice” are exempt from the Act’s notice and comment requirements as well.<sup>23</sup> And while statutes such as the Freedom of Information Act<sup>24</sup> and other “sunshine” laws force some agency transparency,<sup>25</sup> these laws are limited in their reach, subject to exemptions, and can be circumvented.<sup>26</sup> The upshot is that Presidents can do a lot to undermine agencies without incurring significant legal risk.

With legal strategies so limited, the best response to structural deregulation is likely to be political. In Part IV, we suggest tools that Congress might use to limit structural deregulation, ranging from ex ante statutory safeguards to ex post oversight. All of these potential responses face serious political hurdles, however, and even if politically viable, they each bring significant downsides. Nevertheless, we conclude that the only way to stop a President bent on structural deregulation is for Congress to push back.

## I. 50 WAYS TO KILL AN AGENCY

In this Part, we offer a typology of structural deregulation consisting of four broad categories. Each category contains separate actions that a President may use to weaken agencies and which, when deployed simultaneously, can operate synergistically to more powerful, detrimental effect.<sup>27</sup> In the first category are actions that interfere with agency staffing. Examples include intentionally declining to fill open agency positions at both the leadership and line levels. The second category

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<sup>19</sup> 5 U.S.C. §§ 551–559, 561–570a, 701–706.

<sup>20</sup> *Id.* § 551(i).

<sup>21</sup> *See Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

<sup>22</sup> 5 U.S.C. § 553(a)(2).

<sup>23</sup> *Id.* § 553(b)(A).

<sup>24</sup> 5 U.S.C. § 552.

<sup>25</sup> *See, e.g., id.* § 552b(b) (requiring that government agencies’ meetings be open to the public); *id.* app. §§ 2–12 (Federal Advisory Committee Act).

<sup>26</sup> *See infra* p. 651.

<sup>27</sup> In the examples below we ascribe all actions, ultimately, to the President. In most cases, this line of responsibility is easy to trace. However, we acknowledge that the connections between presidential policy and agency action are not always transparent. And we do not pretend that the President makes these decisions personally in all or even most cases. But, in an era of presidential administration especially, responsibility for executive agency action ultimately lies with the occupant of the Oval Office. In contrast to our approach, in a forthcoming article, Professor David Noll identifies the agency itself as the key actor when it comes to understaffing and other forms of administrative “sabotage.” David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. (forthcoming 2022) (manuscript at 1) (on file with the Harvard Law School Library).

comprises presidential manipulation of other resources, including substantially reducing an agency's budget by reallocating funds, making funding more difficult to spend for particular purposes, and diverting agency attention from more material statutory responsibilities with "busywork" or "churn." Third is undermining the institutional expertise that is essential to performing congressionally assigned tasks. Fourth are attacks on agency reputation. When a President or other high-ranking executive official persistently charges an agency with incompetence, bias, or worse, it can have a corrosive effect. The ensuing harm to reputation can make it incrementally more difficult for the agency to secure funding from Congress, influence regulated entities, and even prevail in the courts.<sup>28</sup> There may be other things a President can do that would contribute to structural deregulation; our list is not exhaustive. The examples also can be thought of as falling along a spectrum, with the most concerning being those actions that are least transparent, least vulnerable to legal challenge, and "stickiest" or hardest to undo.

Delegation necessarily affords Presidents some "play in the joints," which they can exploit to pursue their policy prerogatives. It can be difficult to distinguish structural deregulation from so-called "good governance" reforms intended to improve the government's performance, cut costs, or streamline cumbersome procedures. In section I.E, we suggest considerations that can help to distinguish legitimate, good governance efforts from structural deregulation. The line is difficult to draw in the abstract, since it depends on a number of factors that can be evaluated only in the context of specific examples. Nevertheless, we argue that there is both a conceptual and practical difference between the two.

The Trump Administration aggressively pursued both substantive and structural deregulation. It sought to repeal or weaken regulations

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<sup>28</sup> See, e.g., Elizabeth Guo, *Ruling by Repute: Agency Reputation on Judicial Affirmance of Agency Action*, 74 FOOD & DRUG L.J. 379, 382, 399 (2019) (reviewing data on Food and Drug Administration (FDA) and Environmental Protection Agency (EPA) win rates and concluding that an agency's reputation is positively correlated with better judicial outcomes).

related to environmental protection,<sup>29</sup> civil rights,<sup>30</sup> education,<sup>31</sup> health care,<sup>32</sup> and immigration,<sup>33</sup> among other areas. In addition, the Administration modified agency procedures in ways that would systematically produce deregulatory outcomes.<sup>34</sup> In Executive Order 13,771, for example, the President updated centralized regulatory review procedures.<sup>35</sup> That order imposed an Administration-wide regulatory “budget” that purported to limit the total number of regulations.<sup>36</sup> It

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<sup>29</sup> See, e.g., Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) (codified at 40 C.F.R. pt. 60) (repealing and replacing the Clean Power Plan with less stringent emission guidelines for greenhouse gases); National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units — Reconsideration of Supplemental Finding and Residual Risk and Technology Review, 85 Fed. Reg. 31,286 (May 22, 2020) (codified at 40 C.F.R. pt. 63) (reversing agency finding that it was “appropriate and necessary” to regulate hazardous air emissions from electric generating units); Definition of “Waters of the United States” — Recodification of Pre-existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) (codified at 33 C.F.R. pt. 338 and scattered sections of 40 C.F.R.) (excluding certain streams, wetlands, and other waters from regulation).

<sup>30</sup> See, e.g., Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44,811 (proposed July 24, 2020) (to be codified at 24 C.F.R. pts. 5, 576) (proposing to rescind protections for transgender and gender-nonconforming individuals in HUD-funded shelters); HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 85 Fed. Reg. 60,288 (Sept. 24, 2020) (codified at 24 C.F.R. pt. 100) (making it more difficult for challengers to show a housing policy or practice is discriminatory).

<sup>31</sup> See, e.g., Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements, 83 Fed. Reg. 63,775 (Dec. 12, 2018) (codified at 7 C.F.R. pts. 210, 215, 220, 226) (relaxing nutritional requirements for school lunch programs); Secretarial Determination to Lower Head Start Center-Based Duration Requirements, 85 Fed. Reg. 5332 (Jan. 30, 2020) (codified at 45 C.F.R. pt. 1302) (rescinding requirement that Head Start programs provide more in-school hours).

<sup>32</sup> See, e.g., Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160 (June 19, 2020) (codified in scattered sections of 42 and 45 C.F.R.) (loosening antidiscrimination requirements and adopting blanket exemptions for providers on religious grounds); State Relief and Empowerment Waivers, 83 Fed. Reg. 53,575 (Oct. 24, 2018) (codified at 31 C.F.R. pt. 33 & 45 C.F.R. pt. 155) (expanding availability of state waivers from Affordable Care Act mandates).

<sup>33</sup> See, e.g., Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 85 Fed. Reg. 37,502 (June 22, 2020) (codified at 8 C.F.R. pt. 208) (extending timeline for USCIS to adjudicate employment authorization applications); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80,274 (Dec. 11, 2020) (codified at scattered sections of 8 C.F.R.) (expediting removal and screenings); Asylum Eligibility and Procedural Modifications, 85 Fed. Reg. 82,260 (Dec. 17, 2020) (codified at 8 C.F.R. pts. 208, 1208) (requiring asylum applicants to apply for protection in a third country before seeking asylum in the United States).

<sup>34</sup> Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Fed. Reg. 469 (Jan. 6, 2021) (codified at 40 C.F.R. pt. 30) (limiting the studies the EPA may rely on in promulgating regulations); Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 85 Fed. Reg. 8626 (Feb. 14, 2020) (codified at 10 C.F.R. pts. 430–31) (establishing higher threshold before conservation standard can be tightened).

<sup>35</sup> See Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

<sup>36</sup> See *id.*

also commanded agencies to eliminate two rules for every new regulation promulgated.<sup>37</sup>

However, President Trump went further and deployed a variety of other strategies to impair agencies — strategies that we call structural deregulation. While not the first administration to employ such tactics, the Trump Administration used them more aggressively, comprehensively, and in a more coordinated fashion than its predecessors. These instruments are likely to remain appealing to deregulatory Presidents. The history of regulation shows that new tools, once exercised, tend to remain in the deregulatory arsenal.<sup>38</sup>

### A. Staffing

It should go without saying that the daily operation of the U.S. government, including the military and law enforcement, and the broad array of functions assigned by Congress to both executive branch and independent regulatory agencies, requires an adequate and competent staff with relevant subject matter expertise.<sup>39</sup> Modern administration is complex, requiring decisionmakers to make judgments about intricate financial, economic, public health, medical, scientific, technological, security, and other matters. It cannot operate without a civil service of skilled and dedicated professionals.<sup>40</sup> As administrations come and go, and political appointees cycle through the agencies, the permanent civil service is a source of stability and continuity. It has been described as the “cartilage” of the federal government.<sup>41</sup>

While Congress does not set precise staffing levels for agencies (other than for agency leadership), it delegates tasks that presuppose adequate staffing for their fulfillment. The optimal size of the civil service is open to debate; it may be impossible to pinpoint the precise level of staffing required by any one agency or set of tasks. Yet there have been instances

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<sup>37</sup> *Id.*

<sup>38</sup> See, e.g., Noll & Revesz, *supra* note 8, at 3–4.

<sup>39</sup> Between 2016 and 2021, nearly half of all federal employees became eligible for retirement, raising the prospect that the federal government soon could have insufficient personnel to fulfill its tasks. Recognizing this problem, the Obama Administration made recruiting and retaining millennials a key part of its agenda for strengthening the federal workforce. See Carten Cordell, *How the Obama Administration Shaped the Federal Workforce*, FED. TIMES (Dec. 5, 2016), <https://www.federaltimes.com/management/2016/12/05/how-the-obama-administration-shaped-the-federal-workforce> [<https://perma.cc/L2G4-75LB>].

<sup>40</sup> See generally PAUL R. VERKUIL, VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT (2017).

<sup>41</sup> “[T]he permanent civil service at the federal level and its collective delegated responsibilities might be considered modern America’s ‘cartilage’ developed over time to maintain continuity and soften the friction inherent to the country’s constitutional skeleton.” William G. Resh, *The Administrative Presidency and the Degradation of the United States Civil Service*, in HANDBOOK OF PUBLIC ADMINISTRATION 25, 26 (W. Bartley Hildreth et al. eds., 4th ed. 2021).

where agency staffing, on any fair assessment, has fallen below the requisite minimum.<sup>42</sup> Where such shortfalls are the direct or predictably indirect result of a purposeful presidential policy designed to weaken the agency, we attribute them to structural deregulation.

Presidents can undermine agency capacity by reducing or otherwise manipulating staffing, such as by intentionally declining to fill open agency positions at both the leadership and line level, by inducing staff departures through demoralization, and by weakening staffing agency mechanisms.

*I. Line-Level Staffing.* — Presidents can hinder agencies' capacity to do their work by shrinking the size of their workforces. Sometimes these efforts are overt, sometimes covert. For example, President Trump made plain his desire to reduce the size of the federal workforce in a memorandum issued shortly after he assumed office.<sup>43</sup> In it, he imposed a hiring freeze and directed the Office of Management and Budget (OMB), in consultation with the Office of Personnel Management (OPM), to "recommend a long-term plan to reduce the size of the Federal Government's workforce through attrition."<sup>44</sup> Such initiatives are nothing new and are not necessarily aimed at agency incapacitation. President Reagan, too, announced a federal hiring freeze shortly after his inauguration;<sup>45</sup> President Obama froze pay levels for federal employees for three years.<sup>46</sup>

As we discuss in more detail below, staff reductions or temporary caps on pay are not necessarily linked to structural deregulation. But where those reductions appear designed to marginalize particular agency programs or operations, or when they cut so deeply that they may compromise an agency's ability to fulfill core functions, they ought to raise red flags. The size of the federal civil service has remained

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<sup>42</sup> For example, a former Inspector General (IG) for the Department of Homeland Security in the Trump Administration testified in Congress that some offices were "simply too thinly staffed to be able to even be aware of, much less effectively manage, the significant and varied issues that face DHS." *Trouble at the Top: Are Vacancies at the Department of Homeland Security Undermining the Mission? Hearing Before the H. Comm. on Homeland Sec., 116th Cong. 20* (2019) [hereinafter *Trouble at the Top*] (statement of John Roth, Former Inspector General, Department of Homeland Security).

<sup>43</sup> See Hiring Freeze, 82 Fed. Reg. 8493 (Jan. 23, 2017).

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

<sup>45</sup> Joe Davidson, *Reagan's Complicated Legacy for Federal Workforce*, WASH. POST (Feb. 8, 2011), [https://www.washingtonpost.com/local/despise-reagans-actions-government-workforce-grew-in-his-tenure/2011/02/07/ABuzkZF\\_story.html](https://www.washingtonpost.com/local/despise-reagans-actions-government-workforce-grew-in-his-tenure/2011/02/07/ABuzkZF_story.html) [https://perma.cc/EJG8-UQHD]. President Reagan announced that "[i]mposing a freeze now can eventually lead to a significant reduction in the size of the Federal work force." *Id.* However, the federal workforce actually increased in size during Reagan's presidency. *Id.*

<sup>46</sup> Cordell, *supra* note 39.

relatively constant for the past fifty years,<sup>47</sup> but fluctuations within specific agencies matter more than overall numbers, and several agencies have at times lost a notable amount of key staff.<sup>48</sup> For example, in 2018, the Environmental Protection Agency's (EPA) staff dropped to its lowest level in thirty years, and the Agency lost several mission-critical positions.<sup>49</sup> Administrations can reduce line staff through attrition simply by failing to replace departing employees. Even after the hiring freeze imposed at the start of President Trump's term was lifted, one Labor Department official reported that political leadership at the Department prevented hiring, which left remaining staff "doing the work that four or five people used to handle."<sup>50</sup> Similarly, due to delays in replacing departing inspectors, the Occupational Safety and Health Administration in 2020 had just 761 inspectors — an all-time low.<sup>51</sup>

While it might be reasonable to expect a modest amount of attrition in any given administration, a pattern of severe attrition across numerous agencies suggests something is amiss. Especially troubling is the data on civil service attrition during the Trump Administration showing that attrition was higher for senior members of the executive service, who have significant expertise and valuable institutional knowledge,

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<sup>47</sup> The federal civil service includes approximately two million employees. Contractors and grantees increase that number to between seven and nine million. PAUL C. LIGHT, VOLCKER ALL., *THE TRUE SIZE OF GOVERNMENT* 1, 3 tbl.1 (2017), [https://www.volckeralliance.org/sites/default/files/attachments/Issue%20Paper\\_True%20Size%20of%20Government.pdf](https://www.volckeralliance.org/sites/default/files/attachments/Issue%20Paper_True%20Size%20of%20Government.pdf) [<https://perma.cc/F4H9-KD87>]. The total size of the workforce decreased under President Obama by more than two million. *Id.* However, President Obama increased permanent employees by 68,000 in his first nine months, compared to a net loss of 16,000 in President Trump's first nine months. Lisa Rein & Andrew Ba Tran, *How the Trump Era Is Changing the Federal Bureaucracy*, WASH. POST (Dec. 30, 2017), [https://www.washingtonpost.com/politics/how-the-trump-era-is-changing-the-federal-bureaucracy/2017/12/30/8d5149c6-daa7-11e7-b859-fb0995360725\\_story.html](https://www.washingtonpost.com/politics/how-the-trump-era-is-changing-the-federal-bureaucracy/2017/12/30/8d5149c6-daa7-11e7-b859-fb0995360725_story.html) [<https://perma.cc/684M-BQ36>].

<sup>48</sup> See Emily Badger et al., *The Government Agencies that Became Smaller, and Unhappier, Under Trump*, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/02/01/upshot/trump-effect-government-agencies.html> [<https://perma.cc/CZ2L-8WM2>] (showing that the Departments of Labor, State, Education, Interior, Agriculture, Energy, Health and Human Services, Housing and Urban Development, Transportation, and Justice, along with the EPA, saw net workforce losses during the Trump Administration).

<sup>49</sup> See Timothy Cama, *EPA Staffing Falls to Reagan-Era Levels*, THE HILL (Jan. 9, 2018, 11:39 AM), <https://thehill.com/policy/energy-environment/368090-epa-staffing-hits-reagan-levels> [<https://perma.cc/AH6N-W88J>].

<sup>50</sup> Rachel M. Cohen, *"I Fully Intend to Outlast These People": 18 Federal Workers on What It's Really Like to Work for the Trump Administration*, WASHINGTONIAN (Apr. 7, 2019), <https://www.washingtonian.com/2019/04/07/18-federal-workers-what-its-really-like-to-work-for-the-trump-administration> [<https://perma.cc/C3C2-NEYH>].

<sup>51</sup> Joe Yerardi & Alexia Fernández Campbell, *Fewer Inspectors, More Deaths: The Trump Administration Rolls Back Workplace Safety Inspections*, VOX (Aug. 18, 2020, 5:05 AM), <https://www.vox.com/2020/8/18/21366388/osha-worker-safety-trump> [<https://perma.cc/UMD6-WYLN>]. A former policy adviser to the Agency opined that the Trump Administration was "starving" the Agency of staff and that this was "undermining the effectiveness of the agency." *Id.* The article also details the "human cost" of fewer inspections. *Id.*

and who work most closely with an administration's political appointees.<sup>52</sup>

Civil servants are difficult to fire because of civil-service job protections, but an administration can induce them to retire by offering a variety of incentives. In implementing the recommendations of the National Performance Review under President Clinton, for example, the government offered federal employees up to \$50,000 each to leave their positions.<sup>53</sup> During the Trump Administration, an EPA scientist reported that the Agency bought out several high-level scientist positions and then designated those jobs as unnecessary.<sup>54</sup> While such buyout programs may be standard fare and even beneficial, the question is whether, *in context*, they are part of a larger effort to hollow out the agency by depleting key staff. When used together with other destaffing techniques — firing, attrition, relocation, and the like — buyouts can be evidence of a larger campaign of structural deregulation.

A President or an agency's political leadership may also seek to dishearten staff to induce them to quit. President Reagan, who memorably announced that "government is the problem,"<sup>55</sup> took an approach to administration that was "deeply demoralizing to federal civil servants and left a legacy of distrust which has never completely faded."<sup>56</sup> More recently, the president of the National Treasury Employees Union commented in 2017 that "[m]orale has never been lower" and that "[g]overnment is making itself a lot less attractive as an employer."<sup>57</sup> The Consumer Financial Protection Bureau (CFPB) lost at least 129 employees after Mick Mulvaney assumed the position of Acting Director.<sup>58</sup> Political appointees might also demoralize staff by excluding

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<sup>52</sup> See Daniel Lim, *Federal Workforce Attrition Under the Trump Administration*, GOV'T EXEC. (Dec. 28, 2020), <https://www.govexec.com/management/2020/12/federal-workforce-attrition-under-trump-administration/171045> [<https://perma.cc/P49Y-4BH8>] ("[B]etween calendar years 2016 and 2017, 1,616 senior executives voluntarily left government service, a year-over-year increase of 799 (98%), or more than twice the 2009 spike. Based solely on separations, many more experienced civil servants were willing to work through a change of administration under Obama than under Trump.")

<sup>53</sup> Charles S. Clark, *Reinventing Government — Two Decades Later*, GOV'T EXEC. (Apr. 26, 2013), <https://www.govexec.com/management/2013/04/what-reinvention-wrought/62836> [<https://perma.cc/6JYH-Q7XZ>].

<sup>54</sup> Cohen, *supra* note 50.

<sup>55</sup> President Ronald Reagan, First Inaugural Address 2 (Jan. 20, 1981) (transcript on file with the Ronald Reagan Presidential Foundation and Institute), <https://www.reaganfoundation.org/media/128614/inauguration.pdf> [<https://perma.cc/Y2JC-2M9Q>].

<sup>56</sup> Davidson, *supra* note 45 (quoting Linda J. Bilmes, a senior lecturer at the Harvard Kennedy School).

<sup>57</sup> Rein & Tran, *supra* note 47.

<sup>58</sup> Robert O'Harrow Jr. et al., *How Trump Appointees Curbed a Consumer Protection Agency Loathed by the GOP*, WASH. POST (Dec. 4, 2018), [https://www.washingtonpost.com/investigations/how-trump-appointees-curbed-a-consumer-protection-agency-loathed-by-the-gop/2018/12/04/3cb6cd56-de20-11e8-aa33-53bad9a881e8\\_story.html](https://www.washingtonpost.com/investigations/how-trump-appointees-curbed-a-consumer-protection-agency-loathed-by-the-gop/2018/12/04/3cb6cd56-de20-11e8-aa33-53bad9a881e8_story.html) [<https://perma.cc/5WJH-44WZ>].

them from key decisionmaking.<sup>59</sup> A 2019 State Department Inspector General's report cited examples of hostile treatment of staff and improper withholding of promotions.<sup>60</sup> Finally, career staff who cannot be fired easily or otherwise prodded to leave might be moved into jobs that hold no interest for them.<sup>61</sup>

An administration can also trigger staff departures by relocating certain jobs or entire offices. In summer 2019, for example, the Department of Agriculture (USDA) moved two of its research agencies — the Economic Research Service and the National Institute of Food and Agriculture — from Washington, D.C., to Kansas City, Missouri.<sup>62</sup> About two-thirds of affected employees declined their reassignments and were let go.<sup>63</sup> Few of those positions were filled by new hires.<sup>64</sup> A

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Some employees blamed these departures on choices made by political leadership, including the slower pace of enforcement actions and staff micromanagement by political employees. *Id.* A Bureau lawyer observed that “[t]hey want everyone to leave.” *Id.* Employees of other agencies have reported similar demoralization. An employee at the Defense Department reported that “[m]orale is pretty low, and I think it has to do with the general lack of respect for civil servants.” Cohen, *supra* note 50. An employee at the Treasury Department noted a general lack of respect for career staff under the Trump Administration. *Id.*

<sup>59</sup> See Juliet Eilperin & Emma Brown, *Cabinet Secretaries' Tough Task: Lack of Funding, Support for Agency Missions*, WASH. POST (July 2, 2017), [https://www.washingtonpost.com/politics/cabinet-secretaries-tough-task-lack-of-funding-support-for-agency-missions/2017/07/02/d17279ee-4ad9-11e7-a186-60c031eab644\\_story.html](https://www.washingtonpost.com/politics/cabinet-secretaries-tough-task-lack-of-funding-support-for-agency-missions/2017/07/02/d17279ee-4ad9-11e7-a186-60c031eab644_story.html) [https://perma.cc/68F6-R4DX].

<sup>60</sup> Rachel Oswald, *Trump Appointees Routinely Bullied State Department Staffers, IG Reports*, ROLL CALL (Aug. 16, 2019, 7:27 AM), <https://www.rollcall.com/2019/08/16/trump-appointees-routinely-bullied-state-department-staffers-ig-reports> [https://perma.cc/EW4F-ZLBU]. While this example concerns a nonregulatory agency, it shows that administrations bent on doing so can demoralize agency staff to the point of driving an exodus.

<sup>61</sup> The Department of the Interior's policy analysis head until 2017 described being moved to the Agency's Office of Natural Resources Revenue, whose work is to collect royalty payments from oil and gas companies. Joel Clement, Opinion, *I'm a Scientist. I'm Blowing the Whistle on the Trump Administration*, WASH. POST (July 19, 2017), [https://www.washingtonpost.com/opinions/im-a-scientist-the-trump-administration-reassigned-me-for-speaking-up-about-climate-change/2017/07/19/389b8dce-6b12-11e7-9c15-177740635e83\\_story.html](https://www.washingtonpost.com/opinions/im-a-scientist-the-trump-administration-reassigned-me-for-speaking-up-about-climate-change/2017/07/19/389b8dce-6b12-11e7-9c15-177740635e83_story.html) [https://perma.cc/4LSX-UFCC].

<sup>62</sup> The reason given for the move was that it would enable the Department to “provide more streamlined and efficient services.” Ben Guarino, *Many USDA Workers to Quit as Research Agencies Move to Kansas City: “The Brain Drain We All Feared,”* WASH. POST (July 18, 2019), <https://www.washingtonpost.com/science/2019/07/18/many-usda-workers-quit-research-agencies-move-kansas-city-brain-drain-we-all-feared> [https://perma.cc/M5Y3-XHPU].

<sup>63</sup> *Id.* (quoting Jack Payne, the vice president for agriculture and natural resources at the University of Florida, as commenting that “[t]his is the brain drain we all feared, possibly a destruction of the agencies”). As one former employee pointed out, even if the Department hired someone to fill his position, it could take that new employee “years” to get up to speed on the modeling programs he oversaw. Annie Gowen et al., *Science Ranks Grow Thin in Trump Administration*, WASH. POST (Jan. 23, 2020), [https://www.washingtonpost.com/climate-environment/science-ranks-grow-thin-in-trump-administration/2020/01/23/5d22b522-3172-11ea-a053-dc6d944ba776\\_story.html](https://www.washingtonpost.com/climate-environment/science-ranks-grow-thin-in-trump-administration/2020/01/23/5d22b522-3172-11ea-a053-dc6d944ba776_story.html) [https://perma.cc/L8KS-ME6D].

<sup>64</sup> See *Internal USDA Memo Shows Move to KC Left Offices Fallow*, KAN. CITY BUS. J. (Feb. 28, 2020, 9:21 AM), <https://www.bizjournals.com/kansascity/news/2020/02/28/usda-memo-ers-nifa-kansas-city-office-employment.html> [https://perma.cc/66PF-XV43]. These departures created deep

similar relocation effort by the Department of the Interior's Bureau of Land Management prompted more than eighty-seven percent of employees asked to move from Washington, D.C., to Grand Junction, Colorado, to resign or retire instead.<sup>65</sup> In a reverse move, the Department of Health and Human Services asked employees in its Administration for Community Living to move from regional offices to the nation's capital in order to "improve efficiency."<sup>66</sup> Transferring or reassigning particular senior officials rather than whole offices may also be part of an effort to weaken an agency.<sup>67</sup>

Sometimes, staff vacancies are filled by contractors and other temporary workers — strategies that an administration can embrace as "cost-saving" but might compromise an agency's capacity.<sup>68</sup> For example, the Trump Administration more than doubled funding previously spent contracting with temporary employment agencies to fill federal vacancies,<sup>69</sup> a practice OMB defended, in part, as a way to "bridge staffing shortages."<sup>70</sup> Contracting out a significant share of federal jobs,

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deficits in particular areas, including farm finance, tax, bees and pollination, and trade and international development. See Guarino, *supra* note 62.

<sup>65</sup> Juliet Eilperin, *Trump Officials Moved Most Bureau of Land Management Positions out of D.C. More than 87 Percent Quit Instead.*, WASH. POST (Jan. 28, 2021, 6:24 PM), <https://www.washingtonpost.com/climate-environment/2021/01/28/trump-blm-reorganization> [<https://perma.cc/7RBZ-4S2N>].

<sup>66</sup> Arthur Delaney & Dave Jamieson, *The Trump Administration Is Literally Pushing Workers Around*, HUFFPOST (July 1, 2019, 5:45 AM), [https://www.huffpost.com/entry/trump-federal-workers-relocation\\_n\\_5d166993e4bo7f6ca57d12c8](https://www.huffpost.com/entry/trump-federal-workers-relocation_n_5d166993e4bo7f6ca57d12c8) [<https://perma.cc/48CQ-VTZ2>].

<sup>67</sup> For example, a senior EPA lawyer who had worked on high-profile air quality rules, including the Obama-era Clean Power Plan, was, in the Trump Administration, reassigned from her Associate General Counsel role to work on "special projects." Doug Obey, *In "Highly Unusual Move," Trump EPA Reassigns Top Agency Air Lawyer*, INSIDEEPA (Jan. 17, 2018), <https://insideepa.com/daily-news/highly-unusual-move-trump-epa-reassigns-top-agency-air-lawyer> [<https://perma.cc/W9PM-7RSL>].

<sup>68</sup> Hiring temporary workers or contracting with private employees can compromise agency expertise. CHRIS SCHWARTZ & LAURA PADIN, NAT'L EMP. L. PROJECT, *TEMPING OUT THE FEDERAL GOVERNMENT 1-2* (2019), <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Temping-Out-Federal-Government-6-19.pdf> [<https://perma.cc/QN6L-3FWK>]. Temporary workers might also prove just as costly as federal employees while providing lower-quality services. *Id.* at 4. The combination of pervasive outsourcing and extensive reliance on nonexpert "loyalists" in leadership "has brought about a lack of attention to long-term human capital planning. This, in turn, leads to a lack of functional expertise and competence . . . and simply a shortage in the number of professionals needed to capably run the many functions of the federal government." Resh, *supra* note 41, at 35.

<sup>69</sup> See SCHWARTZ & PADIN, *supra* note 68, at 2; Joe Davidson, *Trump Is Outsourcing Government to Temps. Why That Might Not Be Good.*, WASH. POST (June 19, 2019), [https://www.washingtonpost.com/politics/trump-is-outsourcing-government-to-temps-why-that-might-not-be-good/2019/06/18/8f0d07e-9212-11e9-b570-6416efdc0803\\_story.html](https://www.washingtonpost.com/politics/trump-is-outsourcing-government-to-temps-why-that-might-not-be-good/2019/06/18/8f0d07e-9212-11e9-b570-6416efdc0803_story.html) [<https://perma.cc/YZM3-596M>]. Most of the increase in outsourcing comes from efforts to privatize federal government-provided healthcare. *Id.*

<sup>70</sup> Davidson, *supra* note 69.

including military functions, is a long-term trend, but it reached new levels in the Trump Administration.<sup>71</sup>

We recognize that Presidents may wish to rely more heavily on political appointees than career staff in some instances because they believe those political appointees will be more aligned with their agendas. Likewise, they may wish to reassign staff whom they believe do not support, or might undermine, their priorities. And physically relocating offices may in some cases be entirely legitimate. We grow concerned, however, when efforts to reduce, reassign, relocate, or demoralize career staff are so expansive that they evince something more reckless or destructive, or when they cut so deeply that they may prevent an agency from fulfilling its congressionally assigned mission.

2. *Officers.* — Presidents can also seek to disable agencies by failing to nominate leadership. The Constitution states that the President shall nominate, and the Senate shall confirm, all “Officers of the United States.”<sup>72</sup> The Supreme Court has interpreted this language to mean that the Senate must confirm “principal” officers, including the heads of executive departments and independent commissions.<sup>73</sup> There are more than 1,100 such positions in the federal government.<sup>74</sup> However, Presidents do not always nominate, nor does the Senate always confirm, candidates for these positions in a timely manner.<sup>75</sup> By April 2018, fifteen months into his presidency, President Trump had nominated 589 candidates for key positions, compared with 734 by that same point under President Obama, 746 under President George W. Bush, and 734 under President Clinton.<sup>76</sup> Halfway through President Trump’s presidency, sixty-three nominees had withdrawn their candidacies or seen

<sup>71</sup> For example, the Department of Defense has increasingly relied on contractors. *See, e.g.*, MARK F. CANSIAN, CTR. FOR STRATEGIC & INT’L STUD., U.S. MILITARY FORCES IN FY 2020: SOF, CIVILIANS, CONTRACTORS, AND NUKES 9–10 (2019), [https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/191024\\_Cansian\\_FY2020\\_OtherForces\\_v2.pdf](https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/191024_Cansian_FY2020_OtherForces_v2.pdf) [<https://perma.cc/KG4A-RFN3>].

<sup>72</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>73</sup> While the Court has never defined the category of “principal” officers precisely, it has suggested that the category includes those not subject to removal by higher executive branch officials (other than the President), who exercise broad duties and whose tenure is not temporary. *See* *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 510 (2010); *Edmond v. United States*, 520 U.S. 651, 662–63 (1997); *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988).

<sup>74</sup> Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 917 (2009).

<sup>75</sup> It is important not to conflate presidential failures to nominate with Senate failures to confirm.

<sup>76</sup> Press Release, Senate Democrats, Special Report: How the Trump Administration Dysfunction and Senate Republicans Are Responsible for Trump Administration Dysfunction (Apr. 25, 2018), <https://www.democrats.senate.gov/imo/media/doc/SPECIAL%20REPORT%20How%20the%20Trump%20Administration%20and%20Senate%20Republicans%20are%20Responsible%20for%20Trump%20Administration%20Dysfunction.pdf> [<https://perma.cc/H7B3-TWYF>].

their nominations pulled before confirmation — almost double the figure for the Obama Administration by the same point.<sup>77</sup> As with staffing shortages, it is not the failure to nominate in any one instance that matters, but its strategic and systematic use to weaken agency capacity. Here, we discuss two effects of the failure to appoint: relying for extended periods on “acting” heads of executive branch agencies and depriving independent regulatory commissions of a quorum.

(a) *Acting Officials*. — When vacancies arise at executive agencies,<sup>78</sup> Presidents may appoint acting officials pending the nomination and confirmation of more permanent officers.<sup>79</sup> Presidents have increasingly relied on acting officials to head agencies for at least some period of time, but President Trump’s use of acting officials “has been far more extensive and controversial than his predecessors’.”<sup>80</sup> By early 2020, acting officials in the Trump Administration had already served more days, combined, than had acting officials in all eight years of the Obama Administration, and by a significant margin.<sup>81</sup>

Substituting an acting official for one who is Senate confirmed is sometimes necessary, of course. The Vacancies Act of 1868,<sup>82</sup> most recently amended by the Federal Vacancies Reform Act of 1998, contemplates that vacancies will occur in high-level government posts and that it can be beneficial to fill those posts on a temporary basis while waiting

<sup>77</sup> Michael Collins, *Donald Trump’s Picks for Administration Jobs Keep Dropping Out with John Ratcliffe Latest to Go*, USA TODAY (Aug. 2, 2019, 11:17 PM), <https://www.usatoday.com/story/news/politics/2019/06/17/from-heather-nauert-to-herman-cain-trumps-job-candidates-keep-quitting/3758484002> [<https://perma.cc/YX98-3UE6>].

<sup>78</sup> The Vacancies Act of 1868 does not apply to multimember commissions. 5 U.S.C. § 3349c(1).

<sup>79</sup> *Id.* §§ 3345–3349d.

<sup>80</sup> Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613, 623 (2020).

<sup>81</sup> See Aaron Blake, *Trump’s Government Full of Temps*, WASH. POST (Feb. 21, 2020), <https://www.washingtonpost.com/politics/2020/02/21/trump-has-had-an-acting-official-cabinet-level-job-1-out-every-9-days> [<https://perma.cc/T3Z2-C6QS>]; see also W. James Antle III, *Opinion, Trump’s Acting Troupe*, WASH. EXAMINER (Apr. 26, 2019, 12:00 AM), <https://www.washingtonexaminer.com/opinion/trumps-acting-troupe> [<https://perma.cc/WA9N-JTQ3>]. President Trump emphasized that “I like acting because I can move so quickly. It gives me more flexibility.” Brett Samuels, *Trump Learns to Love Acting Officials*, THE HILL (Apr. 14, 2019, 10:30 AM), <https://thehill.com/homenews/administration/438660-trump-learns-to-love-acting-officials> [<https://perma.cc/8A9U-CJLN>]; see also KATHRYN DUNN TENPAS, BROOKINGS INST., TRACKING TURNOVER IN THE TRUMP ADMINISTRATION (2021), <https://www.brookings.edu/research/tracking-turnover-in-the-trump-administration> [<https://perma.cc/PLA5-8KFC>]. The Trump Administration has also had higher levels of turnover in cabinet-level posts than any first-term elected administration in the past 100 years. Tamara Keith, *Trump Cabinet Turnover Sets Record Going Back 100 Years*, NPR (Mar. 29, 2018, 5:00 AM), <https://www.npr.org/2018/03/19/594164065/trump-cabinet-turnover-sets-record-going-back-100-years> [<https://perma.cc/W9GB-HZU3>].

<sup>82</sup> Act of July 23, 1868, ch. 227, 15 Stat. 168 (codified as amended at 5 U.S.C. §§ 3345–3349).

for presidential nomination and Senate confirmation of a permanent replacement.<sup>83</sup> During such vacancies, Presidents may generally assign the responsibilities of the office to a senior officer or employee of the same agency or to a Senate-confirmed officer serving in a different governmental position, subject to certain limitations.<sup>84</sup> Acting officials can have salutary effects — rejuvenating an agency after scandal or mismanagement, keeping an agency on track through presidential transition periods, or caretaking the agency when a senior official suddenly must resign.<sup>85</sup> Assigning leadership responsibilities to career civil servants during nomination or confirmation delays might also enhance agency expertise.<sup>86</sup>

Yet, the President’s power to appoint acting officials also can be abused to prevent the agency from executing its statutory duties. The Vacancies Act does not contemplate acting officials remaining in place perennially, yet Presidents sometimes press the statute’s limits.<sup>87</sup> Agencies may function less well under acting officials for a variety of reasons, including uncertainty about how long they will remain.<sup>88</sup> While some acting officials may have considerable sway with the White House, not all will. Temporary heads may lack the “stature” to push back on controversial actions by the White House, which is sometimes necessary to defend the agency’s pursuit of its statutory obligations.<sup>89</sup> The inferior

<sup>83</sup> O’Connell, *supra* note 80, at 695, 700–01 (noting the potential benefits of continuity for agency action, morale, stability, and stature).

<sup>84</sup> Vacancies Act § 3345. There is a 210-day time limit on service as an acting officer, but that period can be extended if there are nominations for the office pending before the Senate. *Id.* § 3346.

<sup>85</sup> Professor Anne O’Connell argues that “[t]he costs of gaps in confirmed leadership may not be as dire as the conventional wisdom suggests,” and she concludes that acting officials continue to make important decisions and provide stability and continuity at the agency. O’Connell, *supra* note 80, at 699–702.

<sup>86</sup> See Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 DUKE L.J. 1571, 1596–97 (2015); O’Connell, *supra* note 80, at 702.

<sup>87</sup> See VALERIE C. BRANNON, CONG. RSCH. SERV., R44997, THE VACANCIES ACT: A LEGAL OVERVIEW 13–14 (2021). For examples of the Trump Administration’s use of acting officials and the legal questions these uses raised, see *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 24–25 (D.D.C. 2020) (holding that President Trump’s appointment of Acting Director of United States Citizenship and Immigration Services violated the text, structure, and purpose of the Federal Vacancies Reform Act), *judgment entered*, No. CV 19-2676, 2020 WL 1905063 (D.D.C. Apr. 16, 2020), *appeal dismissed*, No. 20-5141, 2020 WL 5358686 (D.C. Cir. Aug. 25, 2020); Becca Damante, *At Least 15 Trump Officials Do Not Hold Their Positions Lawfully*, JUST SEC. (Sept. 17, 2020), <https://www.justsecurity.org/72456/at-least-15-trump-officials-do-not-hold-their-positions-lawfully> [<https://perma.cc/WDM9-SFN2>]; Joel Rose, *How Trump Has Filled High-Level Jobs Without Senate Confirmation Votes*, NPR (Mar. 9, 2020, 5:04 AM), <https://www.npr.org/2020/03/09/813577462/how-trump-has-filled-high-level-jobs-without-senate-confirmation> [<https://perma.cc/8V8G-PJPN>].

<sup>88</sup> See O’Connell, *supra* note 80, at 698 & n.461 (citing PAUL C. LIGHT, BROOKINGS INST., A CASCADE OF FAILURES: WHY GOVERNMENT FAILS, AND HOW TO STOP IT 16–19 (2014)) (observing that “vacancies and delays” contributed to eight of forty-one examples of agency failure studied).

<sup>89</sup> *Id.* at 696–97 (citing example of Pentagon acting head’s failure to push back on Trump Administration’s holdup of aid to Ukraine); see also Wesley Morgan, *Trump’s Ukraine Holdup Hit*

designation of “acting” also may undermine the ability of these officials to drive the agency’s agenda forward in Congress and influence important interagency and cabinet-level debates.

The former Inspector General (IG) of the Department of Homeland Security identified the shortcomings of temporary “actings” when he testified before Congress in 2019 that “the nature and extent of senior leadership vacancies in the Department . . . significantly hamper the Department’s ability to carry out its all-important mission.”<sup>90</sup> He noted that acting officials “are simply in a caretaker role and are justifiably hesitant to make decisions that would tie the hands of the individual ultimately appointed to that position” and that presidential appointees are “better able to represent the Department’s interests in interagency coordination” because they are seen as more legitimate.<sup>91</sup>

As with all of our examples, any one instance of failing to nominate agency leadership and relying on acting officials for a time might easily be explained. But a persistent failure to name critical officers to key agency posts across the government for extended periods of time is more troubling and suggests something is awry. A President might rely on acting officials temporarily to energize or reform agencies, but it seems more likely that a President wanting agencies to actively pursue their statutory mandates would try to equip them with Senate-confirmed leaders.

(b) *Commission Vacancies.* — Nearly all of the so-called independent agencies in the federal government are headed by commissions or boards rather than single individuals.<sup>92</sup> While there are multiple features that make agencies more or less independent from White House influence, the primary feature identified by scholars is whether agency heads are removable at will by the President.<sup>93</sup> The President lacks the ability to remove independent commissioners without cause, but he may nominate new members to fill vacancies, and he generally names the commission chair.<sup>94</sup>

In some cases, Presidents may be slow to fill these vacancies, which can interfere with agency operations to the extent that commissions require a quorum to act. Quorum requirements vary by commission. For

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a *Rudderless Pentagon*, POLITICO (Sept. 25, 2019, 6:24 PM), <https://www.politico.com/news/2019/09/25/trump-ukraine-military-aid-pentagon-000679> [https://perma.cc/LNT5-CWSF].

<sup>90</sup> *Trouble at the Top*, *supra* note 42, at 1 (statement of John Roth, Former Inspector General, Department of Homeland Security).

<sup>91</sup> *Id.* at 4–5.

<sup>92</sup> *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2201–02 (2020).

<sup>93</sup> See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 15 (2010) (noting that discussions of independent agencies hinge on this factor as well as their multimember structure and their exemption from centralized regulatory review).

<sup>94</sup> See Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 265.

example, the Federal Election Commission (FEC) needs at least four commissioners for most policymaking and enforcement actions.<sup>95</sup> The Federal Energy Regulatory Commission (FERC) may issue decisions with three of its five members.<sup>96</sup> A few commissions can operate with smaller quorums.<sup>97</sup>

For the first time in its history, FERC operated without a quorum for six months in 2017.<sup>98</sup> The FEC, whose duties include investigating allegations of campaign finance violations, was also without a quorum from September 2019 until May 2020.<sup>99</sup> The Senate surely bears some responsibility for this problem, since President Trump had nominated one commissioner, Trey Trainor, in September 2017. However, the President had nominated no other candidates.<sup>100</sup> Thus, even after Trainor's confirmation in May 2020, when another FEC commissioner resigned in June, the Commission was again without power to act.

Commissions with multiple vacancies are also more likely to lose their quorums if a commissioner must recuse herself from a particular decision. For example, FERC, which oversees wholesale electricity markets, was unable to vote on a controversial regulatory filing by a regional grid operator in August 2019 because two of its four members had recused themselves.<sup>101</sup> Commissions can take some steps to protect decisionmaking authority in the event of a loss of quorum by redefining quorum rules or delegating particular decisions to staff, but these authorities are limited.<sup>102</sup>

The Privacy and Civil Liberties Oversight Board (PCLOB) is another example of an agency that has been disabled by Presidents failing to nominate appointees. The independent agency — established in 2004 by the 9/11 Commission to help ensure that the executive branch's coun-

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<sup>95</sup> 52 U.S.C. § 30106(c); *see also* CONG. RSCH. SERV., R45160, FEDERAL ELECTION COMMISSION: MEMBERSHIP AND POLICYMAKING QUORUM, IN BRIEF 7 (2020).

<sup>96</sup> 42 U.S.C. § 7171(e).

<sup>97</sup> The SEC amended its quorum requirements by regulation in the 1990s to allow fewer than three members to constitute a quorum if there are fewer than three members in office. 17 C.F.R. § 200.41 (2019).

<sup>98</sup> Devin Henry, *Energy Commission Swears in New Members, Regains Quorum*, THE HILL (Aug. 10, 2017, 12:10 PM), <https://thehill.com/policy/energy-environment/346048-ferc-swears-in-new-members-regains-quorum> [<https://perma.cc/RX4M-C7TK>].

<sup>99</sup> *See* Kate Ackley, *FEC Set to Lose Its Quorum Again*, ROLL CALL (June 26, 2020, 3:31 PM), <https://www.rollcall.com/2020/06/26/ferc-set-to-lose-its-quorum-again> [<https://perma.cc/32YK-PVXQ>]; Dave Levinthal, *Prepare to Be Shocked! Trump's One Weird Trick to Avoid a Campaign Investigation.*, CTR. FOR PUB. INTEGRITY (Jan. 13, 2020), <https://publicintegrity.org/politics/trump-ferc-campaign-election-quorum-pascrell> [<https://perma.cc/TNK6-3ZBQ>].

<sup>100</sup> Ackley, *supra* note 99.

<sup>101</sup> Rod Kuckro, *Lack of FERC Quorum Prompts Market Changes*, E&E NEWS (Aug. 7, 2019), <https://www.eenews.net/stories/1060870495> [<https://perma.cc/L89Z-NPDS>].

<sup>102</sup> *See* Ryan J. Levan, Note, *Do We Have a Quorum?: Anticipating Agency Vacancies and the Prospect for Judicial Remedy*, 48 COLUM. J.L. & SOC. PROBS. 181, 219–20 (2015).

terterrorism efforts consider individual rights — reviews national security legislation, regulations, and policy; advises the executive branch; and compels agencies to produce documents and undergo investigation.<sup>103</sup> President Obama took nearly two years to name nominees, despite the statutory requirement that the President appoint members in a timely manner.<sup>104</sup> The PCLOB did not begin work until August 2012 and became fully operational only the following May when a Chair was confirmed.<sup>105</sup>

PCLOB's operational status was short lived; the Chair unexpectedly resigned in 2016, and three part-time members resigned.<sup>106</sup> The PCLOB President Trump inherited had only one member by March 2017, far short of the full-time Chair and four additional members required by the Agency's enabling statute.<sup>107</sup> Without the statutory quorum of three members, the PCLOB could not initiate new investigations, offer formal advice to the intelligence community, submit reports to Congress, or hold public meetings.<sup>108</sup> Since even public reports require majority approval to be released, the PCLOB could not release information from concluded investigations, such as the long-awaited study of surveillance and intelligence powers authorized by the Reagan-era Executive Order 12,333.<sup>109</sup> That report was not released until April 2021 — six years after the study began.<sup>110</sup> Additionally, PCLOB was

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<sup>103</sup> See 42 U.S.C. § 2000ee(c)–(d); David P. Fidler, *Is the Privacy and Civil Liberties Oversight Board Back in Business?*, COUNCIL ON FOREIGN RELS. BLOG (Sept. 11, 2017, 10:53 AM), <https://www.cfr.org/blog/privacy-and-civil-liberties-oversight-board-back-business> [<https://perma.cc/5MLU-VVFF>]; see also Declan McCullagh, *Obama Privacy Board Gets Members After Two Years*, CNET (Dec. 16, 2010, 3:57 PM), <https://www.cnet.com/tech/services-and-software/obama-privacy-board-gets-members-after-two-years> [<https://perma.cc/UQJ8-M6XL>]; Jay Stanley, *What Powers Does the Civil Liberties Oversight Board Have?*, ACLU (Nov. 4, 2013, 9:28 AM), <https://www.aclu.org/blog/national-security/privacy-and-surveillance/what-powers-does-civil-liberties-oversight-board> [<https://perma.cc/77F7-FT8U>].

<sup>104</sup> See Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 801, 121 Stat. 266, 357; Andrea Peterson, *Key Government Privacy Watchdog Muzzled During Surveillance Debate*, SLATE (June 26, 2017, 7:30 AM), <https://slate.com/technology/2017/06/trump-hasnt-appointed-anyone-to-a-privacy-oversight-board.html> [<https://perma.cc/3P93-3VHW>]; see also McCullagh, *supra* note 103.

<sup>105</sup> See Fidler, *supra* note 103.

<sup>106</sup> See *id.*; Jenna McLaughlin, *Top Privacy Watchdog Suddenly Resigns*, THE INTERCEPT (Mar. 29, 2016, 11:14 AM), <https://www.theintercept.com/2016/03/29/top-privacy-watchdog-suddenly-resigns> [<https://perma.cc/6547-JFYF>].

<sup>107</sup> See 42 U.S.C. § 2000ee(h)(1).

<sup>108</sup> Jenna McLaughlin, *The U.S. Government's Privacy Watchdog Is Basically Dead, Emails Reveal*, THE INTERCEPT (Mar. 3, 2017, 2:24 PM), <https://theintercept.com/2017/03/03/the-governments-privacy-watchdog-is-basically-dead-emails-reveal> [<https://perma.cc/D25V-JCEV>].

<sup>109</sup> Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981); see also Peterson, *supra* note 104.

<sup>110</sup> Jacob Schulz, *PCLOB Releases Public Report on Executive Order 12333*, LAWFARE (Apr. 5, 2021, 11:17 AM), <https://www.lawfareblog.com/pclob-releases-public-report-executive-order-12333> [<https://perma.cc/26F7-5XMW>].

unable to hire any new staff since only the Chair had hiring authority.<sup>111</sup>

President Trump's failure to fill PCLOB vacancies stymied the Agency's ability to contribute promptly to the surveillance debate and left it "essentially paralyzed."<sup>112</sup> The delay prevented timely release of the Executive Order 12,333 report, debilitated the Agency from serving as a watchdog on the country's counterterrorism operations, and frustrated privacy protections related to European and U.S. data.<sup>113</sup> President Trump did not nominate a chair until September 2017<sup>114</sup> or announce nominations for two part-time vacancies until August of the following year.<sup>115</sup> Intentionally opting not to staff the Agency may have done enduring damage, tarnishing the PCLOB's reputation as a "credible evaluator of key surveillance programs."<sup>116</sup>

Certainly, Presidents enjoy virtually unconstrained latitude under the Appointments Clause to nominate their preferred appointees, and the order and timing of those nominations, we recognize, must be managed by a busy White House. Yet persistent failures to nominate that in fact prevent an agency from doing the business assigned to it by statute do seem to thwart congressional design. So, while periodic and temporary staffing shortfalls seem to us both inevitable and relatively innocuous, intentionally failing to staff as a strategy of incapacitation is something altogether different.<sup>117</sup>

3. *Structural Changes to Staffing Mechanisms.* — Presidents can impede an agency's ability to hire or backfill staff by weakening the agencies responsible for overseeing the staffing process. With over 1,000 federal positions requiring nomination and confirmation and over two million full-time federal employees, Presidents cannot single-handedly manage federal employment. Instead, they rely on agencies for support.

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<sup>111</sup> Peterson, *supra* note 104.

<sup>112</sup> *Id.* (quoting Senator Ron Wyden, Democrat of Oregon).

<sup>113</sup> See Cameron F. Kerry, *It's Time for the Senate to Act on PCLOB Nominations*, LAWFARE (Aug. 27, 2018, 9:08 AM), <https://www.lawfareblog.com/its-time-senate-act-pclob-nominations> [<https://perma.cc/FNV7-W9FK>]. Democratic members of the House Permanent Select Committee on Intelligence implored President Trump to nominate candidates to fill the open seats. Press Release, U.S. House of Reps. Permanent Select Comm. on Intel., Intelligence Committee Democrats Send Letter to President Asking for Nomination of PCLOB Members (July 28, 2017), <https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=255> [<https://perma.cc/333Q-QTCJ>]. The European Commission called for the "swift appointment of . . . missing members," with the European Parliament also weighing in. Kerry, *supra*.

<sup>114</sup> See David Hoffman & Riccardo Masucci, *One PCLOB Nomination to Applaud and Three More to Urge*, LAWFARE (Sept. 14, 2017, 3:49 PM), <https://www.lawfareblog.com/one-pclob-nomination-applaud-and-three-more-urge> [<https://perma.cc/ATK5-TAFE>].

<sup>115</sup> See Kerry, *supra* note 113.

<sup>116</sup> *Id.* (quoting Adam Klein, Chairman nominee, PCLOB).

<sup>117</sup> To be clear, our argument applies regardless of how we might personally feel about the value of an agency's work. As long as Congress has created it and assigned it regulatory tasks, the President should not be able to prevent it from functioning through a wholesale failure to nominate.

The Presidential Personnel Office (PPO) sources potential nominees and conducts background diligence.<sup>118</sup> The Office of Personnel Management recruits, hires, and manages federal employees.<sup>119</sup> A third agency, the Merit Systems Protection Board (MSPB), hears employee appeals.<sup>120</sup> Weakening these agencies can therefore indirectly weaken staffing across government.

At the start of the Trump Administration, the PPO employed just thirty staff — less than one-third the level of prior administrations. In addition, most of the office's employees were inexperienced, again in contrast to earlier administrations.<sup>121</sup> While there may be alternative explanations for this understaffing — for example, that the incoming Administration did not believe it would win the presidential election — the possibility remains that destaffing was a conscious strategy. President Trump sought to eliminate the OPM entirely and scatter its employees among other agencies.<sup>122</sup> When this effort failed, the

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<sup>118</sup> The PPO recruits and vets candidates for thousands of federal government jobs, including those requiring Senate confirmation. Robert O'Harrow Jr. & Shawn Boburg, *Behind the Chaos: Office that Vets Trump Appointees Plagued by Inexperience*, WASH. POST (Mar. 30, 2018), [https://www.washingtonpost.com/investigations/behind-the-chaos-office-that-vets-trump-appointees-plagued-by-inexperience/2018/03/30/cde31a1a-28a3-11e8-ab19-06a445a08c94\\_story.html](https://www.washingtonpost.com/investigations/behind-the-chaos-office-that-vets-trump-appointees-plagued-by-inexperience/2018/03/30/cde31a1a-28a3-11e8-ab19-06a445a08c94_story.html) [<https://perma.cc/JY8J-X557>].

<sup>119</sup> *About*, U.S. OFF. OF PERS. MGMT., <https://www.opm.gov/about-us> [<https://perma.cc/X6SS-7UT6>].

<sup>120</sup> *About MSPB*, U.S. MERIT SYS. PROT. BD., <https://www.mspb.gov/About/about.htm> [<https://perma.cc/48A7-K29Y>].

<sup>121</sup> Professor James Pfiffner at George Mason University reports that, in the past, the PPO has been staffed by senior officials with relevant experience. O'Harrow & Boburg, *supra* note 118. In February 2020, the Administration hired a college senior to serve as the PPO's director of operations. Daniel Lippman & Meridith McGraw, *A New Senior Leader at the White House Personnel Office: A College Senior*, POLITICO (Feb. 25, 2020, 10:55 PM), <https://www.politico.com/news/2020/02/25/college-senior-white-house-personnel-office-117493> [<https://perma.cc/JT8Z-ZU7E>].

<sup>122</sup> Lisa Rein, *Trump Wants to Kill This Federal Agency. Democrats Blasted the Idea.*, WASH. POST (May 21, 2019), [https://www.washingtonpost.com/politics/trump-wants-to-kill-this-federal-agency-democrats-blasted-the-idea/2019/05/21/67f6b978-7b18-11e9-a5b3-34f3edf1351e\\_story.html](https://www.washingtonpost.com/politics/trump-wants-to-kill-this-federal-agency-democrats-blasted-the-idea/2019/05/21/67f6b978-7b18-11e9-a5b3-34f3edf1351e_story.html) [<https://perma.cc/6BMB-8R6J>]. Congress opposed the elimination of the Agency, which would have required legislation. This example demonstrates not only the occasional success of congressional backstop authority in checking structural deregulation but also the fact that Presidents stymied by Congress in their efforts to shrink the bureaucracy may turn to the alternative strategies laid out in this Part to achieve their goal.

Administration outsourced OPM's tasks to other agencies through interagency agreements,<sup>123</sup> and an acting head led the OPM for more than half of President Trump's term.<sup>124</sup>

Presidents can also hasten staff departures by weakening civil service protections. In 2019, the MSPB was left without a single member.<sup>125</sup> Before that, the Board had operated with one member, and therefore without a quorum, since January 2017.<sup>126</sup> President Trump did not nominate any new candidates to serve on the Board until 2018.<sup>127</sup> By the end of 2019, thousands of cases were pending before the Board.<sup>128</sup> Compounding the problem, the Trump Administration took the position that the Supreme Court's opinion in *Lucia v. SEC*<sup>129</sup> makes the decisions of the administrative judges who staff the Board reversible.<sup>130</sup> Because there are no Board members in place to cure any procedural defects in these judges' appointments, the cases they hear

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<sup>123</sup> See Adam Mazmanian, *What if Congress Doesn't Want to Move OPM?*, FED. COMPUT. WK. (May 15, 2019), <https://www.fcw.com/articles/2019/05/15/opm-reorg-congress-plans.aspx> [<https://perma.cc/NTA9-4GYU>] (citing the OPM's acting head Margaret Weichert's comments that if a legislative solution could not be found, OPM could enter into interagency agreements to outsource work to the General Services Administration and other agencies).

<sup>124</sup> See Jessie Bur, *Government Personnel Office Abruptly Loses Its Top Official*, FED. TIMES (Mar. 17, 2020), <https://www.federaltimes.com/management/leadership/2020/03/17/government-personnel-office-abruptly-loses-its-top-official> [<https://perma.cc/5WFN-2VMY>]. A report by the National Academy of Public Administration cited the absence of sustained leadership as an impediment to execution of OPM's mission. JANET HALE ET AL., NAT'L ACAD. OF PUB. ADMIN., ELEVATING HUMAN CAPITAL: REFRAMING THE U.S. OFFICE OF PERSONNEL MANAGEMENT'S LEADERSHIP IMPERATIVE 20 (2021), <https://s3.us-west-2.amazonaws.com/napa-2021/studies/united-states-office-of-personnel-management-independent-assessment/OPM-Final-Report-National-Academy-of-Public-Administration.pdf> [<https://perma.cc/8269-T42D>].

<sup>125</sup> Ben L. Erdreich & Steven L. Katz, Opinion, *The Federal Merit System Keeps Our Democracy Safe. Trump and the Senate Are Killing Its Guardian.*, WASH. POST (Feb. 12, 2019), [https://www.washingtonpost.com/opinions/the-federal-merit-system-keeps-our-democracy-safe-trump-and-the-senate-are-killing-its-guardian/2019/02/12/d1984726-2foe-11e9-8ad3-9a5b113ecd3c\\_story.html](https://www.washingtonpost.com/opinions/the-federal-merit-system-keeps-our-democracy-safe-trump-and-the-senate-are-killing-its-guardian/2019/02/12/d1984726-2foe-11e9-8ad3-9a5b113ecd3c_story.html) [<https://perma.cc/GKF4-5JMJ>]. President Trump had appointed the sole remaining member of the Board to a secondary role as acting general counsel to OPM in late 2018, a step some described as creating a conflict of interest between OPM and the Board, which reviews OPM rules. See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> Nicole Ogrysko, *Trump Names Long-Awaited Second Member to MSPB*, FED. NEWS NETWORK (Mar. 6, 2018, 6:21 PM), <https://federalnewsnetwork.com/all-news/2018/03/trump-names-long-awaited-second-member-to-mspb> [<https://perma.cc/EE5Y-Y9LW>].

<sup>128</sup> Nicole Ogrysko, *Lack of Quorum Hits 3-Year Mark at MSPB, with No Clear End in Sight*, FED. NEWS NETWORK (Jan. 24, 2020, 11:31 AM), <https://federalnewsnetwork.com/workforce/2020/01/lack-of-quorum-hits-3-year-mark-at-mspb-with-no-clear-end-in-sight> [<https://perma.cc/7F3Y-3ZAB>].

<sup>129</sup> 138 S. Ct. 2044 (2018).

<sup>130</sup> See Eric Katz, *New Trump Administration Strategy Leaves Fired Feds Seeking Recourse in Indefinite Purgatory*, GOV'T EXEC. (Sept. 2, 2020), <https://www.govexec.com/workforce/2020/09/new-trump-administration-strategy-leaves-fired-feds-seeking-recourse-indefinite-purgatory/168201> [<https://perma.cc/Z9SX-LHXW>]. In *Lucia*, the Court held that the SEC's administrative law judges (ALJs) were inferior officers subject to appointment by the President, the courts of law, or the heads of department. *Lucia*, 138 S. Ct. at 2049. Because they had

remain open to retrospective challenge. The decline of the MSPB will, at best, create insecurity among federal employees.<sup>131</sup> At worst, it will allow unlawful thinning of their ranks.

Manipulating agency staff is an appealing tool of structural deregulation because Presidents can do it quite informally, without much legal procedure, and outside of the normal and transparent budget process in which Congress sets agency funding levels. In some cases, these presidential maneuvers will attract public scrutiny, but not always. Weakening an agency's staff can be highly effective because it can impair the agency's ability to act across many policy domains simultaneously. And because it is harder to rebuild than to destroy agency capacity, these steps can be "sticky" and quite burdensome to reverse.

### B. Other Resources

Agencies require other forms of support beyond staffing, including office space, technology, and supplies. The General Services Administration (GSA), a little-known but powerful agency, is responsible for procurement and real estate for the federal government.<sup>132</sup> There have been some complaints about procurement policy in past administrations.<sup>133</sup> In theory, a President could try to starve agencies of these resources or create hurdles to procuring what they need.

Most important, however, is an agency's budget. Much of the budget process is highly transparent. The President proposes an annual budget, which Congress considers when appropriating agency funding. Yet even when Congress rejects the President's budget proposals, he can manipulate agency budgets outside of the normal appropriations process. Professor Eloise Pasachoff identifies several "levers" by which the President controls agency spending of allocated funds.<sup>134</sup> First, OMB can limit what portion of their appropriations agencies can spend by

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not been so appointed, their decisions could be overturned. *Id.* at 2055. The SEC subsequently cured the procedural defect by formally appointing all of their ALJs. *See In re: Pending Administrative Proceedings, Securities Act of 1933 Release No. 10,440, Securities Exchange Act of 1934 Release No. 82,178, Investment Advisers Act of 1940 Release No. 4816, Investment Company Act of 1940 Release No. 32,929, 2017 SEC LEXIS 3724 (Nov. 30, 2017).*

<sup>131</sup> *See Erdreich & Katz, supra note 125* ("If federal employees can't trust that they'll get jobs based on their qualifications or be able to do their work impartially, they may leave government, or even decline to pursue federal jobs in the first place.")

<sup>132</sup> U.S. GEN. SERVS. ADMIN., 2018 AGENCY FINAL REPORT 14-15 (2018), [https://www.gsa.gov/cdnstatic/2018-GSA\\_AFR-508\\_v2.pdf](https://www.gsa.gov/cdnstatic/2018-GSA_AFR-508_v2.pdf) [<https://perma.cc/M76F-GX2S>].

<sup>133</sup> *See Maria Ernita T. Joaquin, Agency Strategy, Strength, and Adaptation: Implementation of the Bush Administration's Competitive Sourcing Policy 174 (July 1, 2007) (Ph.D. dissertation, Northern Illinois University) (ProQuest).*

<sup>134</sup> Indeed, one of Pasachoff's recommendations is that the President exert greater control over the Resource Management Offices' activities through executive orders, "thereby claiming ownership of it," in order to enhance transparency about their operations. Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2193 (2016).

time period or by project.<sup>135</sup> OMB may attach conditions to spending on particular projects in “apportionment footnotes.”<sup>136</sup> Finally, OMB may also block requests by an agency to transfer appropriated funds between programs (which requires congressional approval).<sup>137</sup> These behind-the-scenes controls can be used to starve particular programs of funds appropriated by Congress.

Of course, once Congress appropriates money for an agency or particular agency programs, Presidents generally may not refuse outright to spend that money for the specified purpose. The Congressional Budget and Impoundment Control Act of 1974,<sup>138</sup> promulgated in the wake of perceived agency spending abuse by President Nixon, prohibits refusals to spend unless certain conditions are met.<sup>139</sup> Nixon was not the first President to impound a share of congressional appropriations, but he took the practice to new levels, refusing to spend a greater share of allocated funds than prior Presidents, and with the express aim of terminating programs he did not support and frustrating congressional policy goals with which he disagreed.<sup>140</sup>

While Congress has tried to curb such practices, Presidents continue to push the limits of their authority.<sup>141</sup> Where Congress has not limited appropriations with adequate specificity, for example, a President may

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<sup>135</sup> *Id.* at 2228. This limitation is consistent with the Antideficiency Act requirement that agencies spread out appropriated funds over time. See 31 U.S.C. § 1512(a).

<sup>136</sup> Pasachoff, *supra* note 134, at 2229. One example Pasachoff cites is requiring agencies to answer lengthy questionnaires before OMB releases quarterly apportionments to the agency. *Id.* at 2229 n.209 (citing SHELLEY LYNNE TOMKIN, *INSIDE OMB: POLITICS AND PROCESS IN THE PRESIDENT’S BUDGET OFFICE* 187 (1998)).

<sup>137</sup> *Id.* at 2231.

<sup>138</sup> Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 and 31 U.S.C.).

<sup>139</sup> *Id.* § 1012, 88 Stat. at 334 (allowing Presidents to defer spending until the end of a fiscal year provided that they submit a special deferral notice to Congress identifying the amount and duration of, and reasons for, the proposed deferral).

<sup>140</sup> See LOUIS FISHER, *PRESIDENTIAL SPENDING POWER 175-201* (2015) (discussing President Nixon’s impoundment tactics); *Nixon Impounds Pollution Funds: Withholds 3-Billion Allocated for Treatment of Waste—Cites Inflation Peril*, N.Y. TIMES, Jan. 11, 1974, at A1. President Nixon claimed that Presidents possess the constitutional authority not to spend congressional appropriations “when the spending of money would mean either increasing prices or increasing taxes for all the people.” See *Impoundment: Changes During the Nixon Administration*, LAW LIBR.: AM. L. & LEGAL INFO., <https://law.jrank.org/pages/7517/Impoundment-Changes-During-Nixon-Administration.html> [<https://perma.cc/3ED6-EPGN>].

<sup>141</sup> See *infra* section III.B, pp. 642-48.

have a plausible argument that such monies are fungible.<sup>142</sup> And enforcement of the Impoundment Control Act is difficult.<sup>143</sup>

Presidents may also exploit their discretion to transfer appropriations to preferred programs. Under the Constitution, “[n]o Money shall be Drawn from the Treasury, but in Consequence of Appropriations made by law.”<sup>144</sup> Again, however, Presidents can seek ways around this limitation. For example, the Trump Administration diverted billions of dollars from Defense Department programs in order to fund construction of a border wall between the United States and Mexico.<sup>145</sup> This action redirected funding from the Department of Defense’s Overseas Contingency Operations, from the Army’s budget for tactical and support vehicles, from the Navy’s combat aircraft and amphibious ships budgets, from the Air Force’s aircraft program, and from the National Guard’s reserve equipment funds.<sup>146</sup> The Ninth Circuit ruled the funding transfers unconstitutional, but a Supreme Court stay allowed the construction to proceed.<sup>147</sup> In another example, the Administration diverted close to \$10 million in funds from the Federal Emergency Management Agency (FEMA) to fund U.S. Immigration and Customs Enforcement (ICE) operations.<sup>148</sup> Major redirections of funds do not suffer from some of the same problems of transparency or accountability that accompany other forms of structural deregulation. Nevertheless,

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<sup>142</sup> See, e.g., Zachary Price, *Can President Trump Defund the WHO?*, AM. CONST. SOC’Y (June 1, 2020), <https://www.acslaw.org/expertforum/can-president-trump-defund-the-who> [<https://perma.cc/M36K-K3LP>] (arguing that, because Congress appropriated money in a lump sum for dues payments to international organizations, the Trump Administration could lawfully cease to pay World Health Organization dues).

<sup>143</sup> See Wm. Bradford Middlekauff, Note, *Twisting the President’s Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure*, 100 YALE L.J. 209, 216–17, 220, 223 (1990).

<sup>144</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>145</sup> The Administration was required to notify Congress of this diversion, which it did, observing that the diversion was for “higher priority items” related to “Counter-Drug Activity” and was “necessary in the national interest.” DEP’T OF DEF., NO. FY 20-01 RA, SUPPORT FOR DHS COUNTER-DRUG ACTIVITY REPROGRAMMING ACTION (Feb. 13, 2020), <https://www.documentcloud.org/documents/6776019-FY-20-01-RA-Support-for-DHS-Counter-Drug-Activity.html> [<https://perma.cc/2RCW-J8B8>].

<sup>146</sup> *Id.* To do so, the President declared a national emergency at the southern border and argued that this justified use of the funds to block drug smuggling corridors. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019); *Fact Sheets: President Donald J. Trump Stands by His Declaration of a National Emergency on Our Southern Border*, THE WHITE HOUSE (Mar. 15, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-stands-declaration-national-emergency-southern-border> [<https://perma.cc/ANA3-H2U2>].

<sup>147</sup> See *Trump v. Sierra Club*, 140 S. Ct. 2620, 2620 (2020).

<sup>148</sup> Isaac Stanley-Becker, *Trump Administration Diverted Nearly \$10 Million from FEMA to ICE Detention Program, According to DHS Document*, WASH. POST (Sept. 12, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/09/12/document-shows-the-trump-administration-diverted-nearly-10-million-from-fema-to-ice-detention-program> [<https://perma.cc/B2DK-6C8E>].

redirection can be used to starve programs of resources in ways that are time-consuming to reverse.

There are, in sum, several ways a President can at least temporarily deprive agencies of appropriated funds, divert those funds, and create obstacles to agencies accessing resources allocated to them. These approaches may be more or less transparent, and some may even be subject to judicial review. When taken together, however, they demonstrate how much discretion the President retains over agency budgets. That discretion can be used not only to bolster preferred agencies and programs but also to deny disfavored agencies and programs the funds necessary to accomplish their delegated tasks. Inadequate budgets can operate in tandem with other techniques of structural deregulation, undermining agency morale, for example, or weakening agency capacity to provide important services.<sup>149</sup>

Presidents and their political appointees can also divert existing agency resources from core responsibilities by creating busywork to occupy agency staff. This is an even subtler form of structural deregulation, one that is hard to track and virtually impossible to challenge. This “overtasking” can sap an agency’s limited resources. Professor Cass Sunstein has argued that the federal government should audit and mitigate what he calls “sludge” — paperwork and other burdens that can reduce the public’s access to important government goods such as licenses and benefits.<sup>150</sup> But the government is burdened with “sludge” too.

Agencies must comply with a wide variety of statutory paperwork requirements, including, for example, responding to requests for information under the Freedom of Information Act.<sup>151</sup> They must also produce reports, analysis, and testimony in response to congressional oversight requests. And they routinely generate information for various White House offices — including Legislative Affairs, the National Economic Council, the Press Office, and OMB, among others — as needed, to support the administration’s pursuit of its legislative and regulatory agenda, and to explain and defend their policy actions.<sup>152</sup> But

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<sup>149</sup> See Jory Heckman, *Ahead of Filing Season, Decade of IRS Budget Cuts “Taking a Toll” on Workforce Morale*, FED. NEWS NETWORK (Jan. 24, 2020, 1:21 PM), <https://www.federalnewsnetwork.com/workforce/2020/01/ahead-of-filing-season-decade-of-irs-budget-cuts-taking-a-toll-on-workforce-morale> [<https://perma.cc/NU58-R6XY>].

<sup>150</sup> See Cass R. Sunstein, *Sludge and Ordeals*, 16 DUKE L.J. 1843, 1847 (2019).

<sup>151</sup> See, e.g., David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1124 (2017) (noting that FOIA imposes “diversion costs” in that it distracts employees from focusing on an agency’s substantive mission).

<sup>152</sup> See, e.g., 29 U.S.C. § 710(a) (requiring the Commissioner of the Rehabilitation Services Administration to submit reports to the President); *id.* § 781(a)(3), (8), (b)(1)–(2) (outlining the duties of the National Council on Disability to advise and report to the President); H.R. 3126, 111th Cong. § 117(a) (2009) (requiring the Consumer Financial Protection Agency to prepare and submit reports to the Congress). Agencies must also furnish their plans for both short- and long-term regulatory

on top of these routine requirements, Presidents and their appointees can heap additional burdens on agencies that can overwhelm them and distract them from legitimate regulatory work.

First, moving offices and reassigning personnel, in addition to potentially inducing resignations of key staff, as discussed above, also creates busywork for remaining agency staff. Interfering with agency budgets (also mentioned above) likewise consumes scarce agency resources, requiring agency officials to spend time protesting to OMB, other senior White House officials, or members of Congress, to have their funds restored.

In addition, the White House can use centralized regulatory oversight to impose substantial analytic burdens on agencies that are not required by their statutes, and which sometimes appear to conflict with them.<sup>153</sup> White House review of agency regulatory proposals under Executive Order 12,866 and related executive orders can involve repeated demands for additional analysis to support an agency's already-detailed regulatory impact analysis, in what can feel to agency officials like an endless loop of information requests.<sup>154</sup> Likewise, the requirement that agencies retrospectively review their old rules to evaluate their continued relevance and effectiveness, while sensible-sounding on its face, in practice can distract agencies from more immediate priorities, including statutory and court-imposed deadlines.<sup>155</sup> These burdens can create significant additional work for agencies, with only questionable incremental value.

There is a robust and longstanding debate about the practical and political value of such regulatory review requirements, and it can be difficult to distinguish between instances when they exemplify "good governance" and when they may cross the line into tools of delay and obstruction. Yet the voluminous literature on the regulatory review process, which covers both Democratic and Republican administrations,

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actions to the Office of Information and Regulatory Affairs, which annually publishes a Unified Agenda of Regulatory and Deregulatory Actions, which lists the planned actions by agency. *See About the Unified Agenda*, OFF. OF INFO. & REGUL. AFFS., [https://www.reginfo.gov/public/jsp/eAgenda/UA\\_About.myjsp](https://www.reginfo.gov/public/jsp/eAgenda/UA_About.myjsp) [<https://perma.cc/D5PM-Q998>].

<sup>153</sup> For example, under Executive Order 12,866, the EPA must produce a cost-benefit analysis of Clean Air Act provisions that the Supreme Court has held prohibit consideration of cost. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001).

<sup>154</sup> *See, e.g.*, Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV'T L. REV. 325, 340, 359, 361 (2014).

<sup>155</sup> *See, e.g.*, Press Release, Delaney Parrish, Ctr. for Effective Gov't, Federal Agencies Release Retrospective Reviews: Preliminary Plans Appear Reasonable, But Proof Will Be Final Product (May 26, 2011), <https://www.foreffectivegov.org/node/11683> [<http://perma.cc/T3Z2-ZV8R>] ("[T]he more agencies look back the less they will be able to look forward.")

makes clear that the line can be crossed.<sup>156</sup> In the hands of a determined President, centralized review undoubtedly could be used to stymie agency action to a sufficient extent that we would consider it evidence of structural deregulation.

A final example of busywork consists of ministerial tasks that appear to serve little purpose other than chewing up agency time. To offer one example, during the Trump Administration, Acting Director Mick Mulvaney required a new name and seal for the Consumer Financial Protection Bureau; the Bureau's new name was to be the "Bureau for Consumer Financial Protection."<sup>157</sup> The Agency already had spent tens of millions of dollars promoting its previous acronym.<sup>158</sup> Nevertheless, Acting Director Mulvaney insisted upon the change and tasked about a dozen staffers with serving on a "Name Correction Working Group."<sup>159</sup> We are not suggesting that an agency name change is always busywork; when the General Accounting Office became the Government Accountability Office (GAO), there was a rationale, which was to align the name of the Agency with the full set of professional tasks it performs, which go beyond accounting — and in any event, Congress ordered that change.<sup>160</sup> But Acting Director Mulvaney's proffered reason for simply

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<sup>156</sup> Compare Heinzerling, *supra* note 154, at 325–27 (criticizing the Office of Information and Regulatory Affairs (OIRA) for stalling EPA policymaking), with Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013) (defending OIRA). See also Christina Reichert, *Debate over OIRA's Virtues and Vices Continues*, REGUL. REV. (June 26, 2013), <https://www.theregview.org/2013/06/26/26-reichert-oira-virtues-vices> [<https://perma.cc/9Z7Y-8WTR>] (summarizing the larger debate).

<sup>157</sup> See O'Harrow et al., *supra* note 58.

<sup>158</sup> *Id.* One report projected that the name change could cost the Agency up to \$19 million. Sylvan Lane, *Consumer Bureau Name Change Could Cost Firms \$300 Million*, THE HILL (Dec. 3, 2018, 4:44 PM), <https://thehill.com/policy/finance/419527-exclusive-consumer-bureau-analysis-says-name-change-could-cost-firms-300> [<https://perma.cc/58HY-JSML>].

<sup>159</sup> O'Harrow et al., *supra* note 58.

<sup>160</sup> See GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811 (codified as amended in scattered sections of the U.S. Code); *Government Accountability Office: What's in a Name?*, WATCHBLOG (Apr. 4, 2014), <https://www.gao.gov/blog/2014/04/04/government-accountability-office-whats-in-a-name> [<https://perma.cc/47AK-WBHR>] (explaining the motivation behind the name change). Similarly, early in his presidency, Joe Biden signed an executive order establishing his climate change and environmental protection policies broadly, which, among other things, directed the Attorney General to consider changing the name of its existing Environment and Natural Resources Division to the Environmental Justice and Natural Resources Division. Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7631 (Jan. 27, 2021); see also Ellen M. Gilmer, *Biden Bolsters DOJ Focus on Environmental Justice, Climate (3)*, BLOOMBERG L. (Jan. 27, 2021, 3:53 PM), <https://www.news.bloomberglaw.com/environment-and-energy/biden-bolsters-doj-focus-on-environmental-justice-climate> [<https://perma.cc/6XQU-F7J3>] (describing the executive order). The purpose of the request, as the executive order made clear, was to signal the importance of environmental justice to the Administration, which had pledged to prioritize enforcing environmental protection laws in minority communities that (as has been empirically shown) have suffered disproportionate environmental harms. The same executive order also directed the Attorney General to consider adding an office "to coordinate environmental justice activities among Department of

reordering the words in the CFPB's name — aligning the Bureau's name more closely with the one used in its authorizing legislation — strikes us as more suspect since the statute, in fact, uses both names.<sup>161</sup>

Officials at the CFPB during the Trump Administration also complained about being “bogged down with what they considered make-work” more broadly, including being directed to author detailed memos to justify their cases and programs, which took hundreds of hours to complete.<sup>162</sup> Naturally, some work of this kind is unavoidable in any bureaucracy — as anyone who has worked in an agency will attest. New administrations are entitled to ask agency staff for explanatory memos, certainly. Yet there is a point at which such exercises, on any fair measure, are overkill, and serve no other purpose than chewing up time that could otherwise be devoted to statutory tasks. We acknowledge that this determination is something one can assess only by taking the full context into account, but it ought to be possible to do so. Such efforts to bog agencies down may occasionally come to light, as with the CFPB name change incident, but many other examples might evade public scrutiny. And while assigning busywork may be relatively easy for an incoming President to stop doing, the lost time cannot be recouped.

### C. Agency Expertise

A key premise of our argument, as noted above, is that some questions assigned by Congress to administrative agencies require expertise and technocratic knowledge, which nonexpert political appointees typically do not possess. While we recognize that most agency decisions are the product of policy preference as well as expertise, the fact remains that agencies must make expert judgments of various kinds in order to execute statutory commands. Agencies simply cannot set air pollution limits “requisite to protect the public health,” for instance, without the support of epidemiologists;<sup>163</sup> regulate energy markets to ensure rates are “just and reasonable” without detailed economic analyses;<sup>164</sup> or approve new drugs to ensure they are “safe and effective” without evaluating data from clinical trials.<sup>165</sup> Moreover, established precedent

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Justice components and United States Attorneys' Offices nationwide,” and established an inter-agency working group on environmental justice and a White House advisory group on environmental justice. See Exec. Order No. 14,008, 86 Fed. Reg. at 7629–31.

<sup>161</sup> See O'Harrow et al., *supra* note 58.

<sup>162</sup> *Id.*

<sup>163</sup> See 42 U.S.C. § 7409(b)(1).

<sup>164</sup> See 16 U.S.C. § 824d(a).

<sup>165</sup> See 21 U.S.C. § 393(b)(2)(B). While critics of delegation may bemoan Congress's unwillingness to set numerical standards itself in such cases, delegations both broad and narrow are a fact of modern governance and one we do not contest here.

requires that agencies conform their actions to available evidence.<sup>166</sup> Statutes often explicitly require agencies to perform specific analyses or assessments that assume the availability of relevant expertise.<sup>167</sup>

As discussed above, manipulating agency staffing levels is an important tool of presidential control. So too are steps a President can take to undermine the agency expertise that is foundational to the modern regulatory enterprise.<sup>168</sup> A President is entitled to disagree with experts about how to weigh “incommensurables under conditions of uncertainty,”<sup>169</sup> and certainly may introduce policy considerations into regulatory decisionmaking where a statute so allows,<sup>170</sup> but it is fundamentally different to disable the agency’s capacity to reduce uncertainty and calibrate the relevant tradeoffs in its assigned domain, especially when the agency’s authorizing statute contemplates that the agency will develop and bring to bear scientific and technical expertise.<sup>171</sup>

Presidents can undermine expertise by reducing the absolute numbers of expert staff below levels necessary to perform the agency’s functions, interfering with expert staff’s ability to collect and use relevant information, sidelining experts in the agency decisionmaking process, and making it difficult for the agency to access external expertise.

Perhaps the most prominent example of how Presidents can undermine agency capacity by eroding expertise is their treatment of science in agencies that rely heavily on scientific data to develop the foundation for their rules or policy actions. Marginalizing agency science can take several forms. First, the staffing cuts described above can be targeted to eliminate certain scientific expertise. Such targeting appears to have

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<sup>166</sup> Cf. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009) (“It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. . . . It is something else to insist upon obtaining the unobtainable.”). Presidents should not be able to convert testable propositions into untestable ones simply by draining agency resources.

<sup>167</sup> See, e.g., 33 U.S.C. § 1363(a)–(b) (creating the Water Pollution Control Advisory Board to help implement the Federal Water Pollution Control Act and provide the Administrator with advice and consultation); 42 U.S.C. § 4332 (establishing the interagency decisionmaking and review process for environmental impact assessments under the National Environmental Policy Act); *id.* § 7409(d)(2)(A) (establishing an independent scientific review committee under the Clean Air Act to review and revise national ambient air quality standards).

<sup>168</sup> Agency staff is commonly thought to fall into two categories: political appointees on the one hand and career staff on the other. But the latter category especially is diverse. As Professors Elizabeth Magill and Adrian Vermeule put it: “Agencies [a]re a ‘they,’ not an ‘it.’” Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 *YALE L.J.* 1032, 1036 (2011) (capitalization omitted).

<sup>169</sup> *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2571 (2019) (noting that while the Secretary of Commerce was entitled to weigh “incommensurables under conditions of uncertainty,” he was still “required to consider the evidence”).

<sup>170</sup> See *Sierra Club v. Costle*, 657 F.2d 298, 330 (D.C. Cir. 1981).

<sup>171</sup> See, e.g., 16 U.S.C. § 1533(b)(1)(A) (requiring the Secretaries of Commerce and Interior to make endangered species listing decisions “solely on the basis of the best scientific and commercial data available”).

happened at the EPA, where 700 scientists left the Agency between January 2017 and January 2020, and only 350 replacements were hired in the same time period.<sup>172</sup> In another example of scientific drain, the Trump Administration eliminated most of the staff at the Centers for Disease Control and Prevention (CDC) who were working on health security in China.<sup>173</sup> Professors Thomas McGarity and Wendy Wagner have called attention to the manipulation of agency science as an aid to substantive deregulation, meaning that it plays a role in weakening particular rules.<sup>174</sup> Many of the same techniques they discuss, including reassigning agency personnel, also contribute to structural deregulation, because of their potentially disabling effect on agency capacity over the longer term.<sup>175</sup>

Presidents can shift resources away from supporting agency expertise to other things. For example, the Trump Administration diverted resources from science-based programs within the CDC to security and disaster-response initiatives.<sup>176</sup> They can also diminish resources outright. For example, the Administration directed all agencies to cut the number of their advisory committees, which provide expert advice to regulators, by one-third — a fairly arbitrary proportion lacking an adequate rationale.<sup>177</sup> In addition, the EPA issued a rule barring membership on expert advisory committees for scientists who had received an agency grant.<sup>178</sup> Although facially neutral, this move had the effect of limiting advisory committee membership for academic scientists with relevant subject matter expertise (many of whom at one time or another received an agency grant) while leaving industry membership unaffected.<sup>179</sup>

Administration officials can also undermine expertise by dismissing, ignoring, or overriding expert views without sufficient process or explanation. The Trump Administration removed climate change resources from agency websites and suppressed climate-related research.<sup>180</sup> President Trump himself dismissed the National Climate Assessment

<sup>172</sup> Gowen et al., *supra* note 63.

<sup>173</sup> Christopher Sellers et al., *An Embattled Landscape Series, Part 2a: Coronavirus and the Three-Year Trump Quest to Slash Science at the CDC*, ENV'T DATA & GOVERNANCE INITIATIVE (Mar. 23, 2020), <https://envirodatagov.org/an-embattled-landscape-series-part-2a-coronavirus-and-the-three-year-trump-quest-to-slash-science-at-the-cdc> [<https://perma.cc/AX5L-6H63>].

<sup>174</sup> See Thomas O. McGarity & Wendy E. Wagner, *Deregulation Using Stealth “Science” Strategies*, 68 DUKE L.J. 1719, 1722 (2019).

<sup>175</sup> See *id.* at 1747–56.

<sup>176</sup> Sellers et al., *supra* note 173.

<sup>177</sup> Exec. Order No. 13,875, § 1(b), 84 Fed. Reg. 28,711, 28,711 (June 19, 2019).

<sup>178</sup> See *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 638 (D.C. Cir. 2020).

<sup>179</sup> See *id.* at 640–41.

<sup>180</sup> See Press Release, Rep. Don Beyer, Safe Climate Caucus Members Urge Trump to Halt “Systematic Effort” to Reduce Public Access to Climate Change Resources (Feb. 28, 2018), <https://beyer.house.gov/news/documentsingle.aspx?documentid=768> [<https://perma.cc/CWT4-FN6Q>].

produced by thirteen of his executive agencies, declaring, “I don’t believe it.”<sup>181</sup> He later removed the scientist in charge of overseeing the Assessment, the executive director of the Global Change Research Program, and replaced him with someone known as a climate change skeptic.<sup>182</sup> One EPA scientist chose to retire after an Agency spokesperson publicly attacked a study the Agency had funded on the long-term effects of exposure to soot and smog.<sup>183</sup> Another long-serving EPA scientist put it this way: “Since Trump was elected, the palpable sense is just that they don’t like what we do. That’s really the bottom line.”<sup>184</sup>

This treatment was not limited to the EPA. Scientists and experts at the Department of Health and Human Services (HHS) and the CDC faced similar challenges. During the COVID-19 pandemic, politically appointed HHS communications staff sought to review, revise, and dilute the CDC’s weekly scientific reports.<sup>185</sup> HHS Assistant Secretary Michael Caputo’s communications team delayed the publication of various CDC reports related to the pandemic, including one addressing the use and effectiveness of hydroxychloroquine, which had become controversial after the President touted its benefits without evidence.<sup>186</sup> It also came to light that a CDC report on testing guidance had been released to the public over the serious objection of agency scientists.<sup>187</sup>

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<sup>181</sup> Emily Holden, *Trump on Own Administration’s Climate Report: “I Don’t Believe It”*, THE GUARDIAN (Nov. 26, 2018, 4:13 PM), <https://www.theguardian.com/us-news/2018/nov/26/trump-national-climate-assessment-dont-believe> [<https://perma.cc/T8TY-RKWF>].

<sup>182</sup> Christopher Flavelle et al., *Trump Administration Removes Scientist in Charge of Assessing Climate*, N.Y. TIMES (Nov. 9, 2020), <https://www.nytimes.com/2020/11/09/climate/michael-kuperberg-climate-assessment.html> [<https://perma.cc/G7B5-ZE4K>]; Andrew Freedman et al., *Trump Administration Official Who Questions Global Warming Will Run Key Climate Program*, WASH. POST (Nov. 11, 2020, 8:32 PM), <https://www.washingtonpost.com/weather/2020/11/11/climate-science-office-david-legates> [<https://perma.cc/XSW9-MPPQ>]. Meddling with agency science and trying to control the public remarks of agency scientists is not limited to the Trump Administration. The George W. Bush White House also reportedly interfered with EPA scientific reports on climate change, and the President himself expressed disdain for government research on the topic. See Jody Freeman, *The Environmental Protection Agency’s Role in U.S. Climate Policy — A Fifty Year Appraisal*, 31 DUKE ENV’T L. & POL’Y F. (forthcoming 2021) (manuscript at 41–42) (on file with the Harvard Law School Library). The George H.W. Bush White House was also accused of muzzling scientists. See *id.* (manuscript at 23).

<sup>183</sup> Gowen et al., *supra* note 63.

<sup>184</sup> Cohen, *supra* note 50.

<sup>185</sup> See Dan Diamond, *Trump Officials Interfered with CDC Reports on Covid-19*, POLITICO (Sept. 12, 2020, 11:11 AM), <https://www.politico.com/news/2020/09/11/exclusive-trump-officials-interfered-with-cdc-reports-on-covid-19-412809> [<https://perma.cc/5S33-MQ5E>].

<sup>186</sup> See *id.*; see also Annie Karni & Katie Thomas, *Trump Says He’s Taking Hydroxychloroquine, Prompting Warnings from Health Experts*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/us/politics/trump-hydroxychloroquine-covid-coronavirus.html> [<https://perma.cc/K2DL-QLK9>].

<sup>187</sup> Apoorva Mandavilli, *C.D.C. Testing Guidance Was Published Against Scientists’ Objections*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/09/17/health/coronavirus-testing-cdc.html> [<https://perma.cc/D37D-XR2N>].

Presidents might also interfere with agency expertise by diminishing an agency's capacity to collect or produce essential information. For example, a rule finalized in January 2021 prevents the EPA from relying on scientific studies unless the data underlying those studies is publicly available.<sup>188</sup> The rule made no exception for confidential medical records, on which many key epidemiological studies supporting the EPA's work rely.<sup>189</sup> An administration might also bar agencies from collecting information that they require to enforce statutory mandates. For example, in 2017, the OMB blocked an Equal Employment Opportunity Commission (EEOC) effort to collect employer data on race, ethnicity, and gender in order to identify potential discrimination.<sup>190</sup> The Trump Administration also restricted agency efforts to communicate essential information in peer-reviewed publications: in July 2018, political appointees at the USDA ordered its research agencies, including the Economic Research Service, to include a disclaimer on USDA scientist peer-reviewed research stating that all findings were "preliminary" and "should not be construed to represent any agency determination or policy."<sup>191</sup> In 2019, after serious criticism from scientists and academics, the USDA rescinded this direction.<sup>192</sup>

The Trump Administration's widespread suppression of, and interference with, agency scientific work is perhaps most starkly reflected in a 2018 survey from the EPA Office of Inspector General, in which almost 400 EPA science employees reported that they had experienced "potential violations of the EPA's scientific integrity policy."<sup>193</sup> More than 250 employees were concerned that a "manager or senior leader . . . [had] possibly interfered with science," and 175 employees

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<sup>188</sup> Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Fed. Reg. 469, 469–70 (Jan. 6, 2021) (to be codified at 40 C.F.R. pt. 30).

<sup>189</sup> Lisa Friedman, *E.P.A. to Limit Science Used to Write Public Health Rules*, N.Y. TIMES (Nov. 11, 2019), <https://www.nytimes.com/2019/11/11/climate/epa-science-trump.html> [<https://perma.cc/7WUM-HQKD>].

<sup>190</sup> *Trump Administration Stops Collection of Data that Could Reveal Pay Discrimination Practices*, UNION OF CONCERNED SCIENTISTS (Mar. 6, 2020), <https://www.ucsusa.org/resources/attacks-on-science/administration-stops-collecting-data-could-reveal-pay-discrimination> [<https://perma.cc/5P2C-V88J>].

<sup>191</sup> Ben Guarino, *USDA Orders Scientists to Say Published Research Is "Preliminary"*, WASH. POST (Apr. 19, 2019), <https://www.washingtonpost.com/science/2019/04/19/usda-orders-scientists-say-published-research-is-preliminary> [<https://perma.cc/KU3A-X5R4>].

<sup>192</sup> Ben Guarino, *After Outcry, USDA Will No Longer Require Scientists to Label Research "Preliminary"*, WASH. POST (May 10, 2019), <https://www.washingtonpost.com/science/2019/05/10/after-outcry-usda-will-no-longer-require-scientists-label-research-preliminary> [<https://perma.cc/3DSP-83F6>].

<sup>193</sup> Rachel Frazin, *EPA Employees Allege Leadership Interference with Science in Watchdog Survey*, THE HILL (May 20, 2020, 3:59 PM), <https://thehill.com/policy/energy-environment/498808-epa-employees-allege-leadership-interference-with-science-in> [<https://perma.cc/WU43-FW5A>].

said they had experienced “suppression or delay of release of [a] scientific report or information.”<sup>194</sup>

Presidents know they can weaken agencies by constraining their ability to build the analytic, economic, and technical foundation necessary for policymaking. Yet it is true that a President might reject expertise for reasons other than wanting to dismantle the administrative state. There is ample evidence, for example, that President Trump eschewed expertise for ideological or temperamental reasons, even when embracing it might have helped him to accomplish his substantive deregulatory agenda.<sup>195</sup> Certainly rules or policies adopted without sufficient expert foundation are more likely to falter upon judicial review. However, even if sapping agency expertise stymies particular efforts to repeal rules in the short term, it will have a pronounced antiregulatory effect in the longer term by undermining the agency’s capacity to promulgate new regulations and fulfill other statutory tasks.

#### D. Reputation

When a President or other high-ranking executive officials persistently charge an agency with incompetence, bias, or worse, it can have a corrosive effect. The ensuing harm to reputation can make it incrementally more difficult for the agency to secure funding from Congress, influence regulated entities, and even prevail in the courts.<sup>196</sup> An agency’s reputation is an intangible asset, but one that scholars have identified as vital to the agency’s success. Professors Daniel Carpenter and George Krause define organizational reputation “as a set of beliefs about an organization’s capacities, intentions, history, and mission that

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<sup>194</sup> *Id.*

<sup>195</sup> See, e.g., Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019), [https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffbo56-33a8-11e9-af5b-b51b7ff322e9\\_story.html](https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffbo56-33a8-11e9-af5b-b51b7ff322e9_story.html) [https://perma.cc/MSL8-SE86] (noting that President Trump’s losing streak for legal challenges to his agenda suggests a “remarkable portrait of a government rushing to implement far-reaching changes in policy without regard for long-standing rules against arbitrary and capricious behavior”); Bethany A. Davis Noll & Christine Pries, Opinion, *The Administration’s Record in the Courts*, THE HILL (Nov. 3, 2020, 11:30 AM), <https://thehill.com/opinion/white-house/524016-tired-of-winning-trumps-record-in-the-courts> [https://perma.cc/LY2T-Z3JD] (noting that President Trump’s overall win rate for legal challenges to his Administration’s actions was seventeen percent, compared to past administrations’ roughly seventy percent win rate, in areas such as immigration, environment, housing, and public assistance); David J. Hayes, “Tired of Winning” Yet?, STATE ENERGY & ENV’T IMPACT CTR., NYU SCH. OF L. (July 23, 2020), <https://www.law.nyu.edu/centers/state-impact/publications/center-commentary/tired-of-winning-yet> [https://perma.cc/F2SU-8RCL] (describing two major losses the Trump Administration suffered in its attempt to roll back regulations in the energy and climate space).

<sup>196</sup> See *supra* note 28 and accompanying text.

are embedded in a network of multiple audiences.”<sup>197</sup> These audiences — including Congress, other agencies, regulated entities, and the public more broadly — use reputation as an antidote to cognitive limitations that prevent the efficient processing of large amounts of information about the agency.<sup>198</sup> Reputation is thus a heuristic, or shortcut, to evaluate agency behavior.<sup>199</sup>

A positive reputation allows agencies to enjoy autonomy and a “protective shield” in the face of opposition.<sup>200</sup> Agencies with good reputations are better able to set policy.<sup>201</sup> They are also less likely to suffer constraints on their appropriations.<sup>202</sup> Each of these benefits facilitates agency implementation of statutory policy. While there continues to be lively debate between those who favor strong bureaucratic autonomy and those who prefer legislative dominance, some autonomy and credibility is essential for agencies to interact effectively with the public. As Professor Carpenter observes in his exhaustive study of the FDA’s reputation and power over time: “Reputations can intimidate or embolden the subjects of government and, in so doing, reputations can complicate an agency’s tasks or render them facile.”<sup>203</sup> More broadly, he argues, public confidence in regulatory agencies is a basic precondition for the success of the regulatory project.<sup>204</sup>

Consider the erosion of the CDC’s reputation during the initial stages of the COVID-19 pandemic. Alleged politicization of the Agency’s scientific work has produced a significant “loss of institutional credibility.”<sup>205</sup> President Trump at one point described the Agency’s head as

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<sup>197</sup> Daniel P. Carpenter & George A. Krause, *Reputation and Public Administration*, 72 PUB. ADMIN. REV. 26, 26 (2012) (citing DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 33 (2010)).

<sup>198</sup> *Id.* at 31.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 26; see also DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY 4 (2001).

<sup>201</sup> See Carpenter & Krause, *supra* note 197, at 30 (arguing that the Department of Agriculture and Post Office from the 1860s to the 1920s had strong enough reputations to develop autonomy and “sway the wishes of executive officials on particular matters of policy and to secure deference from these elected officials,” while the Reclamation Service of the Department of Interior did not).

<sup>202</sup> See *id.* (citing Jason A. MacDonald & William W. Franko, Jr., *Bureaucratic Capacity and Bureaucratic Discretion: Does Congress Tie Policy Authority to Performance?*, 35 AM. POL. RSCH. 790, 790–807 (2007), for the proposition that poor reputation as measured by grades in the Federal Performance Project produced more appropriations riders).

<sup>203</sup> CARPENTER, *supra* note 197, at 33 (“Audiences such as firms and regulated individuals can convey power by obeying the regulator’s rules and suggestions, or contest power by challenging those precepts.”).

<sup>204</sup> *Id.* at 44 (“A facilitating condition for the creation of regulation in modern democratic societies is for the attentive public (and legislators in particular) to believe that whatever problems exist will be capably addressed and solved by a particular agency.”).

<sup>205</sup> Lena H. Sun & Joel Achenbach, *CDC’s Credibility Is Eroded by Internal Blunders and External Attacks as Coronavirus Vaccine Campaigns Loom*, WASH. POST (Sept. 28, 2020),

“confused.”<sup>206</sup> The loss of reputation came at a crucial point in the pandemic when the public’s confidence in emerging vaccines would strongly influence the success of inoculation programs in controlling the disease.

Establishing a good reputation is difficult for agencies under the best of circumstances. It is even more difficult when that reputation is actively undermined by an agency’s own administration, and especially by the President personally, with his singular bully pulpit.<sup>207</sup> As noted above, President Reagan declared government to be “the problem,” not the solution for the country’s ills.<sup>208</sup> Some of President Reagan’s cabinet officials, including EPA Administrator Ann Gorsuch, sought to operationalize that sentiment. Gorsuch advocated in Congress for drastic budget cuts, weakened enforcement, and reduced staff levels to such an extent that one former Assistant Administrator complained that she had “demolish[ed] the nation’s environmental management capacity.”<sup>209</sup> Yet simply by relying on rhetoric, Presidents can damage agency reputation.<sup>210</sup>

Of course, it is appropriate for political leaders to admit and take responsibility for agency failure. We should not expect Presidents to be

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<https://www.washingtonpost.com/health/2020/09/28/cdc-under-attack> [https://perma.cc/6RE6-7SXW].

<sup>206</sup> *Id.*

<sup>207</sup> President Trump regularly belittled agencies during his term in office. He called his intelligence agencies “passive and naive” about the threat posed by Iran. Mark Landler, *An Angry Trump Pushes Back Against His Own “Naive” Intelligence Officials*, N.Y. TIMES (Jan. 30, 2019), <https://www.nytimes.com/2019/01/30/us/politics/trump-intelligence-agencies.html> [https://perma.cc/HXU2-6SUB]. He repeatedly implied that a number of “deep state” agency operatives — presumably members of the civil service that he perceived as insufficiently loyal to his Administration — actively opposed him. *See, e.g., Trump Says Without Proof that FDA “Deep State” Slowing COVID Trials*, REUTERS (Aug. 22, 2020, 12:42 PM), <https://reut.rs/3l9IUj5> [https://perma.cc/SRE8-4TEV].

<sup>208</sup> Reagan, *supra* note 55, at 2.

<sup>209</sup> Joanna Brenner, *Neil Gorsuch’s Late Mother Almost Annihilated the EPA. Is History Repeating Itself?*, NEWSWEEK (Feb. 1, 2017, 2:20 PM), <https://www.newsweek.com/anne-gorsuch-new-bill-abolish-epa-551382> [https://perma.cc/CJ22-ZY97] (alteration in original) (quoting former EPA Assistant Administrator William Drayton); *see also* Philip Shabecoff, *U.S. Environmental Agency Making Deep Staffing Cuts*, N.Y. TIMES (Jan. 3, 1982), <https://www.nytimes.com/1982/01/03/us/us-environmental-agency-making-deep-staffing-cuts.html> [https://perma.cc/7KMU-TQGL]. Gorsuch’s impact on EPA career staff morale was satirized famously in a Doonesbury comic strip in January 1982, which featured an agency employee sitting out on a ledge and threatening to jump unless the Administrator “publicly agrees that the purpose of the Environmental Protection Agency is to protect the environment.” Gary Trudeau, *Morale at EPA*, DOONESBURY (Jan. 28, 1982), <https://www.washingtonpost.com/doonesbury/strip/archive/1982/01/28> [https://perma.cc/E9UE-M7EG].

<sup>210</sup> For example, President Reagan’s “rhetorical assaults . . . undermined the legitimacy of liberal government while simultaneously generating lasting norms within the existing institutional arrangements that favored his preferred ends.” WILLIAM G. RESH, *RETHINKING THE ADMINISTRATIVE PRESIDENCY* 26 (2015) (citing STEPHEN SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISAL AND REAPPRAISAL* 97–98 (2008)).

cheerleaders for inept agencies.<sup>211</sup> Yet sustained attacks can do damage to an agency's reputation and morale. As one Department of Justice employee complained: "The President and his appointees say these terrible things about the DOJ, and then the political leadership of the department doesn't push back at all."<sup>212</sup>

*E. Distinguishing Structural Deregulation from Good Governance*

We recognize that it can be difficult to distinguish structural deregulation from so-called "good governance" reforms intended to improve the government's performance, cut costs, or streamline cumbersome procedures. The line is difficult to draw in the abstract, since it depends on a number of factors that can be evaluated only in the context of specific examples. Nevertheless, we argue that there is both a conceptual and practical difference between the two.

Not all changes to agency staffing or resource levels qualify as structural deregulation. Government efficiency is a laudable goal, and nearly every President in the last several decades has encouraged the bureaucracy to do more with less. Nor do all assignments of additional bureaucratic responsibility constitute busywork. And, as noted above, presidential criticism of the bureaucracy can be warranted. Indeed, accountability sometimes demands that "heads roll." We do contend, however, that there is a point at which promoting efficiency shades into pursuing disability, assigning legitimate tasks shades into busywork, and offering fair critique shades into intentional undermining. Reasonable minds might differ about when this point is reached. But conceptually, and in many cases practically, it is possible to distinguish between efforts to reform and efforts to subvert.

But how can we tell? Some of the same tools courts have used to assess pretext can be helpful in distinguishing instances of likely structural deregulation from more innocent reforms. The process we suggest

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<sup>211</sup> Although sometimes they do play that role. For example, despite his disastrous performance, President George W. Bush praised Michael Brown, his FEMA Administrator, in the aftermath of Hurricane Katrina, declaring "Brownie, you're doing a heck of a job." Elizabeth Chuck, *Where Is Disgraced Former FEMA Chief Michael Brown Now?*, NBC NEWS (Aug. 27, 2015, 3:59 PM), <https://www.nbcnews.com/storyline/hurricane-katrina-anniversary/heck-job-brownie-where-disgraced-fema-head-now-n400436> [<https://perma.cc/PQ2W-MLXW>].

<sup>212</sup> Cohen, *supra* note 50. In some cases, agency leaders make comments disparaging their own subordinates. Attorney General William Barr explained, for example, that lower-level Department officials do not make policy for the Department because while that "might be a good philosophy for a Montessori preschool . . . it is no way to run a federal agency." Katelyn Polantz & Christina Carrega, *Barr Says Calls for Coronavirus Lockdown Are the "Greatest Intrusion on Civil Liberties" Other than Slavery in US History*, CNN POL. (Sept. 16, 2020, 11:35 PM), <https://www.cnn.com/2020/09/16/politics/barr-justice-department-speech/index.html> [<https://perma.cc/KY6T-T3HU>]; see also Phillip J. Cooper, *The Duty to Take Care: President Obama, Public Administration, and the Capacity to Govern*, 71 PUB. ADMIN. REV. 7, 13 (2011) (describing the effects of rhetoric on employee morale, recruitment, and retention).

is similar to the judicial test for whether a defendant's proffered motivations are pretextual. In such cases, courts rely on contextual evidence to elucidate motive.<sup>213</sup> Moreover, while the courts are more reticent to inquire into hidden motivation in reviewing actions by coordinate branches of government, four members of the Supreme Court have suggested that even in such cases "openly available data,"<sup>214</sup> including public statements by the individuals responsible for government action, are relevant to determining the purpose of that action.<sup>215</sup> In *Department of Commerce v. New York*,<sup>216</sup> for example, the Court relied on extra-record evidence to conclude that an agency's justification for adding a question to the census was pretextual.<sup>217</sup> The Court explained that, while courts would not normally inquire into the mental processes of administrative decisionmakers, such an inquiry might be appropriate if there are "strong showing[s] of bad faith or improper behavior."<sup>218</sup> In this case, the Court continued, extra-record discovery revealed that the Secretary's purported justification for adding the census question was not the true rationale.<sup>219</sup>

Courts will also examine the fit between an action and its justification. In employment discrimination cases, evidence that a purported justification is internally inconsistent or otherwise not believable can establish pretext.<sup>220</sup> While courts defer to an employer's business judgments in such cases,<sup>221</sup> the Tenth Circuit has held that "[t]here may be circumstances in which a claimed business judgment is so idiosyncratic

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<sup>213</sup> For example, in *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159 (10th Cir. 1998), the plaintiff offered evidence that her employer had manipulated her final performance evaluation to make it appear that her performance was subpar before terminating her employment. *Id.* at 1169–70.

<sup>214</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2438 (2018) (Sotomayor, J., dissenting).

<sup>215</sup> See *id.* at 2442 (chastising the majority for "utterly fail[ing]" to consider statements by the President suggesting that a presidential Proclamation limiting immigration from specified countries was a product of anti-Muslim animus); *id.* at 2433 (Breyer, J., dissenting) (agreeing with Justice Sotomayor that the President's statements help form a "sufficient basis to set the Proclamation aside"). The majority did not disagree that extra-record evidence could be considered, but found that because rational basis review required only a relationship to legitimate state interests, and because such a relation could be shown between the President's decision to impose entry restrictions on immigrants from certain enumerated countries and the national security interests of the United States, extra-record evidence suggesting that religious animus may have motivated the action was insufficient to invalidate it. *Id.* at 2420–21 (majority opinion).

<sup>216</sup> 139 S. Ct. 2551 (2019).

<sup>217</sup> *Id.* at 2574–76.

<sup>218</sup> *Id.* at 2574 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)).

<sup>219</sup> *Id.* at 2575.

<sup>220</sup> See *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1168 (10th Cir. 1998) (stating that "a plaintiff can demonstrate pretext" by showing that her termination was inconsistent with her employer's reduction-in-force criteria or by showing that the employer sought to use such reduction-in-force criteria "to replace a number of [terminated] employees with new hires").

<sup>221</sup> See *id.* at 1169 (asserting that, even where a plaintiff is able to establish the existence of "a better tool of performance evaluation," the court "will not disturb [the] exercise of [a] defendant's business judgment").

or questionable that a factfinder could reasonably find that it is a pretext for illegal discrimination.”<sup>222</sup> Similarly, in cases challenging legislative or executive action, courts look to whether there is a sufficient connection between the explanation an agency offers for its action and the decision made.<sup>223</sup> In *Romer v. Evans*,<sup>224</sup> for example, the Supreme Court found a state constitutional amendment prohibiting all state and local protections for persons based on their homosexuality “so discontinuous with the reasons offered for it” that it was “inexplicable by anything but animus.”<sup>225</sup>

In line with judicial concern about fit between proffered justification and the action taken, we imagine three categories of evidence that should lead an observer to consider deregulatory motivations for actions that appear to weaken an agency’s capacity: evidence from *context*, evidence of *circumvention*, and evidence of *conflict*.

First, an action’s *context* can suggest deregulatory rather than good governance motives. Taking context into account might mean considering whether a group of actions, taken together, establishes a pattern that suggests a larger strategy to undermine agency capacity. Firing one inspector general might be justified by the idiosyncratic behavior of that official. Removing multiple IGs within a short time frame, however, may indicate a broader effort to disable internal administrative oversight mechanisms.

Evaluating context might also mean considering whether the circumstances surrounding an action seem consistent with its proffered justification. Consider the ostensible reason for moving the Bureau of Land Management’s (BLM) headquarters from Washington, D.C., to Grand Junction, Colorado. The BLM manages approximately 250 million acres of federal public land, mostly in the western United States, and the Agency asserted that its headquarters should be geographically closer to those lands and the people who use them.<sup>226</sup> However, as a GAO report subsequently observed, 97% of the BLM’s career staff were already located in the field.<sup>227</sup> If the reasons offered by an agency’s political leadership can be impeached so easily, it seems fair to call their good faith into question.

Finally, looking to context might involve assessing previous statements by administration officials and preceding events to see if they

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<sup>222</sup> *Id.*

<sup>223</sup> See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see also 5 U.S.C. § 706(2)(a).

<sup>224</sup> 517 U.S. 620 (1996).

<sup>225</sup> *Id.* at 632.

<sup>226</sup> See Kirk Siegler, *BLM Acting Director Defends Agency’s Controversial Move to Colorado*, NPR (Feb. 18, 2020, 11:00 AM), <https://www.npr.org/2020/02/18/806783253/blm-acting-director-defends-agencys-controversial-move-to-colorado> [<https://perma.cc/8LXK-LLBD>].

<sup>227</sup> ANNE-MARIE FENNELL & FRANK RUSCO, U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-397R, BUREAU OF LAND MANAGEMENT: AGENCY’S REORGANIZATION EFFORTS DID NOT SUBSTANTIALLY ADDRESS KEY PRACTICES FOR EFFECTIVE REFORMS 5 (2020).

offer clues to motivation. For example, if an administration punishes an agency employee for decisions or statements made in service of the agency's mission and consistent with their job responsibilities, it is reasonable to ask whether the move is retaliatory. Likewise, when an administration reassigns or relocates economists and scientists who make statements or publish findings inconsistent with its official positions, those decisions merit closer scrutiny. When IGs who criticize the President are subsequently fired for reasons ostensibly unrelated to their public criticism, those firings, too, ought to raise eyebrows. A persistent pattern of such behavior suggests that an administration is seeking to do something other than improve the government and might perhaps be working to disable it.

Public statements by Presidents and senior administration leadership may also reveal deregulatory motives. Sometimes the statements are so transparent, they leave no room for doubt, as when President Trump promised that, when it came to the size of the federal government, he would "cut so much your head will spin."<sup>228</sup> Trump's chief strategist, Steven Bannon, announced that the President would select cabinet members who would pursue "deconstruction of the administrative state."<sup>229</sup> Individual nominees confirmed to lead major federal agencies spoke openly of their desires to see those agencies eliminated. Mick Mulvaney, who was appointed Acting Director of the CFPB, stated in a congressional hearing that he would like to "get rid of" the Agency.<sup>230</sup> He had earlier called it a "sick, sad joke."<sup>231</sup> Such statements might be dismissed as political rhetoric only, not to be taken seriously as policy proposals. But when officials expressing such deep animus toward the agencies they run later portray significant reforms as "good government" measures, observers are entitled to be skeptical.

Second, *circumventing* established procedures for developing policy — especially procedures requiring consultation with career staff, experts, and other stakeholders — can be evidence of a deregulatory motive. For example, a GAO report concluded that the Department of the Interior failed to consult employees in planning to move the Agency's headquarters to Grand Junction.<sup>232</sup> Similarly, the EPA initially bypassed notice-and-comment rulemaking when establishing who could

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<sup>228</sup> Rein & Tran, *supra* note 47.

<sup>229</sup> David Z. Morris, *Steve Bannon Says Trump's Cabinet Picks Are Intended to "Deconstruct" Regulation and Agencies*, FORTUNE (Feb. 25, 2017, 2:35 PM), <https://fortune.com/2017/02/25/bannon-trump-cabinet-cpac> [<https://perma.cc/2EKV-4924>].

<sup>230</sup> Kelsey Ramirez, *CFPB Acting Director Mulvaney Says He Still Believes Bureau Shouldn't Exist*, HOUSINGWIRE (Apr. 11, 2018, 12:22 PM), <https://www.housingwire.com/articles/43077-cfpb-acting-director-mulvaney-says-he-still-believes-bureau-shouldnt-exist> [<https://perma.cc/39L4-WJ5Z>].

<sup>231</sup> *Id.*

<sup>232</sup> FENNELL & RUSCO, *supra* note 227, at 6.

serve as expert advisors, over the objections of many members of the Agency's scientific advisory board.<sup>233</sup> We recognize that there may be good reasons why agencies sometimes use informal policy instruments, like guidance documents, or take internal steps to improve efficiency, without soliciting stakeholder feedback. But a persistent pattern of avoiding input specifically for those policy shifts that appear to reduce agency capacity or marginalize internal and external expertise may also be evidence of a deregulatory purpose.

Finally, we look for *conflict* between those agency officials pursuing certain reforms and other experts within the administration who raise objections to them. Perfect agreement is unattainable in any administration, and there will always be internal dissent over the direction of agency policy. Yet when dissent becomes an outcry, or when credible experts — especially political allies — question an administration's motives, it ought to raise red flags. Consider the Trump Administration's early efforts to cut the Internal Revenue Service (IRS) budget.<sup>234</sup> At his confirmation hearing, Treasury Secretary Steven Mnuchin said he was "very concerned" about IRS staffing reductions and technology deficits and called for increasing the Agency's budget to enable it to perform its assigned duties.<sup>235</sup> When members of an administration's inner circle with credible subject matter expertise risk the President's wrath to suggest that his favored reforms might compromise government capacity, we think it appropriate to pay attention.

Our reliance on context, circumvention, and conflict is not the only way to ferret out structural deregulation. While those categories may be imperfect, they provide helpful clues. The real question is whether, considering all of the surrounding evidence, agency reforms that have potential to reduce functional capacity appear to have been taken in good faith with a purpose *other* than weakening the agency's ability to perform its legislative tasks.

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<sup>233</sup> See, e.g., Sean Reilly et al., *EPA Science Advisers Slammed the Agency for Ignoring Science. Here Is What They Said*, SCIENCE (Jan. 2, 2020, 2:50 PM), <https://www.sciencemag.org/news/2020/01/epa-science-advisers-slammed-agency-ignoring-science-here-what-they-said> [<https://perma.cc/6MEG-ZATL>]. A federal judge remanded the rule to the EPA after the Agency conceded that it was a substantive rather than procedural rule that should have gone through the APA's notice-and-comment process. *Env't Def. Fund v. EPA*, No. 21-cv-00003, 2021 WL 402824, at \*1 (D. Mont. Feb. 1, 2021).

<sup>234</sup> These efforts continued a trend begun in 2010 during the Obama Administration. BRANDON DEBOT ET AL., *CTR. ON BUDGET & POL'Y PRIORITIES, TRUMP BUDGET CONTINUES MULTI-YEAR ASSAULT ON IRS FUNDING DESPITE MNUCHIN'S CALL FOR MORE RESOURCES* 3 (2017).

<sup>235</sup> *Id.* at 1. The Administration proposed a modest effective increase to the IRS budget in 2020. Courtney Bublé, *Trump's Budget Seeks to Increase Funding for the Internal Revenue Service*, GOV'T EXEC. (Feb. 12, 2020), <https://www.govexec.com/management/2020/02/trumps-budget-seeks-increase-funding-internal-revenue-service/163087> [<https://perma.cc/XPN2-YZUJ>].

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## II. IMPLICATIONS FOR CONSTITUTIONAL, ADMINISTRATIVE, AND DEMOCRATIC VALUES

Structural deregulation is underexplored terrain in the struggle between the President and Congress for control of the administrative state. Presidents increasingly have found ways to make the bureaucracy work in service of their domestic and foreign policy aims to burnish their political reputations. Even “deregulatory” Presidents target particular areas of government for deregulation while bolstering and promoting agency capacity in other domains they favor.

This story of “presidential administration,” described by then-Professor Kagan two decades ago, overlooks the possibility of structural deregulation. Justice Kagan recounted how President Clinton expanded presidential administration by “making the regulatory activity of the executive branch agencies more and more an extension of the President’s own policy and political agenda.”<sup>236</sup> He did so by exerting control over agency agendas<sup>237</sup> and through formal directives,<sup>238</sup> centralized White House review of proposed regulations,<sup>239</sup> informal monitoring and influencing of agencies by White House staff,<sup>240</sup> and appropriation of regulatory action in his public communications.<sup>241</sup>

In general, Justice Kagan applauded increased presidential control of administration. She observed that such control made bureaucracy “more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism.”<sup>242</sup> This praise extended even to deregulatory actions. Citing President Reagan’s deregulatory impulses, she noted that they provided “a single, coherent direction” characteristic of the President’s relative “energy” as compared with an intransigent legislature and in the face of administrative ossification.<sup>243</sup> Justice Kagan published her article at the apogee of faith in a strong technocratic presidency, and her account of presidential administration assumes a good faith chief executive committed to maintaining the authority and legitimacy of the bureaucracy.<sup>244</sup> She argued

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<sup>236</sup> Kagan, *supra* note 10, at 2248.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 2249.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 2302.

<sup>241</sup> *Id.* at 2249. President Clinton would unveil agency action himself, sometimes even before it was finalized, and claim public ownership of that action. *Id.* at 2299–301.

<sup>242</sup> *Id.* at 2252.

<sup>243</sup> *Id.* at 2344–45. Justice Kagan acknowledged that presidential involvement in administration can be problematic. This concern is especially true when Presidents interfere with administrative adjudication, which should be safeguarded from political influence. *Id.* at 2363.

<sup>244</sup> Justice Kagan noted that presidential decisions to reverse technical agency actions are uncommon. *Id.* at 2356.

that Presidents “have a stake in build[ing] an institutional capacity for effective governance.”<sup>245</sup>

Structural deregulation complicates Justice Kagan’s narrative by showing that not all Presidents are committed to maintaining the institutional capacity of the bureaucracy.<sup>246</sup> A President might embrace structural deregulation either as a complement to the more targeted project of substantive deregulation (that is, repealing certain rules and policies), or as a substitute for it, or both. For example, undermining agency capacity through destaffing and resource deprivation can advance the project of substantive deregulation by enabling agencies to claim, credibly, that they lack the resources necessary to implement or enforce statutes.<sup>247</sup> Or, structural deregulation might be an alternative to substantive deregulation when efforts to rescind or weaken regulations encounter resistance, whether in the bureaucracy itself or in Congress,<sup>248</sup> or if they become mired in litigation.<sup>249</sup>

As we described in Part I and discuss further below, Presidents can undermine agency capacity with little formality or transparency in most cases. These features, as well as structural deregulation’s incremental nature, make it unlikely that either Congress or the courts will interfere. An additional benefit of structural deregulation for a President intent on undercutting regulatory action is that it is time-consuming for a successor to reverse.

Structural deregulation flourishes in a climate of extreme “anti-administrativism,”<sup>250</sup> which characterizes the current political moment, when members of Congress, governors, and other influential political

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<sup>245</sup> *Id.* at 2355.

<sup>246</sup> Professor Michael Sant’Ambrogio has accused President Trump of “presidential maladministration,” pointing to a broad array of actions, including the weakening of congressional controls over agency leadership, favoring regulated interests over congressional mandates and public preferences, as well as some of the capacity weakening that we identify here. See Michael Sant’Ambrogio, *Presidential Maladministration*, 46 OHIO N.U. L. REV. 459, 460 (2020).

<sup>247</sup> See *infra* pp. 651–52 and note 382.

<sup>248</sup> On the potential for internal executive branch resistance, see generally Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139 (2018) (charting a middle course between fear of a “deep state,” *id.* at 142, and total embrace of “bureaucratic resistance,” *id.* at 143, and underscoring the essential role of the civil service in the modern separation of powers); Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018) (arguing that American bureaucracy presents none of the threats identified in regimes abroad but that civil servants perform a salutary role in checking the chief executive); Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349 (2019) (offering a taxonomy of resistance and identifying the prerequisites for legitimate civil-servant disobedience); Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627 (2019) (arguing that civil-servant resistance should alert Congress to potential problems of law execution).

<sup>249</sup> Of course, as noted above, it is also possible that structural deregulation could work *against* a President’s substantive deregulatory agenda in the short term, by draining agencies of the requisite expertise to rescind and weaken existing rules in a legally defensible manner.

<sup>250</sup> Metzger, *supra* note 3, at 4.

leaders heap scorn upon government and deride civil servants.<sup>251</sup> The Supreme Court has contributed to this climate too, by embracing an expansive view of the President's power to control agencies and suggesting that, absent such pervasive executive control, the constitutional legitimacy of administrative governance is in doubt.<sup>252</sup> At the same time, the Court has consistently rebuked agencies for what it views as regulatory overreach, faulting them for, among other things, reading their statutory authority expansively and failing to account adequately for cost, but almost never finding them to have fallen short through "underreach" — that is by failing to act when their mission arguably demands they do so.<sup>253</sup> This combination — indulging broad presidential power while suggesting agencies err primarily by *overregulating* — sows fertile ground for structural deregulation to take root.

However, the same aspects of structural deregulation that make it so alluring to a President also make it antithetical to long-established principles of constitutional, administrative, and democratic governance. First, structural deregulation is in tension with constitutional separation of powers principles, including the principle of legislative supremacy and the President's obligation to "take Care that the Laws [are] faithfully executed."<sup>254</sup> Second, structural deregulation's informality and opacity conflict with administrative norms favoring process, reasoning, accountability, and transparency. Third, structural deregulation's stickiness binds successors in a version of what Professors Daryl Levinson and Benjamin Sachs have called "functional political entrenchment."<sup>255</sup> The remainder of this Part will address these tensions

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<sup>251</sup> See, e.g., R. Sam Garrett et al., *Assessing the Impact of Bureaucracy Bashing by Electoral Campaigns*, 66 PUB. ADMIN. REV. 228, 229–31, 236–37 (2006); Adam Butler & Ross Gianfortune, *Bureaucrat-Bashing at the Highest Levels of Government*, GOV'T EXEC. (Feb. 27, 2020), <https://www.govexec.com/workforce/2020/02/govexec-daily-bureaucrat-bashing-high-levels-government/163357> [<https://perma.cc/D7XB-DZCL>]; Ken Thomas, Opinion, *The Way We View Public Servants in This Country Is a Disgrace*, THE HILL (May 10, 2019, 7:30 AM), <https://thehill.com/opinion/civil-rights/443003-the-way-we-view-public-servants-in-this-country-is-a-disgrace> [<https://perma.cc/C473-QDHS>].

<sup>252</sup> See, e.g., *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (finding that the for-cause removal protection for the CFPB's director was an unconstitutional limitation on the President's executive power); *Lucia v. SEC*, 138 S. Ct. 2044, 2057 (2018) (holding that ALJs at the SEC were inferior officers and therefore must be appointed by the President, department heads, or the courts). While *Lucia* was ostensibly about appointment mechanics, its holding will tend to increase presidential power over agency adjudications by limiting ALJ independence.

<sup>253</sup> See e.g., *Michigan v. EPA*, 576 U.S. 743, 751 (2015) (striking down agency interpretation at *Chevron* Step 2 citing failure to consider cost); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320–24 (2014) (striking down agency legal interpretation at *Chevron* Step 2, citing major questions canon and agency overreach); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (declining to compel agency action unless discrete and mandatory).

<sup>254</sup> U.S. CONST. art. II, § 3.

<sup>255</sup> Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 454–56 (2015) (describing efforts by political incumbents to bind successors without formal rule changes).

in more detail. To be clear, our argument applies regardless of how we might personally feel about the value of an agency's work. As long as Congress has created an agency and assigned it regulatory tasks, the President should not be able to prevent it from functioning through structural deregulation.

*A. Tensions with the Separation of Powers*

While current constitutional law doctrine seems to allow a President to engage in structural deregulation largely unimpeded,<sup>256</sup> we think a President's efforts to destroy administrative capacity sit uncomfortably with important constitutional values. First, structural deregulation seems to encroach on Congress's Article I powers in violation of the separation of powers. Congress is constitutionally entitled to create federal agencies, pass statutes delegating to them a variety of duties, and appropriate money to accomplish congressional goals.<sup>257</sup> By contrast, the Constitution carefully circumscribes the President's role in lawmaking.<sup>258</sup> Presidents are charged with signing or vetoing bills passed by both houses of Congress.<sup>259</sup> They may also propose legislation for Congress's consideration<sup>260</sup> or call Congress into session.<sup>261</sup> However, the President is not a lawmaker in the conventional sense<sup>262</sup> and may not dispense with duly enacted laws, even those he finds inconvenient.<sup>263</sup>

The view that Congress retains the primary lawmaking role continues to be held by both conservative and liberal jurists. Justice Gorsuch has argued, for example, that failing to enforce the nondelegation doc-

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<sup>256</sup> See *infra* section III.A, pp. 638–41.

<sup>257</sup> Because the President is also assigned a constitutional role in legislation, structural deregulation allows a President to invalidate the legislative work of his predecessor or, in cases where legislation was enacted over his own veto, to nullify that veto override through subsequent inaction.

<sup>258</sup> Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 689 (2014) (describing the President's role in proposing legislation and in signing or vetoing bills passed by both houses of Congress).

<sup>259</sup> U.S. CONST. art. I, § 7.

<sup>260</sup> *Id.* art. II, § 3.

<sup>261</sup> *Id.*

<sup>262</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, the Supreme Court flatly rejected “the idea that [the President] is to be a lawmaker.” *Id.* at 587.

<sup>263</sup> Price, *supra* note 258, at 674–75 (grounding the antidispensation principle in the constitutional text and historical practice); see also *Prioritizing and Deferring Removal of Certain Aliens Unlawfully Present in the United States*, 38 Op. O.L.C. 39, 46 (2014) (“[T]he Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences.”). But see Michael Sant’Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 401–04 (2014) (supporting presidential refusals to defend challenged statutes in court, exercise enforcement discretion, and check statutory implementation through centralized regulatory review as long as sufficient mechanisms are in place to ensure transparency).

trine would “serve only to accelerate the flight of power from the legislative to the executive branch.”<sup>264</sup> Similarly, Justices Thomas and Rehnquist have asserted that Congress must make the “hard choices” about policy.<sup>265</sup> Without endorsing these Justices’ apparent embrace of a revived nondelegation doctrine, we take such statements as supporting the idea that, whatever degree of control the President has or should have over agencies, allowing him to thwart their congressionally mandated mission would usurp congressional authority.

Second, structural deregulation is in tension with the President’s duty to faithfully execute duly enacted law under the Take Care Clause of Article II.<sup>266</sup> That clause, which simultaneously prescribes and circumscribes presidential power, can be read to prohibit presidential undermining of the essential capacities of administrative agencies. Indeed, some have argued that the clause is “not a statement of powers of office, but the first, and in many respects most fundamental, legal obligation of the president.”<sup>267</sup>

The clause’s “simple but delphic terms”<sup>268</sup> have been read to limit presidential powers in important ways. Crucially, the Court has interpreted the Take Care Clause to impose an affirmative obligation on the President to enforce the laws Congress passes. In the early days of the Republic, a Postmaster General refused to honor an Act of Congress requiring him to pay a certain sum to a contractor. The Supreme Court found in *Kendall v. United States ex rel. Stokes*<sup>269</sup> that the Take Care Clause prevented the President, as head of the executive branch, from ignoring duly authorized statutes.<sup>270</sup> It therefore held that the outstanding sum must be paid.<sup>271</sup> The opinion underscored that the Constitution did not grant the President a “dispensing power” — the power to suspend the operation of a statute or rule in the interest of justice.<sup>272</sup> The

<sup>264</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

<sup>265</sup> *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment) (“When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process.”); see also *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 85 (2015) (Thomas, J., concurring in the judgment) (criticizing the Court for allowing “the Executive to decide which policy goals it wants to pursue”).

<sup>266</sup> U.S. CONST. art. II, § 3.

<sup>267</sup> Philip J. Cooper, *The Duty to Take Care: President Obama, Public Administration, and the Capacity to Govern*, 71 PUB. ADMIN. REV. 7, 8 (2011).

<sup>268</sup> Goldsmith & Manning, *supra* note 14, at 1836.

<sup>269</sup> 37 U.S. (12 Pet.) 524 (1838).

<sup>270</sup> See *id.* at 613.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* This concept would have been more familiar in the 1800s as a former royal prerogative of the King of England to exempt individuals from application of the criminal law. Note, *The Power of Dispensation in Administrative Law: A Critical Survey*, 87 U. PA. L. REV. 201, 203 (1938). The concept appears to have originated in Catholicism with the Pope’s power to dispense with temporal laws in his edicts. *Id.* at 204.

*Kendall* Court stressed that the President had no “power to forbid [the laws’] execution.”<sup>273</sup> Citing *Kendall*, Professor Zachary Price argues that neither the Take Care Clause specifically nor the Constitution as a whole allows the President to categorically suspend particular laws or parts of laws.<sup>274</sup>

Moreover, the obligation to see that the laws are “faithfully” executed implies an obligation to implement legislative edicts dutifully. Professors John Manning and Jack Goldsmith note that one of the leading dictionaries of the Founding era, Dr. Johnson’s, “defines ‘faithfully’ to mean ‘strict adherence to duty and allegiance’ and ‘[w]ithout failure of performance; honestly; exactly.’”<sup>275</sup> While the clause does not specify faithfulness “to what,”<sup>276</sup> in combination with the Oath Clause, it “point[s] toward a general obligation of good faith” and a presidential obligation “to ensure that the laws are implemented honestly, effectively, and without failure of performance.”<sup>277</sup>

Others have described this obligation as a duty to superintend the operations of the executive branch. Emphasizing the responsibility of faithful execution, Professor Gillian Metzger describes the duty imposed on Presidents by the Take Care Clause as “a duty to supervise.”<sup>278</sup> While the courts have been largely silent on the existence of such a duty, the Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*<sup>279</sup> did find that the President was subject to a nondelegable duty to “active[ly] . . . supervise” the administration.<sup>280</sup> Importantly, Metzger’s duty to supervise is meant to ensure *effective* as well as accountable government.<sup>281</sup> Metzger leaves to the courts where to draw the line between permissible and impermissible presidential involvement in the work of the bureaucracy, but she stresses that presidential engagement always must operate within “proper bounds.”<sup>282</sup>

<sup>273</sup> 37 U.S. (12 Pet.) at 613.

<sup>274</sup> Price, *supra* note 258, at 675–77, 696. Nor may agencies themselves decline to implement statutes. See, e.g., Buzbee, *supra* note 6, at 1579 (“The first and most essential element of agency political accountability is rooted in legislative supremacy.”).

<sup>275</sup> Goldsmith & Manning, *supra* note 14, at 1857 (alteration in original) (citing 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al. 6th ed. 1785)).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 1857–58.

<sup>278</sup> Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1877 (2015) (“[T]he mandatory character of the Take Care Clause is worth underscoring in its own right.”).

<sup>279</sup> 561 U.S. 477 (2010).

<sup>280</sup> *Id.* at 496 (quoting *Clinton v. Jones*, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring in the judgment)); see *id.* at 478–79 (finding that removal restrictions protecting members of the Public Company Accounting Oversight Board were an unconstitutional infringement on presidential authority); see also Metzger, *supra* note 278, at 1863.

<sup>281</sup> Metzger, *supra* note 278, at 1886.

<sup>282</sup> *Id.* at 1925.

The President operates outside of these bounds, we argue, when he seeks systematically to undermine agency capacity.

Ultimately, the Take Care Clause conveys authority to protect, not destroy. Professor Henry Monaghan associated the clause with such a “protective power” to “protect and defend the personnel, property, and instrumentalities of the United States from harm,” offering as an example the assignment of a U.S. Marshal to protect the life of a federal judge.<sup>283</sup> Goldsmith and Manning similarly have identified a “completion power,” which they define as “the President’s authority to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of any congressional authorization to complete that scheme.”<sup>284</sup> Our own view is that the duties to superintend and to protect assigned to the President in Article II imply a commensurate duty not to destroy.

### B. Tensions with Administrative Law Values

The Administrative Procedure Act,<sup>285</sup> as well as administrative jurisprudence and scholarship, emphasizes formality, transparency, rationality, and accountability as core values.<sup>286</sup> We expect government agencies to “do things by the book” — operate openly, follow prescribed procedures, and give sound reasons for their decisions. Procedural regularity and substantive rationality are the basic minimum requirements for administrative legitimacy.

Yet structural deregulation does not reflect such values. First, it is largely informal. A President invoking the tools of structural deregulation acts unilaterally, without convincing Congress to pass legislation altering an agency’s structure or resources. Presidents also can largely

<sup>283</sup> Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 11 (1993).

<sup>284</sup> Jack Goldsmith & John Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2282 (2006); see also Goldsmith & Manning, *supra* note 14, at 1837–38 (citing *Cunningham v. Neagle*, 135 U.S. 1, 67–68 (1890), for the proposition that the Take Care Clause provides “inherent presidential authority to take acts necessary to protect the operations of the federal government, even in cases in which no statute provides explicit authority to do so”).

<sup>285</sup> Consider the Act’s restrictions on “arbitrary” or “capricious” decisionmaking, APA § 706(2)(A), and its emphasis on the transparency of administrative decisionmaking in §§ 552, 552a, and 552b.

<sup>286</sup> See, e.g., *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (observing that the prohibition on consideration of post hoc agency reasoning serves important administrative law values including accountability and contemporaneous reason-giving); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 494–95 (2003) (identifying nonarbitrariness as key to agency legitimacy); Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1987–89 (2015) (specifying the rule of law’s demands on administrative government and identifying authorization, notice, justification, coherence, and procedural fairness as the most relevant); Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1929 (2018) (arguing that administrative law doctrine, as well as modern criticisms of that doctrine, can be understood in the context of Professor Lon Fuller’s eight elements of a moral system of laws).

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avoid the public notice-and-comment process that is required to rescind agency regulations. Instead, structural deregulation occurs by executive order or, more frequently, as the result of informal communications from the White House to agency officials. Those officials then implement policies internally. Structural deregulation can thus be accomplished through internal agency memoranda and orders that require neither publication nor explanation.

A few examples may help to illustrate the point. Failing to nominate agency officers or hire expert staff requires no more than the President instructing agency leadership. Political appointees can demoralize staff in myriad informal ways. They can reassign staff and relocate offices with minimal procedure and without public deliberation.<sup>287</sup> Overtasking agencies with busywork may occasionally involve some formal direction (for example executive orders imposing on agencies new analytic burdens), but it may also occur less formally, as in the example of the CFPB name-change task force discussed above. Finally, reputational undermining, which tends to take the form of public statements from high-ranking officials, is the height of informal action.

These informal actions may be more or less transparent. It is not possible to hide office relocations, for example. By contrast, staff demoralization might take place entirely within the agency. Of course, even structural changes shielded from public view may be exposed by the media. However, to the extent that these disclosures occur after the actions have already produced effects or when the wheels of change are already in motion, they provide limited opportunity for public engagement and oversight.

Informal structural deregulatory actions' lack of transparency undermines two related administrative law values: accountability and reason giving. To the extent that some of these efforts remain hidden, voters may have more trouble assessing agency performance than they would if deregulatory efforts were undertaken through rule repeals, publicly announced policy changes, and the like. Even if particular structural deregulatory moves are publicized, moreover, because such decisions are generally less formal, they do not require the articulation of reasons that can then be scrutinized in court, by Congress, or by ordinary voters.

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<sup>287</sup> The BLM's move to Grand Junction, for example, was documented in a so-called "Secretary's Order." Sec'y of the Interior, Order No. 3382, Establishment of the Bureau of Land Management's Headquarters in Grand Junction, Colorado (Aug. 10, 2020), <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-order-3382-508-compliant.pdf> [<https://perma.cc/R5NT-ZD25>]. As authority for the order, the Secretary cited Reorganization Plan No. 3 of 1950, which located general management authorities in the Secretary. *See id.* § 2.

*C. Tensions with Democratic Values*

A final concern about structural deregulation is that its effects can be more challenging to undo than the individual regulatory rollbacks that characterize substantive deregulation. It is thus a useful tool for Presidents who seek to insulate their policy preferences from reversal by successors. Presidents have an obvious incentive to make their programs durable. But this durability fits uncomfortably with the core democratic principle that politicians should not be bound to the policies of their predecessors.<sup>288</sup> Scholars have argued that such entrenchment frustrates the will of the present majority.<sup>289</sup> It has been described as an “intergenerational power grab,”<sup>290</sup> or, more poetically, “the dead hand problem.”<sup>291</sup>

Structural deregulation can be seen as another tool of entrenchment, used in this case to ensconce an underresourced bureaucracy rather than political actors or particular policies. Saddling future Presidents with a damaged bureaucracy can be even more durable than substantive deregulation: there is an established pathway for reinstating rules and policies repealed by a predecessor administration but no clear route to rebuilding the staff, resources, expertise, and reputation that enable agencies to perform their tasks well. Remedying structural deregulation can be complicated and time-consuming. Restoring an agency’s workforce requires a sustained recruiting and hiring process that can itself deplete an agency’s resources.<sup>292</sup> Experienced employees may be reluctant to return or undergo a competitive process to reclaim their old jobs.<sup>293</sup> Developing new talent can take time. Similarly, rebuilding an

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<sup>288</sup> See, e.g., Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. BAR FOUND. RSCH. J. 379, 404–05. The literature on entrenchment describes many instruments incumbent politicians can use to insulate their personnel and policies against change, mostly in the context of passing legislation. Daryl Levinson and Benjamin Sachs argue that entrenchment strategies are ubiquitous and can be achieved both formally and informally. See Levinson & Sachs, *supra* note 255, at 407. “[W]e see parties, politicians, and prevailing coalitions continually strategizing to lock in their gains, battening down their offices and policies against the winds of political change.” *Id.* at 402.

<sup>289</sup> See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 497 (1997); Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 881, 886 (2011). While most commentators have criticized entrenchment, Professors Eric Posner and Adrian Vermeule have deemed legislative entrenchment strategies “no more objectionable” than other policy instruments that “shape the legal and institutional environment of future legislation.” Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1666 (2002). *But cf.* Levinson & Sachs, *supra* note 255, at 457 n.234 (noting that Posner and Vermeule are outliers in their defense of entrenchment).

<sup>290</sup> See Serkin, *supra* note 289, at 945.

<sup>291</sup> See, e.g., Klarman, *supra* note 289, at 497–98 (discussing the question of legislative entrenchment and proposing an “anti-entrenchment” theory of judicial review).

<sup>292</sup> See U.S. GEN. ACCT. OFF., GGD-90-105, FEDERAL RECRUITING AND HIRING 21 (1990).

<sup>293</sup> Under existing rules, the federal government may rehire former employees noncompetitively at the same grade level. However, agencies must still expend resources on the reinstatement process

agency's reputation is a slow process that relies on trust and requires repairing relationships. Structural deregulation thus forces an incoming administration to add the task of rebuilding to that of governance.

#### D. Responding to Critics

At first blush, critics of the administrative state might be skeptical of our argument that structural deregulation conflicts with core constitutional, administrative, and democratic principles. As noted in the Introduction, these critics, including several members of the contemporary Supreme Court, view agencies as undemocratic and unaccountable, and they worry that a robust administrative state contravenes the system of checks and balances designed to protect the people against arbitrary power.<sup>294</sup> From this perspective, shielding agencies from presidential control, even to protect against the risk of administrative dismantling, only exacerbates the problem of unchecked agency power. The appropriate check on presidential mismanagement of the bureaucracy, these critics might argue, is political.<sup>295</sup>

We do not agree with the strongest criticisms advanced by the skeptics, believing that agencies, generally, are amply constrained by both political and legal oversight and internal safeguards. Thus, we do not support the revival of the nondelegation doctrine, or subscribe to a formalist understanding of the appointment and removal power, or wish to inter the *Chevron* doctrine.

In any event though, our argument does not depend on these debates. Our point is simply that agencies have two political masters: Congress and the President. The proper remedy for concerns about the value of administrative agencies is legislative. If critics cannot muster sufficient

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for each eligible employee. *See Policy, Data, Oversight: Hiring Information*, U.S. OFF. OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/hiring-information/reinstatement> [<https://perma.cc/K8UQ-33W4>].

<sup>294</sup> *See* *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010) (“The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”).

<sup>295</sup> *See* *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020) (“The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections.”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, C.J., concurring in part and dissenting in part) (footnote omitted) (“A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.”). Such concerns might be heightened for defenders of a “unitary” conception of executive power, in which the President is seen as having sole control over the executive branch. *See generally* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008) (undertaking historical and legal survey of unitary executive theory).

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support in Congress to repeal the statutes creating agencies or assigning them particular tasks, the President should not be able to accomplish the same goal through structural deregulation.

Even Justices skeptical of the administrative bureaucracy concede that the Constitution designates Congress as the lawmaking body. An agency may be “entitled to . . . evaluate priorities in light of the philosophy of the administration,” but it must do so “within the bounds established by Congress.”<sup>296</sup> To the extent structural deregulation thwarts this core element of constitutional design by frustrating agency implementation of statutory mandates, it must be confronted.

Additionally, at the most basic level, relying on electoral accountability to remedy the excesses of the President seems wholly inadequate when those excesses — by muzzling internal dissent, sidelining experts, relying on unconfirmed “acting” officials, and improperly redirecting appropriated funds — weaken the very mechanisms by which he might be held accountable. Because structural deregulation is often opaque, it may be all too easy for Presidents to evade blame for its costs. There is something especially pernicious about a President doing his utmost to debilitate agencies and then faulting them for being ineffectual while taking no responsibility for their deficiencies. In the face of structural deregulation, therefore, it is no answer for critics of the administrative state to maintain that presidential control is the answer to administrative tyranny. That formulation overlooks the destructive potential of presidential control.

### III. PUBLIC LAW RESPONSES TO STRUCTURAL DEREGULATION

This Part argues that public law as a whole is ill-equipped to respond to the challenges posed by structural deregulation because courts are reluctant to oversee interbranch interactions, Presidents have grown adept at circumventing statutory limitations on executive overreach, and administrative law has a blind spot when it comes to internal agency action.

The Constitution, statutory law, and administrative law, for the most part, assume that the President will act in good faith in managing agencies. And the legislative and judicial branches of government have been reluctant to interfere with executive management for fear of overstepping their constitutional roles. The judiciary in particular has also exhibited concern about its relative competence to decide managerial questions. The result is a legal blind spot when it comes to potential presidential undermining of the bureaucracy.

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<sup>296</sup> *State Farm*, 463 U.S. at 59 (Rehnquist, C.J., concurring in part and dissenting in part).

### A. *The Constitutional Blind Spot*

As discussed in the previous Part, Presidents who engage in structural deregulation act at odds with the principle of legislative supremacy and arguably betray the President's duty of faithful execution under the Take Care Clause — at least in the most egregious cases. Yet we think it highly unlikely that courts would find any specific instance of structural deregulation to be a constitutional violation. They might even refuse to hear such a challenge.

One problem is that it is hard to identify precisely when agency incapacitation has gone “too far.” When does priority in execution shade into nullification? Courts and commentators have wrestled with this line in the context of nonenforcement.<sup>297</sup> The Supreme Court has confirmed the executive's broad discretion to select from among competing enforcement priorities.<sup>298</sup> While federal courts have specified that this discretion is not unlimited,<sup>299</sup> and that the executive branch may not nullify statutory commands through inaction,<sup>300</sup> courts remain reluctant to interfere with executive enforcement discretion.<sup>301</sup> Using structural deregulation to nullify statutory commands should raise concerns akin to those raised by blanket nonenforcement decisions. But we think courts would be similarly reluctant to intervene.

Similarly, it is far from clear what precisely the Take Care Clause requires a President to do to maintain a *requisite* level of bureaucratic infrastructure.<sup>302</sup> How much undermining is too much? What test

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<sup>297</sup> Articles discussing the problem of nonenforcement include Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1757 (2016) (identifying cases of categorical enforcement discretion as those most likely to conflict with a good-faith interpretation of the underlying statute); Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517, 1520–21 (2018) (distinguishing nonenforcement that is consistent with statutory purpose from nonenforcement designed to achieve ends that fall outside an agency's statutory authority); and Price, *supra* note 258, at 674 (concluding that executive enforcement discretion is limited and defeasible).

<sup>298</sup> *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985) (establishing a presumption of unreviewability for agency decisions not to take enforcement action).

<sup>299</sup> *See id.* at 833 (“Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers.”); *Ass'n of Civilian Technicians v. Fed. Lab. Rels. Auth.*, 283 F.3d 339, 344 (D.C. Cir. 2002) (recognizing the exception to enforcement discretion for policies of nonenforcement); *Adams v. Richardson*, 480 F.2d 1159, 1161 (D.C. Cir. 1973) (refusing to defer to an agency's adoption of general nonenforcement policy); *see also* Jentry Lanza, Note, *Agency Underenforcement as Reviewable Abdication*, 112 NW. U. L. REV. 1171, 1175–76 (2018) (suggesting that “severe underenforcement” is an abdication of executive duty).

<sup>300</sup> *See infra* section III.C.3, pp. 651–52.

<sup>301</sup> *See* Deacon, *supra* note 5, at 804 (observing that it is difficult for plaintiffs to prove that a pattern of nonenforcement exists).

<sup>302</sup> We recognize that the Take Care Clause has also been read to prohibit limitations on and interference with the President's ordering of the executive branch. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492–93 (2010) (concluding that the President could not satisfy his obligations under the Take Care Clause if the double removal protections of the Board were left in place); *Myers v. United States*, 272 U.S. 52, 122 (1926) (observing that the power to

might the Court use? One commentator suggests that the President must do “what is necessary to ensure that the executive branch has the capacity to implement and administer the policies created by legislation, administrative rules, or presidential directives.”<sup>303</sup> How might that amorphous standard be operationalized concretely by a reviewing court? We expect that several sitting Supreme Court Justices would be extremely skeptical of any litigant advancing such a standard, and that a majority of the Court would resist adopting a test that would be so hard to administer in practice.

Courts might also dismiss challenges to structural deregulation for prudential reasons. Challengers would first struggle to establish constitutional or prudential standing.<sup>304</sup> The Supreme Court has found that “programmatically” challenges to government action raise “obvious difficulties insofar as proof of causation or redressability is concerned.”<sup>305</sup> Challenges to the government inaction that produces structural deregulation, such as failures to appoint, would seem to exacerbate these concerns, especially in the absence of a statutory procedural right to challenge these choices. Even where structural deregulation presents as action, as in the case of policy changes that deprive an agency of expert input, it can be hard to link those changes to specific concrete injuries that plaintiffs will suffer.<sup>306</sup>

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remove executive branch officials is crucial to the President’s ability to take care that the laws are faithfully executed); *see also* Goldsmith & Manning, *supra* note 14, at 1839–53 (compiling examples from the case law). The clause has also been invoked to defend executive branch orders against legal challenge by limiting private individuals’ standing to seek judicial review of particular administrative arrangements or decisions. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (quoting U.S. CONST. art. II, § 3) (opining that permitting members of the public to enforce an undifferentiated public interest would be in tension with the President’s duty to “take Care that the Laws be faithfully executed”); *Allen v. Wright*, 468 U.S. 737, 761 (1984) (same). And it has been used to defend prosecutorial discretion by executive branch officials. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Heckler*, 470 U.S. at 832. But these protections are consistent with our argument that the clause implies a duty to preserve and protect administrative capacity.

<sup>303</sup> Cooper, *supra* note 212, at 7.

<sup>304</sup> *See Lujan*, 504 U.S. at 560.

<sup>305</sup> *Id.* at 568 (plurality opinion); *see also id.* at 571 (arguing that the plaintiffs had failed to prove that eliminating the fraction of funding provided by the agencies would cause the projects at issue to “either be suspended, or [to] do less harm to listed species”); *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 42–43 (1976) (finding it “purely speculative whether the denials of service specified in the complaint fairly can be traced to [the challenged IRS revenue ruling] or instead result from decisions made by the hospitals without regard to the tax implications”); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973).

<sup>306</sup> The Court clarified in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), that procedural injury in itself can sometimes satisfy the injury-in-fact requirement, so long as the particular procedural violation entails “a degree of risk sufficient to meet the concreteness requirement.” *Id.* at 1550.

Even if plaintiffs could establish the core elements of Article III standing, courts may decline to hear challenges to structural deregulation on other prudential grounds.<sup>307</sup> The courts grant “widest latitude” to the government “in the ‘dispatch of its own internal affairs.’”<sup>308</sup> Thus, in *Allen v. Wright*,<sup>309</sup> the Supreme Court denied standing to parents of Black children challenging the IRS’s alleged grant of tax exemptions to racially discriminatory private schools.<sup>310</sup> In declaring that the plaintiffs lacked standing, the Court held that “[t]he Constitution . . . assigns to the Executive Branch, and not to the Judicial Branch, the duty to ‘take Care that the Laws be faithfully executed.’”<sup>311</sup> The Supreme Court has called into question at least some aspects of prudential standing doctrine, leaving its contours in doubt.<sup>312</sup> Nevertheless, a court confronted with a Take Care challenge alleging improper maintenance of agency capacity may well follow *Allen*’s lead and decline to hear the case out of deference to executive managerial discretion.<sup>313</sup>

And even if these hurdles might be overcome,<sup>314</sup> the courts still may invoke the political question doctrine to bar challenges to structural deregulation. That doctrine cautions courts to avoid interference in questions “best suited for resolution by the political branches.”<sup>315</sup> Executive branch undermining of agency capacity may be precisely the sort of

<sup>307</sup> Federal courts have historically adopted an additional “prudential” test for standing, asking for example whether the grievance is more appropriately resolved by another branch of government or whether the harms suffered by plaintiffs alleging statutory violations are within the “zone of interests” that the statute sought to address. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014).

<sup>308</sup> *Allen v. Wright*, 468 U.S. 737, 761 (1984) (quoting *Rizzo v. Goode*, 423 U.S. 362, 378–79 (1976)).

<sup>309</sup> 468 U.S. 737.

<sup>310</sup> *Id.* at 739–40.

<sup>311</sup> *Id.* at 761 (quoting U.S. CONST. art II, § 3). Although Justice Scalia’s opinion for the Court in *Lexmark International* framed the prudential inquiry as primarily or exclusively an exercise in statutory interpretation, it is unclear how that opinion will affect the other prongs of the prudential analysis, if at all. See Ernest A. Young, *Prudential Standing After Lexmark International, Inc. v. Static Control Components, Inc.*, 10 DUKE J. CONST. L. & PUB. POL’Y 149, 152–53 (2014).

<sup>312</sup> See *Lexmark Int’l*, 572 U.S. at 125–28.

<sup>313</sup> *Goldsmith & Manning*, *supra* note 14, at 1847 (arguing the Supreme Court has understood the Take Care Clause as creating “exclusive presidential authority to assure government officials’ fidelity to law”).

<sup>314</sup> Some have argued, for example, that members of Congress might have standing to challenge presidential nonenforcement. See Bethany R. Pickett, Note, *Will the Real Lawmakers Please Stand Up: Congressional Standing in Instances of Presidential Nonenforcement*, 110 NW. U. L. REV. 439, 452–61 (2016).

<sup>315</sup> *Li-Shou v. United States*, 777 F.3d 175, 180 (4th Cir. 2015) (citing *Baker v. Carr*, 369 U.S. 186, 210–11 (1962)). Two of the key factors in this analysis are whether an issue has been textually committed to a coordinate branch of government and whether “judicially . . . manageable standards” for resolution of the matter exist. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)) (emphasizing these two factors in finding that a citizenship challenge was justiciable). For the full list of six factors that govern political question analysis, see *Baker*, 369 U.S. at 217.

question courts feel ill-equipped to address unless the interference involves a straightforward question of statutory interpretation.<sup>316</sup>

*B. Statutory Constraints on Structural Deregulation*

Existing statutes creating agencies or specifying their structures offer few avenues for challenging structural deregulation. To argue successfully that structural deregulation violates a statute, challengers must point to specific statutory provisions that conflict with particular deregulatory moves. However, current statutes that delegate substantive, affirmative responsibilities for agencies tend to outline agency structure and resources in highly general terms.

More promising are suits under “trans-substantive statutes,” which are not agency specific but instead establish procedural requirements that apply across the administrative state.<sup>317</sup> However, even these statutes cannot reach all of the categories of structural deregulation we identify above. There is no statute prohibiting reputational undermining of agencies by the President, for example, nor would such restrictions be consistent with the First Amendment guarantee of free speech.<sup>318</sup> Only removing the speaker from office through the political process can blunt the force of such criticisms — an admittedly extreme remedy for a President disparaging government bureaucrats.

*i. Substantive Statutes.* — As discussed above, courts are reluctant to intervene in the day-to-day resource-allocation decisions agencies make in the course of implementing statutes. Courts normally afford agencies significant deference in cases where plaintiffs challenge agency inaction,<sup>319</sup> for example, or the exercise of enforcement discretion.<sup>320</sup> In theory, there are limits — the Supreme Court has expressed skepticism about cases that demonstrate an agency’s “abdication of its statutory responsibilities”<sup>321</sup> — but in practice, there are few.

Courts would be readier to intervene if structural deregulation violated discrete statutory provisions. However, Congress does not typically specify precise agency staffing and resource levels in the so-called

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<sup>316</sup> See, e.g., *Population Inst. v. McPherson*, 797 F.2d 1062, 1070 (D.C. Cir. 1986) (finding the question of whether the Administrator of USAID withheld program funds in violation of statutory earmark to be justiciable).

<sup>317</sup> This section will deal with both substantive and procedural statutes but leave discussion of the Administrative Procedure Act for the following section on potential administrative law remedies.

<sup>318</sup> Moreover, Presidents enjoy broad immunity from suit for actions related to their official duties. See *Nixon v. Fitzgerald*, 457 U.S. 731, 755–56 (1982) (recognizing absolute presidential immunity from damages liability for actions within even the “outer perimeter” of his official responsibility, *id.* at 756).

<sup>319</sup> See, e.g., *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66–67 (2004).

<sup>320</sup> See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985).

<sup>321</sup> *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987) (quoting *Heckler*, 470 U.S. at 833 n.4).

enabling acts creating particular agencies. These statutes do specify an agency's leadership structure by either prescribing that the agency shall be headed by a single secretary or creating a multimember commission.<sup>322</sup> They may also create subsidiary leadership positions within the agency.<sup>323</sup> But when it comes to general staffing, agency enabling acts are largely silent. Instead, agency heads are delegated authority to hire additional staff as they deem necessary.<sup>324</sup>

Occasionally a statute will offer more detail. For example, the Department of Energy Organization Act of 1977<sup>325</sup> (DOE Act) limits the number of staff positions that can be exempt from civil service laws to 311.<sup>326</sup> It does not, however, specify the total or minimum number of staff in the department. Statutes might also reference, either directly or obliquely, the *type* of employees that should be hired. The DOE Act references "scientific, engineering, professional, and administrative personnel," for example, in the same section on exempt-staff provisions.<sup>327</sup> While the provision does not explicitly *require* that scientific and engineering professionals be hired, it could be read as anticipating that they will be part of the department's staff.

Most statutes are similarly vague when it comes to the number and location of an agency's offices. A few specify the location of an agency's headquarters. The Fair Labor Standards Act of 1938,<sup>328</sup> for example, establishes that "[t]he principal office of the Administrator shall be in

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<sup>322</sup> See, e.g., Department of Transportation Act of 1966, Pub. L. No. 89-670, § 3, 80 Stat. 931, 931 (codified as amended at 49 U.S.C. § 102(b)); Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 1, 38 Stat. 717, 717-18 (codified as amended at 15 U.S.C. § 41).

<sup>323</sup> See, e.g., Budget and Accounting Act of 1921, Pub. L. No. 67-13, § 207, 40 Stat. 20, 22 (creating the Bureau of the Budget in the Treasury Department as well as a Director and an Assistant Director); Department of Transportation Act § 3(B)-(C) (creating an Under Secretary of the Department, four Assistant Secretaries and a General Counsel); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011(b)(5), 124 Stat. 1376, 1964 (2010) (codified as amended at 12 U.S.C. § 5491(b)(5)) (establishing a Deputy Director of the new CFPB).

<sup>324</sup> Typical is the authority granted to the Secretary of Energy in the Department of Energy Organization Act of 1977 (DOE Act), Pub. L. No. 95-91, § 621(a), 91 Stat. 565, 596 (codified as amended at 42 U.S.C. § 7231). That Act allows the Secretary to "appoint and fix the compensation of such officers and employees, including attorneys, as may be necessary to carry out [his] functions." *Id.* Similarly, the Fair Labor Standards Act of 1938 authorizes an Administrator of the Wage and Hour Division of the Department of Labor to "appoint such employees as he deems necessary to carry out his functions and duties under this chapter." 29 U.S.C. § 204(b). The Department of Transportation Act of 1966 empowers Department leadership "to select, appoint, employ, and fix the compensation of such officers and employees, including investigators, attorneys, and hearing examiners, as are necessary to carry out the provisions" of the Act "and to prescribe their authority and duties." § 9(a), 80 Stat. at 944.

<sup>325</sup> Pub. L. No. 95-91, 91 Stat. 565 (codified as amended in scattered sections of 42 U.S.C.).

<sup>326</sup> 42 U.S.C. § 7231(b)(1).

<sup>327</sup> *Id.*

<sup>328</sup> 29 U.S.C. §§ 201-219.

the District of Columbia.”<sup>329</sup> The Mine Safety and Health Review Commission’s enabling act also places its headquarters in the District.<sup>330</sup>

Additionally, annual appropriations bills generally do not impose specific requirements on agencies for staffing or resources. Amounts for salaries and expenses are instead typically provided in a lump sum. Appropriations may be directed specifically to certain administrative projects — for example modernizing an agency’s infrastructure technology — though again, typically without specifying particular staffing or resource quantities.<sup>331</sup> Because appropriations language is so general, it would be difficult to base a suit challenging the elimination of a given number of staff positions, for example, on congressional intent (as embodied in appropriations) to maintain staffing levels.

2. *Non-APA Procedural Statutes.* — Challenging structural deregulation under procedural statutes is a piecemeal affair, with the relative odds of success dependent on the precise action taken and the particular statute at issue. Sometimes statutes enlarge the scope of agency authority to manage their own affairs. The Federal Housekeeping Statute,<sup>332</sup> for example, the modern version of which was passed in 1966, gives the head of an executive department authority to “prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.”<sup>333</sup> Other statutes, however, constrain the ability of the President and his political appointees to interfere with agency operations. These statutes offer possible avenues to challenge structural deregulation. However, their scope is limited, and entrepreneurial chief executives increasingly have identified ways to sidestep their strictures.

(a) *Civil Service Protections.* — Notably, many of the statutes governing staffing of the federal executive branch emerged in response to perceived presidential abuses of discretion. Congress passed the Pendleton Act, the dominant statute providing civil servants with salary and job protection, to curb the “spoils system” — perfected under President Jackson and continued after the Civil War — under which

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<sup>329</sup> *Id.* § 204(c). The Dodd-Frank Act also places the CFPB’s principal office in the District of Columbia. 12 U.S.C. § 5491(e).

<sup>330</sup> 30 U.S.C. § 823a (“The principal office of the Commission shall be in the District of Columbia.”).

<sup>331</sup> See Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 133 Stat. 2534, 2550 (2019) (appropriating \$25 million for modernization of Department of Labor centralized infrastructure technology investments).

<sup>332</sup> 5 U.S.C. § 301.

<sup>333</sup> *Id.* The EPA recently invoked this statute as legal justification for its final rule limiting the use of scientific studies in agency rulemaking. Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Fed. Reg. 469, 471 (Jan. 6, 2021) (to be codified at 40 C.F.R. pt. 30).

Presidents would reward their allies by placing them in plum administrative posts.<sup>334</sup>

The Pendleton Act established protections for civil service employees in the federal government.<sup>335</sup> The U.S. Civil Service Commission originally oversaw the law's enforcement. Today, several newer agencies perform the same role. These include the Office of Personnel Management, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, and the Office of Special Counsel.<sup>336</sup> The MSPB and EEOC hear appeals in unlawful termination cases and thus stand as bulwarks against wrongful termination of federal employees.<sup>337</sup>

Therefore, civil service laws can be used to challenge agency staff terminations. But the structural deregulatory mechanisms identified in Part I largely circumvent these protections. Cutting staff through attrition relies on voluntary or incentivized retirements rather than terminations. Hiring freezes do not run afoul of the Pendleton Act, nor do office relocations that lead federal employees to quit en masse.<sup>338</sup> In addition, Presidents have found novel ways to circumvent the protections afforded by these laws, for example, by reclassifying federal employees. President Carter supported the Civil Service Reform Act of 1978<sup>339</sup> in part because it created a Senior Executive Service whose members were

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<sup>334</sup> See *Pendleton Act (1883)*, OUR DOCUMENTS, <https://www.ourdocuments.gov/doc.php?flash=false&doc=48> [<https://perma.cc/4ZSJ-Z325>]. The immediate impetus for the Act was the assassination of President Garfield by a disgruntled and deluded federal job seeker who believed the President owed him a job in the administration in exchange for alleged help provided to his election campaign. See Gilbert King, *The Stalking of the President*, SMITHSONIAN MAG. (Jan. 17, 2012), <https://www.smithsonianmag.com/history/the-stalking-of-the-president-20724161> [<https://perma.cc/GQ7Z-4RFC>].

<sup>335</sup> Pub. L. No. 47-27, § 2, 22 Stat. 403, 403-04 (1883). The Pendleton Act has been updated several times, notably by the Civil Service Reform Act in 1978. Pub. L. No. 95-454, 92 Stat. 1111.

<sup>336</sup> Andrew Glass, *Pendleton Act Inaugurates U.S. Civil Service System, Jan. 16, 1883*, POLITICO (Jan. 16, 2018, 12:00 AM), <https://politico.com/story/2018/01/16/pendleton-act-inaugurates-us-civil-service-system-jan-16-1883-340488> [<https://perma.cc/H27K-5S6N>]; see also U.S. GEN. ACCT. OFF., FPCD-80-38, CIVIL SERVICE REFORM — WHERE IT STANDS TODAY 2-3 (1980).

<sup>337</sup> See *Policy, Data, Oversight: Employee Relations*, U.S. OFF. OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/#url=EmployeeCoverage> [<https://perma.cc/2E8F-FKFL>].

<sup>338</sup> Former White House Chief of Staff Mick Mulvaney reportedly cheered the Department of Agriculture's move to Kansas City as a method for thinning the Agency's workforce, noting: "[I]t's nearly impossible to fire a federal worker. I know that because a lot of them work for me, and I've tried. You can't do it." Paul Bedard, *Mulvaney Cheers for More Federal Workers to Quit, "Wonderful Way" to Drain Swamp*, WASH. EXAM'R (Aug. 3, 2019, 8:10 AM), <https://washingtonexaminer.com/washington-secrets/mulvaney-cheers-for-more-federal-workers-to-quit-wonderful-way-to-drain-swamp> [<https://perma.cc/LN3F-BAC9>].

<sup>339</sup> Pub. L. No. 95-454, 92 Stat. 1111.

subject to fewer job protections than the rest of the civil service.<sup>340</sup> President Reagan expanded the number of noncareer political appointees within agencies in an effort to exert more control over agency decisionmaking.<sup>341</sup>

President Trump issued an executive order in October 2020 purporting to create a new category of federal employees with *no* protection from adverse personnel actions.<sup>342</sup> Citing the need for the President to “have appropriate management oversight,” the executive order mandated that the new “Schedule F” employees would be exempt from competitive service requirements and preremoval procedural protections.<sup>343</sup> The order covered all federal civil service employees in “positions of a confidential, policy-determining, policy-making, or policy-advocating character that are not normally subject to change as a result of a Presidential transition.”<sup>344</sup> President Biden revoked the order, but it illustrates yet another way that a determined President can try to exert greater control over the civil service.<sup>345</sup>

(b) *The Federal Vacancies Reform Act.* — The Federal Vacancies Reform Act similarly tries to restrict presidential authority over agency personnel. It does so by limiting the amount of time that Presidents can staff vacant agency leadership posts with acting officials.

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<sup>340</sup> See Mark W. Huddleston, *The Carter Civil Service Reforms: Some Implications for Political Theory and Public Administration*, 96 POL. SCI. Q. 607, 617–18 (1981–1982); Stuart E. Eizenstat, *Jimmy Carter and Civil Service Reform* 6 (Ctr. for the Study of the Admin. State, Working Paper No. 19-16, 2019). The Act also consolidated authority over federal personnel in the OPM, giving the President greater oversight over functions previously exercised by the bipartisan Civil Service Commission. See Huddleston, *supra*, at 607.

<sup>341</sup> See Steven D. Stehr, *Top Bureaucrats and the Distribution of Influence in Reagan's Executive Branch*, 57 PUB. ADMIN. REV. 75, 75 (1997); see also *Political Appointees in Federal Agencies: Hearing Before the Subcomm. on Civ. Serv. of the H. Comm. on Post Off. & Civ. Serv.*, 101st Cong. 5 (1989) (summary of statement of Bernard L. Ungar, director of federal human resource management issues, United States General Accounting Office) (providing data on the increases in noncareer staff).

<sup>342</sup> Exec. Order No. 13,957, 85 Fed. Reg. 67,631 (Oct. 21, 2020).

<sup>343</sup> *Id.* at 67,631; see *id.* at 67,632.

<sup>344</sup> *Id.* at 67,632. The order was immediately challenged, see *Complaint at 2*, Nat'l Treasury Emps. Union v. Trump, No. 20-3078 (D.D.C. Oct. 26, 2020) (citing law's limitation of exemptions from civil service to cases when exemption is “necessary” or “as conditions of good administration warrant” (quoting 5 U.S.C. § 3302)), and the incoming Biden Administration repealed it as one of its first acts in office, see Exec. Order No. 14,003, 86 Fed. Reg. 7,231 (Jan. 22, 2021).

<sup>345</sup> Cf. Erich Wagner, *The Legal Theories at the Heart of Trump's Order Politicizing the Civil Service*, GOV'T EXEC. (Nov. 3, 2020), <https://www.govexec.com/management/2020/11/legal-theories-heart-trumps-order-politicizing-civil-service/169765> [<https://perma.cc/C588-RTHK>] (noting that President Trump undid more than a century of civil service law “with the stroke of a pen,” resulting in “swift and nearly unanimous” backlash).

Early versions of the Act specified time limits for acting officials that Congress hoped would induce Presidents to nominate replacements expeditiously.<sup>346</sup> However, Presidents continued to make broad use of acting officials.<sup>347</sup> Moreover, the Department of Justice opined after the passage of the 1988 amendments to the Act that agency heads possessed independent authority to fill offices temporarily.<sup>348</sup>

In the 1998 Federal Vacancies Reform Act, Congress again sought to specify the manner in which temporary executive branch appointments could be made.<sup>349</sup> The Act's legislative history underscores Congress's view that "[t]he selection of officers is not a presidential power,"<sup>350</sup> and that the President "lacks any inherent appointment authority for government officers" beyond the nomination duties specified in the Constitution.<sup>351</sup>

There are three problems with congressional efforts to limit presidential power to appoint acting agency officials. First, the White House has asserted that Presidents are not bound by the 1998 Act's efforts to constrain it, at least where an agency's specific statutes contain conflicting provisions.<sup>352</sup> Second, Presidents have tried to circumvent the Act's limitations by having agency heads delegate responsibilities to subordinates before vacating their offices.<sup>353</sup> Finally, the Act permits acting officials to stay in their roles for long periods,<sup>354</sup> and Presidents often wait until near the end of that period to send a nomination to the Senate.<sup>355</sup>

(c) *The Impoundment Control Act of 1974*. — The Impoundment Control Act, too, was passed in response to executive excess. The Act sought "to resolve disagreement between the Executive and Legislative branches over which has ultimate control of government program and

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<sup>346</sup> An early version of the Act limited acting officials to ten day periods in many cases. See O'Connell, *supra* note 80, at 626 (citing Act of July 23, 1868, ch. 227, 15 Stat. 168). Amendments in 1988 extended that period and offered even longer extensions if the President submitted a nominee for Senate consideration. S. REP. NO. 105-250, at 4 (1998).

<sup>347</sup> O'Connell, *supra* note 80, at 626.

<sup>348</sup> *Id.*; see also S. REP. NO. 105-250, at 4.

<sup>349</sup> See S. REP. NO. 105-250, at 4.

<sup>350</sup> *Id.* at 4.

<sup>351</sup> *Id.* at 5.

<sup>352</sup> See O'Connell, *supra* note 80, at 667-71 (examining the cases of the CFPB and the Department of Justice).

<sup>353</sup> See *id.* at 635 ("Presidents can strategically use delegation to keep their preferred officials in control of certain administrative functions long past the Vacancies Act's time limits."); Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533, 560 (2020) (observing that Congress sought to eliminate delegation as a tool of circumvention in the 1998 Act).

<sup>354</sup> While the statute limits acting officials to 210 days in office in most cases, the clock starts over in the case of a failed nomination for the position. O'Connell, *supra* note 80, at 630-31.

<sup>355</sup> See *id.* at 724.

fiscal spending policies.”<sup>356</sup> President Nixon had refused to spend large amounts of funds appropriated by Congress, and he did so in a way that weakened legislative programs with which President Nixon disagreed.<sup>357</sup> The Act obligates Presidents to spend money appropriated by Congress for particular purposes.<sup>358</sup> If a President plans to withhold spending on a permanent basis, he must notify Congress and must receive approval for that withholding from both Houses within forty-five days.<sup>359</sup> If he fails to do so, that failure is subject to challenge in court.<sup>360</sup>

The Impoundment Control Act did stop the kind of egregious withholding seen during the Nixon Administration. However, while the Act prohibits refusals to spend, it does not affect the reprogramming of appropriated funds within a single account. As discussed above, the President can exert control over agency reprogramming because OMB acts as a gatekeeper between the agency and the relevant congressional committee that must approve any such requests.<sup>361</sup>

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In sum, statutes designed to limit presidential flexibility to remove civil servants and replace them with loyalists, to fill vacancies with acting officials rather than submit nominees for Senate confirmation, and to hijack appropriated agency funds have been only partially successful. As the next section will show, the APA has similarly failed to constrain presidential discretion to unmake the bureaucracy.

### C. *The Administrative Law Blind Spot*

Administrative law also offers an unsatisfying response to structural deregulation. The APA, sometimes referred to as the “statutory constitution of administrative government,”<sup>362</sup> does not lend itself to challenging structural deregulation. This incompatibility is in part due to the language and exclusions of the Act itself, and in part due to the judicial gloss given to its provisions over time.

The first problem with using the APA to challenge structural deregulation is that the Act is generally understood not to apply directly to

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<sup>356</sup> *Dabney v. Reagan*, 542 F. Supp. 756, 760 (S.D.N.Y. 1982).

<sup>357</sup> Peter E. Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1, 14–15.

<sup>358</sup> See 31 U.S.C. § 1402.

<sup>359</sup> *Id.* Either House of Congress may also pass a resolution disapproving of any temporary impoundments, in which case the monies must be spent as specified by statute. *Id.* § 1403.

<sup>360</sup> In *Dabney v. Reagan*, 542 F. Supp. 756, for example, the court ordered President Reagan to spend money that Congress had allocated to the Solar Energy and Energy Conservation Bank after the President declined to do so. Abner J. Mikva, *Deregulating Through the Back Door: The Hard Way to Fight a Revolution*, 57 U. CHI. L. REV. 521, 526 (1990) (citing *Dabney*, 542 F. Supp. at 768).

<sup>361</sup> Pasachoff, *supra* note 134, at 2231 (identifying this lever as a way for Presidents to control agencies).

<sup>362</sup> Gillian Metzger, Columbia L. Sch., *The Administrative Procedure Act: An Introduction* 1 (2017), <https://pracc.org/pdf/APA.summary.ProfMetzger.pdf> [<https://perma.cc/2NBU-SV5E>].

the President. However, even where agencies, rather than the President, take the ultimate actions we characterize as structural deregulation, the APA is unlikely to provide an effective remedy. This incapacity is, first, because the Act largely shields an agency's managerial decisions from public scrutiny, and, second, because courts are reluctant to police agency inaction and delay. Moreover, because courts frequently accept an agency's claim of scarce resources as justification for the failure to perform statutorily mandated actions by specified deadlines, structural deregulation (for example, depriving an agency of resources) can reinforce substantive deregulation (for example, failing to meet congressional deadlines for issuing rules), perpetually.

I. *Presidential Action.* — In *Franklin v. Massachusetts*,<sup>363</sup> the Supreme Court held that presidential actions are not “agency action” under the APA.<sup>364</sup> Thus, presidential actions, such as executive orders, are unreviewable for consistency with the APA's procedural and substantive requirements.<sup>365</sup> The same is true of appointments and removal decisions. Such actions may still be challenged as inconsistent with the Constitution or with substantive and procedural requirements in other statutes. As discussed above, however, statutory claims may be difficult to make because agency-enabling acts typically outline agency structures only in general terms.

The exemption of presidential action from any of the APA's requirements of regularity or procedure has another important consequence for structural deregulation: it facilitates presidential imposition of increasingly burdensome obligations on an already-stressed bureaucracy. Every President since Reagan has imposed some version of cost-benefit analysis on agencies to facilitate centralized review and coordination of federal administrative action.<sup>366</sup> Other Executive-created agency bur-

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<sup>363</sup> 505 U.S. 788 (1992).

<sup>364</sup> *Id.* at 796. *Franklin* concerned the decennial census and its effects on the allocation of congressional representatives to the states. Massachusetts challenged the census's method of allocating overseas military personnel among the states as arbitrary and capricious under the APA. *Id.* at 790–91. While the Secretary of Commerce oversees the census count and recommends apportionment of representatives, ultimately the President submits a statement to Congress entitling states to a particular number of representatives. *Id.* at 792. Because the Secretary's action had no effect until the President issued his statement, and because the Secretary's calculations generated no administrative record and were not made public, the Court deemed the relevant final action “presidential” and therefore unreviewable. *Id.* at 796–800. The Court's decision was relatively terse, and some have suggested that it is time to rethink its holding. See Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 68 (2020).

<sup>365</sup> However, agency action taken pursuant to such orders is subject to challenge so long as it meets the APA's other criteria for reviewability.

<sup>366</sup> See Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENV'T & ADMIN. L. 209, 238–68 (2012).

dens include required analyses of the effects of proposed rules on federalism,<sup>367</sup> environmental health and safety risks for children,<sup>368</sup> energy supply,<sup>369</sup> and environmental justice.<sup>370</sup> As noted above, while many of these requirements are entirely salutary, Presidents determined to do so can abuse the regulatory review process to demand round after round of additional analysis, overload agencies, and bury them in “sludge.”<sup>371</sup>

2. *Excluding Managerial Decisions from Public Participation and Disclosure.* — Administrative law shields most internal agency management decisions from public participation and even from public scrutiny. The APA requires that agencies give notice to the public of most proposed regulations and that members of the public have the opportunity to comment on those proposals before a final rule issues.<sup>372</sup> However, “rules of agency organization, procedure, or practice” are exempt from these requirements.<sup>373</sup> There are few cases applying this exemption to organizational rules as opposed to rules of practice and procedure. But it seems clear that internal organizational rules affecting, for example, personnel policies and resource distribution would not be subject to public scrutiny. Thus internal agency decisions about how to allocate resources, where to place employees, where to locate offices, how to spend funds, and how to review allegations of wrongdoing are not subject to public input under the APA.

The EPA recently claimed this exemption for its rule limiting the scientific studies the Agency could rely on in its rulemaking.<sup>374</sup> While framed as a transparency measure, this rule would have the effect of limiting agency reliance on important peer-reviewed studies due to their use of health data with personal identifiers, which is shielded from disclosure by public health privacy laws.<sup>375</sup> While claiming an exemption from the requirements of APA § 553, however, the Agency voluntarily engaged in a notice-and-comment process.<sup>376</sup> The purpose of identifying the rule as procedural seems to have been, instead, to locate the authority for its promulgation in the Federal Housekeeping Statute at 5 U.S.C.

<sup>367</sup> See, e.g., Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 30, 1987).

<sup>368</sup> See, e.g., Exec. Order No. 13,045, 62 Fed. Reg. 19,885 (Apr. 23, 1997).

<sup>369</sup> See, e.g., Exec. Order No. 13,211, 66 Fed. Reg. 28,355 (May 22, 2001).

<sup>370</sup> See, e.g., Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

<sup>371</sup> See Heinzerling, *supra* note 154, at 326, 365.

<sup>372</sup> See 5 U.S.C. § 553.

<sup>373</sup> *Id.* § 553(b)(3)(A).

<sup>374</sup> Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Fed. Reg. 469, 472 (Jan. 6, 2021) (to be codified at 40 C.F.R. pt. 30).

<sup>375</sup> See Lisa Friedman, *A Plan Made to Shield Big Tobacco from Facts Is Now E.P.A. Policy*, N.Y. TIMES (Jan. 4, 2021), <https://www.nytimes.com/2021/01/04/climate/trump-epa-science.html> [<https://perma.cc/FD9T-PVUS>].

<sup>376</sup> Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Fed. Reg. at 472.

§ 301. Thus the procedural exemption can be helpful to an agency seeking to expand its policymaking authority as well as one seeking to circumvent public process.

The public may not even be aware of changes affecting internal agency management. An agency must publish in the *Federal Register* basic information such as its locations and key employee contacts, along with “statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures.”<sup>377</sup> More detailed information about the agency’s internal operations is shielded, however, even from document requests under the Freedom of Information Act, by an exception for matters “related solely to the internal personnel rules and practices of an agency.”<sup>378</sup>

Thus, even where an agency documents policies such as a hiring freeze or the decision to shift personnel from one area of agency operations to another, it can be hard for the public to access that information. The most reliable method of public information about these decisions may be leaks from the individuals involved, and indeed media accounts suggest this is the primary means by which structural deregulatory actions come to public attention.<sup>379</sup>

3. *Judicial Review of Inaction and Delay.* — Federal court jurisprudence on review of agency inaction and delay also shows the limitations of the APA for challenging structural deregulation. Many structural deregulation efforts present as a failure to act, including failures to hire, failures to procure, failures to investigate alleged managerial or operational shortcomings, and refusals to spend. Agency inaction and delay are difficult to challenge under the APA. The courts have been consistently deferential to agency inaction,<sup>380</sup> and plaintiffs win only truly egregious cases of agency delay.<sup>381</sup>

Moreover, by exacerbating resource scarcity, structural deregulation can produce judicial deference to instances of *substantive* deregulation

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<sup>377</sup> 5 U.S.C. § 552(a)(1)(A)–(B).

<sup>378</sup> *Id.* § 552(b)(2).

<sup>379</sup> See, e.g., Ken Dilanian, *Under Trump, More Leaks — And More Leak Investigations*, NBC NEWS (Apr. 8, 2019, 3:14 PM), <https://www.nbcnews.com/politics/justice-department/under-trump-more-leaks-more-leak-investigations-n992121> [<https://perma.cc/LTG9-C77C>].

<sup>380</sup> See, e.g., *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (finding that APA claims could proceed only “where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take,” which excluded “broad programmatic attack[s]” (emphasis omitted)).

<sup>381</sup> See Michael D. Sant’Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1404–14 (2011) (surveying cases suggesting that the Supreme Court has a “presumption against reviewability of [agency] inaction” for several kinds of actions, *id.* at 1409, including decisions about enforcement, and that the Court has never interpreted “action . . . unreasonably delayed” as used in the APA, *id.* at 1411).

that take the form of agency inaction or delay.<sup>382</sup> As the Supreme Court emphasized in *Massachusetts v. EPA*,<sup>383</sup> “an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.”<sup>384</sup>

Jurisprudence on review of agency inaction and delay therefore throws up a double barrier to confronting structural deregulation. First, it is difficult to challenge structural deregulation itself where it takes the form of inaction or delay. Second, structural deregulation can make it more difficult to challenge failures to promulgate substantive rules or to take enforcement action by worsening the problem of agency resource scarcity.

#### IV. EXECUTIVE AND CONGRESSIONAL REMEDIES

Structural deregulation in its most extreme form is far-reaching, comprehensive, and radical.<sup>385</sup> Yet its insidiousness lies in its incremental nature. In this Part, we briefly describe some short-term measures an incoming President might take to rebuild agency capacity, and then turn to tools Congress might use to guard against structural deregulation over the longer term. Congress could adopt provisions to force greater transparency, impose constraints on agency managerial decisions, or exert greater budgetary controls. Yet we readily concede that such measures also come with significant downsides and may create more

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<sup>382</sup> Professor Eric Biber has written persuasively that at the core of the federal courts’ deference to agency inaction is their recognition that agencies do not have the resources to implement their statutory responsibilities to anything like the fullest extent. See Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN L. REV. 1, 17 (2008) [hereinafter Biber, *Resource Allocation*] (“[T]he analysis of whether an agency must act . . . often turns on whether the courts have concluded that the case involves important resource allocation issues.”); see also Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENV’T L.J. 461, 467–68 (2008) [hereinafter Biber, *Two Sides of the Same Coin*] (“An agency’s decision about how to allocate its resources among competing priorities is at the core of the policy-making discretion that the executive branch of government and any administrative agency must have.”). Biber understands court decisions on agency inaction as balancing deference to agency resource-allocation decisions with the courts’ constitutional duty to ensure agencies adhere to their statutory mandates. Biber, *Resource Allocation*, *supra*, at 4. In this balancing test, Biber continues: “[R]esource allocation is sometimes outcome-determinative.” *Id.*

<sup>383</sup> 549 U.S. 497 (2007).

<sup>384</sup> *Id.* at 527. Courts have not been specific about the precise meaning of “resource.” This vagueness can be problematic, especially where agencies are able to strategically invoke the “talismanic” idea of “limited resources” to justify failures to execute statutory responsibilities. See Biber, *Resource Allocation*, *supra* note 382, at 27; see also Biber, *Two Sides of the Same Coin*, *supra* note 382, at 468–69.

<sup>385</sup> See, e.g., Lisa Rein et al., *Trump’s Historic Assault on the Civil Service Was Four Years in the Making*, WASH. POST (Oct. 23, 2020, 8:30 PM), [https://www.washingtonpost.com/politics/trump-federal-civil-service/2020/10/23/02fbf05c-1549-11eb-ba42-ec6a580836ed\\_story.html](https://www.washingtonpost.com/politics/trump-federal-civil-service/2020/10/23/02fbf05c-1549-11eb-ba42-ec6a580836ed_story.html) [https://perma.cc/L3H5-VGR3].

problems than they solve. Congress might also play a more active oversight role with the aim of checking presidential overreach. Such oversight is more likely to occur in periods of divided government, and we are mindful that the hyperpartisanship and dysfunction in the contemporary Congress makes meaningful oversight hard to conduct.

#### A. Short-Term Rebuilding

After a period of structural deregulation, a new President cannot restore agency capacity with the stroke of a pen; he must do it brick by brick.<sup>386</sup> The immediate task is to rebuild and strengthen agencies to ensure they are adequately staffed, sufficiently resourced, and appropriately empowered to fulfill their statutory tasks. In some instances, it will be obvious which agencies require bolstering. To the extent their condition may not be clear, independent assessments by nonpartisan agencies like the GAO, or the National Academy of Public Administration, can suggest areas of greatest need.<sup>387</sup>

During the presidential transition period, an incoming administration is authorized to consult with agency officials, and it normally works with senior civil service at each agency to identify priorities for restoring budget, staffing, and the like.<sup>388</sup> In instances where agencies have been badly weakened, the incoming team can draw up plans to move swiftly to shore up staff. The White House would take steps to rebuild both internal and external expertise by, for example, staffing key expert positions that had been eliminated or left unfilled by the prior administration; restoring reassigned or relocated officials to their prior jobs if doing so would advance the agency's mission; and reestablishing or strengthening statutorily mandated advisory committees.<sup>389</sup> To support this

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<sup>386</sup> See Nicholas Confessore, *Mick Mulvaney's Master Class in Destroying a Bureaucracy from Within*, N.Y. TIMES MAG. (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html> [<https://perma.cc/4CVN-4SM3>] (chronicling the example of Acting Director Mick Mulvaney weakening the CFPB "brick by brick"); see also Catherine Rampell, Opinion, *How Mick Mulvaney Is Dismantling a Federal Agency*, WASH. POST (Jan. 25, 2018), [https://www.washingtonpost.com/opinions/mick-mulvaney-cant-legally-kill-the-cfpb-so-hes-starving-it-instead/2018/01/25/4481d2ce-0216-11e8-8acf-ad2991367d9d\\_story.html](https://www.washingtonpost.com/opinions/mick-mulvaney-cant-legally-kill-the-cfpb-so-hes-starving-it-instead/2018/01/25/4481d2ce-0216-11e8-8acf-ad2991367d9d_story.html) [<https://perma.cc/B5Y8-LBES>].

<sup>387</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-205, ENVIRONMENTAL HEALTH: HIGH-LEVEL STRATEGY AND LEADERSHIP NEEDED TO CONTINUE PROGRESS TOWARD PROTECTING CHILDREN FROM ENVIRONMENTAL THREATS 34 (2010) (concluding that the EPA's Children's Health programs are underfunded and understaffed).

<sup>388</sup> See, e.g., MARTHA JOYNT KUMAR, BEFORE THE OATH: HOW GEORGE W. BUSH AND BARACK OBAMA MANAGED A TRANSFER OF POWER 113-15 (2015) (describing the role and work of agency review teams); P'SHIP FOR PUB. SERV. & BOS. CONSULTING GRP., PRESIDENTIAL TRANSITION GUIDE 143-56 (2020), <https://presidentialtransition.org/wp-content/uploads/sites/6/2018/01/Presidential-Transition-Guide-2020.pdf> [<https://perma.cc/6ZW2-2S77>] (same).

<sup>389</sup> For example, to restaff agencies like the State Department and the Defense Department, which were badly weakened by President Trump's staff attrition and erosion policies, President

work, it would be necessary to properly staff and equip the key personnel agencies, such as the Office of Personnel Management and Office of Federal Procurement Policy, something Presidents from both parties have failed to do in the past.<sup>390</sup> An incoming administration might also prioritize appointing internal agency watchdogs such as IGs,<sup>391</sup> who, while not critical to an agency's regulatory capacity per se, help to promote transparency and accountability.<sup>392</sup>

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Biden moved quickly in 2021 to fill subcabinet positions that do not require Senate confirmation. See Nahal Toosi et al., *Anticipating Senate Bottlenecks, Biden Races to Fill Agency Jobs*, POLITICO (Dec. 2, 2020, 4:30 AM), <https://www.politico.com/news/2020/12/02/biden-nominations-transition-442046> [https://perma.cc/KQK4-UFS3].

<sup>390</sup> See Cooper, *supra* note 212, at 12–13 (discussing the Obama Administration's delay in filling these key posts). Anne O'Connell emphasizes that “[s]tability in the [White House Presidential Personnel Office] is critical to agency staffing.” ANNE JOSEPH O'CONNELL, CTR. FOR AM. PROGRESS, WAITING FOR LEADERSHIP: PRESIDENT OBAMA'S RECORD IN STAFFING KEY AGENCY POSITIONS AND HOW TO IMPROVE THE APPOINTMENTS PROCESS 4 (2010).

<sup>391</sup> Approximately thirty IGs, generally those associated with the larger government agencies, must be nominated by the President before they can be confirmed by the Senate. See KATHRYN FRANCIS, CONG. RSCH. SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 11, 12 tbl.5 (2019) (reporting that thirty-six IGs must be nominated by the President and confirmed by the Senate, and that thirty-three of these are establishment IGs). Toward the end of the Trump Administration, fifteen IG positions were vacant. See COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY & EFFICIENCY, PRESIDENTIAL TRANSITION HANDBOOK 17 (2020), <https://www.ignet.gov/sites/default/files/files/CIGIE-Presidential-Transition-Handbook.pdf> [https://perma.cc/6ZUP-DP8S]. Of these, four were awaiting a presidential nomination and three were awaiting nomination by an agency head. Of the vacant positions with candidates pending confirmation, all but one were nominated in 2020, even though seven of the offices were vacated in 2019 or earlier. See Bill Theobald, *Federal Waste Watchdogs, Undermined by Trump, Get Some GOP Backing*, THE FULCRUM (June 25, 2020), <https://thefulcrum.us/inspector-general-trump-gop> [https://perma.cc/C32D-24ZN]. For example, the CIA IG position became vacant in 2015, but the President did not nominate a replacement until April 2020. See Julian E. Barnes, *Senate Questions C.I.A. Watchdog Nominee over Independence*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/us/politics/cia-watchdog-peter-thomson.html> [https://perma.cc/A46E-TYK6]. Earlier, the State Department IG slot was vacant for over five years, from 2008 until a permanent replacement was confirmed in 2013. See Joseph E. Schmitz, Opinion, *Obama's Inspector General Negligence*, WALL ST. J. (June 4, 2013, 7:02 PM), <https://online.wsj.com/article/SB10001424127887324063304578520952503319368.html> [https://perma.cc/TBJ9-9LQQ]; Domani Spero, *Senate Confirms Steve Linick; State Dept Finally Gets an Inspector General After 2,066 Days*, DIPLOPUNDIT (Sept. 30, 2013), <https://diplopundit.net/2013/09/30/senate-confirms-steve-linick-state-dept-finally-gets-an-inspector-general-after-2066-days> [https://perma.cc/PZB5-2BG3].

<sup>392</sup> IGs are one of the primary avenues by which Congress oversees agencies; they are internal watchdogs who investigate agency waste, fraud, and other misconduct. IGs are independent by design. They choose which matters to audit and investigate without agency interference, and report their findings to both the agency and Congress. Both Metzger and Professor Neal Katyal have highlighted the role of IGs in the “administrative” separation of powers — the system of internal checks and balances within the executive branch. See Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 429–30 (2009); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2347 (2006); see also Pozen, *supra* note 151, at 1143 & n.270 (citing IGs as one of several important checks on government misbehavior); *Where Are All the Watchdogs? Addressing Inspector General Vacancies: Hearing Before the H. Comm. on Oversight*

In addition, an incoming President's first annual budget could propose that Congress refund agencies that have suffered significant budget reductions, or which have had their allocated funds reassigned in the prior administration.<sup>393</sup> The President's budget is developed by the OMB in collaboration with federal agencies; among other things, it establishes the administration's priorities for federal programs and regulatory policies.<sup>394</sup> While just the first step in a long congressional appropriations process, the budget presents an early opportunity for a new administration to signal — to Congress, the agencies, and the public — that it plans to remediate structural deregulation by rebuilding agency capacity.<sup>395</sup>

While the President nominates and awaits confirmation of new agency leadership, he can direct senior acting officials to cancel or suspend time-consuming busy work and refocus agencies on their statutory priorities. Presidents can do this informally, but they can also announce their intentions more publicly, through memos from the Chief of Staff, or executive orders and presidential memoranda directing agencies to take certain actions. Presidents can also prioritize certain regulatory matters by specific deadlines.<sup>396</sup>

Finally, in order to help reverse the damaging effects of reputational undermining, an incoming President could set a tone of treating agency personnel with respect,<sup>397</sup> and appoint senior agency leaders who both

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& *Gov't Reform*, 112th Cong. 2 (2012), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/5-10-12-Wiens-Testimony.pdf> [<https://perma.cc/DZG7-AGVG>] (statement of Jake Wiens, Investigator, Project on Government Oversight).

<sup>393</sup> For example, President Biden's first budget proposed substantial funding increases for many agencies that had suffered reductions during the prior administration, including the Education Department, Health and Human Services Department, and Environmental Protection Agency. Tony Romm, *Biden Seeks Huge Funding Increases for Education, Health Care and Environmental Protection in First Budget Request to Congress*, WASH. POST (Apr. 9, 2021, 5:17 PM), <https://www.washingtonpost.com/us-policy/2021/04/09/biden-2022-budget/> [<https://perma.cc/RF8D-H3YV>].

<sup>394</sup> See Pasachoff, *supra* note 134, at 2194 (describing the role that the office plays in developing the President's budget).

<sup>395</sup> For an overview of the budget process, see CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: INTRODUCTION TO THE FEDERAL BUDGET PROCESS (2020), <https://www.cbpp.org/research/introduction-to-the-federal-budget-process> [<https://perma.cc/FM6C-W4L2>].

<sup>396</sup> For example, President Biden's "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" tasked EPA and other agencies with a variety of substantive policy tasks, and included deadlines for action. Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021).

<sup>397</sup> See, for example, President Biden's commitment in a letter to a member of Congress during the campaign that he would treat federal workers with "the utmost dignity and respect." Eric Katz, *Biden Promises Pay Raises for Feds, Vows to Rely on Civil Servants' Expertise*, GOV'T EXEC. (Mar. 2, 2020), <https://www.govexec.com/workforce/2020/03/biden-promises-pay-raises-feds-vows-rely-civil-servants-expertise/163451> [<https://perma.cc/N4EB-DBHZ>]; see also Eric Katz, *The Rival: Rebuilding the Bureaucracy*, GOV'T EXEC. (Sept. 21, 2020), <https://www.govexec.com/>

possess, and are seen to possess, relevant expertise and experience.<sup>398</sup> Those leaders, in turn, could make an effort to revitalize demoralized career staff by rallying them around the agency's mission.<sup>399</sup> Such steps may sound basic, or even quaint, but they are essential to rebuilding morale and integrity.<sup>400</sup>

### B. *Longer-Term Measures to Fortify Agency Capacity*

Thus far we have described the things an incoming Chief Executive can do relatively quickly and unilaterally to rebuild agency capacity after a period of structural deregulation. But what might be done proactively to guard against it? The key actor here must be Congress, which has the power to structure, empower, fund, and oversee administrative agencies, and to push back against presidential overreach. Below, we discuss steps Congress might take to limit presidential discretion over the administrative state *ex ante*, or conduct oversight *ex post*, to shore

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management/2020/09/rival-rebuilding-bureaucracy/168571 [https://perma.cc/NFM3-WJGX] (discussing President Biden's plans for ethics reforms). President Biden took immediate steps to restore civil service protections, issuing an "Executive Order on Protecting the Federal Workforce" revoking President Trump's executive order creating a new Schedule F service category exempting employees offering policy advice from service job protections; the order also revoked measures designed to limit union activity and make it easier to fire federal employees. *See* Exec. Order No. 14,003, 86 Fed. Reg. 7,231 (Jan. 22, 2021); Elaine Knutt, *Role Reversal: Biden Rolls Back Trump's Civil Service Directives*, GLOB. GOV'T F. (Jan. 27, 2021), https://www.globalgovernmentforum.com/round-up-biden-moves-support-federal-workers [https://perma.cc/J699-CH2N]. The order also stated the President's commitment to pursue a higher minimum wage of \$15 per hour for federal employees. *Id.*

<sup>398</sup> Several of President Trump's cabinet appointees were criticized for, among other things, lacking expertise and being opposed to their agency's mission. *See* Paul Waldman, Opinion, *Donald Trump Has Assembled the Worst Cabinet in American History*, WASH. POST (Jan. 19, 2017), https://www.washingtonpost.com/blogs/plum-line/wp/2017/01/19/donald-trump-has-assembled-the-worst-cabinet-in-american-history [https://perma.cc/GDF4-3JFT]. These appointees were seen as disrupters, however, by the President and his allies. *See* Heidi M. Przybyla, *Trump's Cabinet Is His Team of Disrupters at Agencies They've Battled*, USA TODAY (Jan. 12, 2017, 10:28 AM), https://www.usatoday.com/story/news/politics/2017/01/12/some-trump-cabinet-picks-skeptical-their-agencies-missions/96417756 [https://perma.cc/HP26-PKT5]. Other Presidents have been faulted for not prioritizing competence in their senior political appointments. *See, e.g.,* Donald P. Moynihan & Alasdair S. Roberts, *The Triumph of Loyalty over Competence: The Bush Administration and the Exhaustion of the Politicized Presidency*, 70 PUB. ADMIN. REV. 572, 574-75 (2010) (criticizing the Bush Administration's appointees for their lack of experience).

<sup>399</sup> *See, e.g.,* Scott Gottlieb, Comm'r, U.S. Food & Drug Admin., First Remarks to FDA Staff (May 15, 2017), https://www.fda.gov/news-events/speeches-fda-officials/first-remarks-fda-staff-05152017 [https://perma.cc/7RJM-6WVV]. While the State Department is not a regulatory agency, the remarks of Secretary of State Antony Blinken to State Department employees also provide a good example of how incoming agency heads can seek to rally disheartened career staff. *See* Antony J. Blinken, Sec'y of State, First Remarks to State Department Employees (Jan. 27, 2021), https://www.state.gov/secretary-antony-j-blinken-to-state-department-employees [https://perma.cc/J37P-75CC].

<sup>400</sup> *Cf.* Matthew C. Stephenson, *The Qualities of Public Servants Determine the Quality of Public Service*, 2019 MICH. ST. L. REV. 1177, 1197-204 (discussing both the direct, tangible factors and indirect, intangible factors that influence civil service morale and prestige).

up agency capacity. We hasten to add that these measures, while imaginable, likely would face numerous political and practical hurdles to adoption. They could also contribute to bureaucratic ossification, and politicize agency decisionmaking to a greater extent, by involving Congress too extensively in day-to-day management.

*I. Limiting Ex Ante the President's Discretion to Manage.* — In the past, in the wake of presidential abuses, Congress has sought to insulate administrative personnel, funding, and oversight from presidential interference. A Congress that was so inclined could build on these precedents. For example, Congress could require minimum staffing levels and specify staff composition to a greater extent in legislation. As noted above, authorizing acts do not typically include information about agency staffing beyond leadership structure. While we recognize that higher numbers of staff do not guarantee agency competence or effectiveness, it may be worthwhile for Congress to designate certain minimum thresholds below which an agency's capacity to accomplish its mission would be assumed to be compromised, and to require that, if staffing levels fall below that threshold, the agency do something to enhance transparency, such as report to Congress or submit its staffing plan for public comment. There are obvious downsides to this idea, however — it would be time- and resource-intensive for Congress to stay abreast of agency staffing at this level of detail, and presumably Congress would have to update the numbers over time. Such specifications could also backfire: administrations might treat the minimum thresholds as ceilings rather than floors, refusing to add staff even if the agency workload required it.<sup>401</sup>

Congress could also impose transparency-enhancing requirements on agency decisions to manipulate staff. As an example, the Department of Energy Act of 1978 – Civilian Applications<sup>402</sup> (DOECA) mandates that the Secretary of Energy transmit any proposal to terminate or change the activities of the national laboratories to the House Committee on Science and Technology and wait thirty days before implementing those changes.<sup>403</sup> Congress could follow this model and require agencies to report to the relevant oversight committees before relocating their offices or reassigning certain categories of agency staff, such as scientists.<sup>404</sup> Such measures, like minimum staffing thresholds, have significant downsides. They could slow and encumber legitimate

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<sup>401</sup> On anchoring generally, see Adrian Furnham & Hua Chu Boo, *A Literature Review of the Anchoring Effect*, 40 J. SOCIO-ECON. 35 (2011), which surveys the robust literature on anchoring effects.

<sup>402</sup> Pub. L. No. 95-238, 92 Stat. 47 (codified in scattered sections of 42 U.S.C.).

<sup>403</sup> *Id.* § 104(c) (42 U.S.C. § 7257 note).

<sup>404</sup> On the benefits and costs of relocating agencies or agency offices, see Jeff Neal, Commentary, *Move Agency Headquarters Out of DC? Only if You Want Them to Fail*, FED. NEWS NETWORK (Oct. 31, 2019, 10:03 AM), <https://federalnewsnetwork.com/commentary/2019/10/move-agency-headquarters-out-of-dc-only-if-you-want-them-to-fail> [<https://perma.cc/L5ET-WHEH>].

agency reorganization efforts. Rather than promote good governance, they might create new opportunities for political interference by members of Congress in decisions that are better left to the agencies.

Still, such transparency requirements have undeniable benefits and will tend to increase accountability. Agency leadership may think twice if they have to publicize decisions that could undermine staff. And even if agency heads persevere, members of Congress will be in a better position to take corrective measures, by either pressuring the agency to refrain or reversing its decision, if necessary, through an appropriations rider or separate legislation. Of course the success of reporting requirements presumes that Congress will perform its oversight function diligently — a significant assumption that may be wrong, especially during periods of one-party rule. Nevertheless, transparency requirements at a minimum give internal staff additional leverage and signal to the public that something may be amiss.

Another possibility is that Congress adopt explicit reorganization authority, defining and limiting it, for department heads.<sup>405</sup> Currently, this authority varies considerably by agency. Some department heads have plenary power to reorganize their departments or transfer personnel and funds between programs.<sup>406</sup> Others may rely on their more nebulous or indirect authority to prescribe regulations governing internal department affairs to effect reorganizations.<sup>407</sup> By speaking directly to reorganization authority, Congress can avoid either agency or judicial

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<sup>405</sup> For an analogous proposal in the context of the dispensation and suspension powers, see Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 417–20 (2018).

<sup>406</sup> See, e.g., 6 U.S.C. § 452(a)(2) (giving the Secretary of Homeland Security authority to “allocate or reallocate functions among the officers” and to “consolidate, alter, or discontinue organizational units within the Department” sixty days after providing notice to the relevant congressional committees along with an explanation of the rationale for the action); 43 U.S.C. § 1451 note (granting the Secretary of the Interior authority to “effect such transfers within the Department of the Interior of any of the records, property, personnel, and unexpended balances (available or to be made available) of appropriations, allocations, and other funds of such Department”). While agencies are generally prohibited from reprogramming appropriated funds, individual statutes create exceptions. The Department of Homeland Security, for example, may reprogram funds up to \$500,000, or ten percent of a program’s funds, whichever is less, without congressional authorization. Michelle Mrdeza & Kenneth Gold, *Reprogramming Funds: Understanding the Appropriators’ Perspective*, GEO. UNIV. GOV’T AFFS. INST., <https://gai.georgetown.edu/reprogramming-funds-understanding> [<https://perma.cc/T2XK-3YK7>]. And the Department of Defense may reprogram funds up to \$20 million, or twenty percent of a program’s funds, whichever is greater. *Id.*

<sup>407</sup> See, e.g., 5 U.S.C. § 301 (“The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.”). Courts have approved the use of this authority, for example, by the Secretary of Labor to create the Labor Department’s Administrative Review Board. See *Willy v. Admin. Rev. Bd.*, 423 F.3d 483, 491–92 (5th Cir. 2005); see also 3 U.S.C. § 301 (authorizing the President to delegate to agency heads in writing, after publication in the *Federal Register*, any function vested in the President by law).

interpretation of statutory silence as license to manipulate agency structure.

Congress could also specify qualifications for executive branch appointments more frequently, in an effort to ensure that nominees have baseline experience or expertise. There is a debate over Congress's constitutional authority to establish statutory qualifications for executive branch appointees incident to its power to create executive branch offices.<sup>408</sup> Historically, Congress has specified qualifications sparingly,<sup>409</sup> no doubt out of reluctance to interfere with the President's constitutional appointment power. But such requirements do exist.<sup>410</sup> In response to structural deregulation, Congress could impose experience or expertise criteria more often, and strategically, in a manner designed not to encroach too much on the President's power to select his preferred nominees. The biggest downside to this strategy is that it might not work. Faced with legislation purporting to limit his appointment power, a President might veto the bill (forcing a two-thirds override, which may be difficult), or issue a signing statement signaling his disagreement on constitutional grounds. Or he might simply ignore the limitation.<sup>411</sup>

There may be other ways to bolster agencies against structural deregulation, for example by increasing the independence of internal agency watchdogs, like IGs, who serve an important accountability function. Even though IGs investigate agency waste, fraud, and other misconduct<sup>412</sup> and are not, strictly speaking, overseers of the regulatory process, their presence might inhibit Presidents from pursuing nontransparent strategies to erode agency capacity.<sup>413</sup> Failing to appoint IGs, or firing them without replacement, is analogous to shooting out the lights

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<sup>408</sup> See HENRY B. HOGUE, CONG. RSCH. SERV., RL33886, STATUTORY QUALIFICATIONS FOR EXECUTIVE BRANCH POSITIONS 3-7 (2015) (discussing the history of interbranch conflict over whether Congress may establish such qualifications incident to its constitutional authority to establish executive branch offices).

<sup>409</sup> *Id.* at 7.

<sup>410</sup> See, e.g., Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, GEO. WASH. L. REV. (forthcoming) (manuscript at 21-27) (on file with Harvard Law School Library), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3787704](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787704) [<https://perma.cc/UEM3-3RAR>] (surveying existing requirements for agency heads and other leaders).

<sup>411</sup> HOGUE, *supra* note 408, at 1-2, 4 (noting that President George W. Bush did just that when Congress for the first time specified qualifications for the FEMA Administrator in the Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, 120 Stat. 1394, following the Agency's inadequate response to Hurricane Katrina in 2005).

<sup>412</sup> Inspector General Act of 1978, 5 U.S.C. app. § 2(2), § 4(a).

<sup>413</sup> Inspectors general choose which matters to audit and investigate without agency interference, and they report their findings to both agency leadership and Congress. See Pozen, *supra* note 151, at 1143-44 (citing inspectors general as one of several important checks on government misbehavior). In addition, inspectors general are exempt from the rule that agencies may not dissent from the President's budget proposals; they are explicitly authorized to argue that such proposals "would substantially inhibit the Inspector General from performing the duties of the office." Pasachoff, *supra* note 134, at 226 (quoting 5 U.S.C. app. § 6(g)(3)).

before a burglary: by removing an internal watchdog not beholden to him, a President can obscure misbehavior.<sup>414</sup> Congress already protects the independence of IGs, but still greater protections may be necessary.<sup>415</sup> And Congress may also consider extending similar protections to certain other categories of agency personnel, like scientists.<sup>416</sup> Another way to increase transparency is to strengthen internal complaint processes that permit employees to report unethical behavior or raise other concerns about agency action.<sup>417</sup> Reinforcing confidence in these channels and protecting those who use them by strictly enforcing retaliation bans may embolden staff who might otherwise remain silent to expose instances of structural deregulation.

Congress might also consider strengthening civil service protections, for example by revisiting whether Presidents should retain the power to establish new civil service classifications with fewer-than-normal protections,<sup>418</sup> an authority that, in any event, appears to conflict with the Pendleton Act's original emphasis on a professional civil service free from political influence.<sup>419</sup>

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<sup>414</sup> Over seventy federal IGs are creatures of statute, and those statutes make many IGs subject to the Article II, Section 2 appointments process. See FRANCIS, *supra* note 391, at 11. Thirty-six IGs, generally those associated with the larger government agencies, must be nominated by the President before they can be confirmed by the Senate. See *id.* Toward the end of the Trump Administration, fifteen IG positions were vacant. See COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY & EFFICIENCY, *supra* note 391, at 17. The State Department IG slot was vacant for over five years, from 2008 until a permanent replacement was confirmed in 2013. See Schmitz, *supra* note 391; Spero, *supra* note 391. That inspector general then served until 2020, when he was fired by President Trump and replaced with an acting IG. See Meridith McGraw & Nahal Toosi, *Trump Ousts State Department Watchdog*, POLITICO (May 15, 2020, 11:21 PM), <https://www.politico.com/news/2020/05/15/state-department-inspector-general-fired-261536> [https://perma.cc/UGU3-Z6WD].

<sup>415</sup> See, e.g., BEN WILHELM, CONG. RSCH. SERV., IF11546, REMOVAL OF INSPECTORS GENERAL: RULES, PRACTICE, AND CONSIDERATIONS FOR CONGRESS 2 (2020); Danielle Brian, *It's More Clear Now Than Ever: Inspectors General Need Stronger Protections*, PROJECT ON GOV'T OVERSIGHT (Apr. 13, 2020), <https://www.pogo.org/analysis/2020/04/its-more-clear-now-than-ever-inspectors-general-need-stronger-protections> [https://perma.cc/9NWC-DSV2]; Danielle Brian & Liz Hempowicz, *Good Governance Paper No. 11: Strengthening Inspectors General*, JUST SEC. (Oct. 27, 2020), <https://www.justsecurity.org/73075/good-governance-paper-no-11-strengthening-inspectors-general> [https://perma.cc/5YJU-Z3YE]; Press Release, Sen. Chuck Grassley, Grassley Leads Bipartisan Bill to Bolster Inspector General Protections (June 18, 2020), <https://www.grassley.senate.gov/news/news-releases/grassley-leads-bipartisan-bill-bolster-inspector-general-protections> [https://perma.cc/6CHY-QHGT].

<sup>416</sup> See WILHELM, *supra* note 415, at 2 (noting potential challenges to such protections under the separation of powers).

<sup>417</sup> See Joe Davidson, Perspective, *Some Federal Agencies Have Dissent Channels. A Report Says They Aren't Working*, WASH. POST (July 31, 2020, 6:00 AM), [https://www.washingtonpost.com/politics/some-federal-agencies-have-dissent-channels-a-report-says-they-arent-working/2020/07/30/d242a114-d29e-11ea-af07-1d058ca137ae\\_story.html](https://www.washingtonpost.com/politics/some-federal-agencies-have-dissent-channels-a-report-says-they-arent-working/2020/07/30/d242a114-d29e-11ea-af07-1d058ca137ae_story.html) [https://perma.cc/F67V-F2PC].

<sup>418</sup> See *supra* section III.B.2.a, pp. 644–46.

<sup>419</sup> See, e.g., Sean M. Theriault, *Patronage, the Pendleton Act, and the Power of the People*, 65 J. POL. 50, 54–57 (2003) (overviewing the history of civil service reform of the spoils system as had been popularized by Andrew Jackson).

Finally, Congress might appropriate agency funds with greater specificity and impose more conditions on agency spending, which would limit the President's ability to delay, divert, and otherwise impact agency budgets.<sup>420</sup> However, the U.S. Congress already appropriates in a far more prescriptive manner than the governments of many other developed countries, and greater specificity might produce more ossification.<sup>421</sup>

2. *Stronger Oversight Ex Post.* — The ex ante measures described above could help to impede structural deregulation, but they are not without drawbacks and could go too far in limiting administrative flexibility. They may also enhance congressional influence in ways that might further politicize agency decisionmaking, enabling members of Congress to interfere more readily in day-to-day agency management.

It may be preferable then, to rely to a greater extent on ex post oversight measures that do not intrude excessively on agency discretion, as a check on structural deregulation. Oversight is designed to encourage good behavior and promote political accountability. The Government Performance and Results Act of 1993<sup>422</sup> (GPRA) already helps to keep Congress abreast of agency performance, but it does not focus specifically on the incapacitation we are worried about, and the President has too much influence over its implementation. As amended by the GPRA Modernization Act of 2010,<sup>423</sup> this law requires agencies to consult with Congress and other stakeholders to develop four-year strategic plans, set long-term goals for their major functions, establish performance measures, and report results.<sup>424</sup>

In addition to multiyear strategic plans, agencies must produce annual performance plans with fiscal year performance goals, objectives on how to achieve these goals, and an explanation of how performance is measured and verified.<sup>425</sup> Agencies must also post annual updates on performance on their websites. And a subset of executive branch agencies must establish “priority goals” for which they must conduct quarterly reviews. The OMB plays a central role in administering the

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<sup>420</sup> Cf. Joachim Wehner, *The Case for Congressional Budgeting*, 71 PUB. ADMIN. REV. 349, 350–51 (2011) (questioning the capacity of Presidents to be fiscal stewards and arguing for a stronger congressional role).

<sup>421</sup> Most other leading jurisdictions, by contrast, set objective budgets rather than the line-item budget accounts that have evolved in this country. See *id.* at 349 (comparing appropriations process in the United States to those in other developed countries).

<sup>422</sup> Pub. L. No. 103-62, 107 Stat. 285. For an overview summarizing the reforms, see CLINTON T. BRASS, CONG. RSCH. SERV., R42379, CHANGES TO THE GOVERNMENT PERFORMANCE AND RESULTS ACT (GPRA) (2012).

<sup>423</sup> Pub. L. No. 111-352, 124 Stat. 3866.

<sup>424</sup> See *id.* § 2, 124 Stat. 3866–67.

<sup>425</sup> See Alfred Ho, *GPRA After a Decade: Lessons from the Government Performance and Results Act and Related Federal Forms: Introduction*, 30 PUB. PERFORMANCE & MGMT. REV. 307, 307 (2007).

GPRAs.<sup>426</sup> For example, OMB must determine whether agencies meet the performance goals in their Agency Performance Plans, and if not, OMB and the agencies must produce various reports and plans to address any unmet goals.<sup>427</sup>

We cannot do justice to the GPRAs' complex scheme here. It is, to be sure, highly bureaucratic and burdensome for agencies. More problematic for our purposes is that this elaborate goal-setting, performance review, and reporting scheme — while requiring agencies to consult with various congressional committees and generating numerous products on agency performance for Congress to review — is largely overseen and implemented by the OMB, which means, ultimately, that it falls significantly under presidential control and direction.<sup>428</sup> But a similar set of requirements less subject to presidential interference could bring instances of structural deregulation (or at least their consequences) to light.

Congress could also enable stronger oversight by engaging nonpartisan agencies, such as the GAO, the National Academy of Public Administration, and the Administrative Conference of the United States in monitoring agencies to ensure that they are adequately staffed and capacitated to perform their statutory functions. While the GAO already performs assessments of agency performance,<sup>429</sup> it could be charged specifically with investigating whether agencies are subject to presidential undermining using the tools we have described as structural deregulation, and reporting those findings to Congress and the public. Another possibility is for Congress to expand the purview of the IGs beyond ensuring whether agency officials are complying with legal requirements to include responsibility for evaluating presidential interference of the sort we have described.

All of this monitoring, investigating, reporting, and publicizing may not amount to much if Congress is unwilling to act on the information by holding oversight hearings, calling agency and White House officials to testify, and using all of the other instruments at its disposal, including

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<sup>426</sup> See BRASS, *supra* note 422, at 7; WALTER GROSZYK, IMPLEMENTATION OF THE GOVERNMENT PERFORMANCE AND RESULTS ACT OF 1993, at ¶ 26 (1995), <https://govinfo.library.unt.edu/npr/library/omb/gpra.html> [<https://perma.cc/W9LQ-CWXQ>] (examining the experience of the U.S. government two years after the GPRAs was implemented).

<sup>427</sup> See BRASS, *supra* note 422, at 8. See generally EXEC. OFF. OF THE PRESIDENT & OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-11: PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (2017), [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/a11\\_current\\_year/a11\\_2017.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/a11_current_year/a11_2017.pdf) [<https://perma.cc/8XXB-LYT7>] (providing an overview of the federal performance framework related to agencies' Strategic Plans, Annual Performance Plans, and Annual Performance Reports requirements).

<sup>428</sup> BRASS, *supra* note 422, at 18–19.

<sup>429</sup> *Id.* at 20–21.

its lawmaking and appropriations powers. But at least greater transparency about structural deregulation would better enable the public to hold the President and Congress, both, to account.

3. *Administrative Law Remedies.* — As noted above, the legal and procedural requirements of the APA have been held not to apply to presidential action.<sup>430</sup> Still, many instances of structural deregulation that originate with the President but are in practice carried out by the agencies — such as hiring freezes, agency reorganizations, and funding reallocations — should be subject to the APA. Nevertheless, many such actions might escape judicial review if courts deem them to be “committed to agency discretion by law.”<sup>431</sup> Congress could address this problem by imposing guidelines for such actions in particular agency statutes. Revisions to the APA might also specify that major managerial actions are reviewable under the “arbitrary and capricious” standard of review in § 706(2)(A).<sup>432</sup>

Rather than waiting for Congress to promulgate statutory criteria, agencies could fortify themselves against structural deregulation. One way they could do so is by establishing, through regulation, the “law” against which subsequent managerial actions could be measured. In *Physicians for Social Responsibility v. Wheeler*,<sup>433</sup> the D.C. Circuit concluded that structural changes by agency heads were reviewable so long as there was a meaningful legal standard to guide that review.<sup>434</sup> That meaningful standard need not be expressed in legislation, the court held, but could take the form of an agency regulation or even a policy statement.<sup>435</sup> Therefore, agencies could themselves promulgate the criteria against which subsequent structural changes like the transfer of personnel, the treatment of whistleblowers, and the composition of advisory committees could be measured.

Courts should also reconsider their deference to agency inaction and delay due to scarce resources where those resources *intentionally* were made scarce. Administrations should not be able to incapacitate agencies and then later claim incapacitation as grounds for inaction. Courts’ general reluctance to intervene in agency priority setting is understandable as a matter of comparative institutional competence.<sup>436</sup> However, where parties have presented compelling evidence of structural deregulation, that deference is less appropriate. Professor Eric Biber has suggested that courts reviewing agency delay take into account whether the

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<sup>430</sup> See *supra* section III.C.1, pp. 648–49.

<sup>431</sup> 5 U.S.C. § 701(a)(2).

<sup>432</sup> See *id.* § 706.

<sup>433</sup> 956 F.3d 634 (D.C. Cir. 2020).

<sup>434</sup> *Id.* at 643.

<sup>435</sup> *Id.*

<sup>436</sup> See Biber, *Resource Allocation*, *supra* note 382, at 19.

agency is acting in good faith in asserting that it has insufficient resources to take the action at issue.<sup>437</sup> Evaluating evidence of structural deregulation could be part of this good faith assessment.

Agencies should also make managerial decisions more transparent so the public can discern when political appointees are making decisions with serious consequences for the structural integrity of their agencies. A subset of managerial decisions might merit not just publication but public participation. Congress could reconsider the scope of the APA's exclusion of rules directed at "agency management or personnel" from notice-and-comment requirements. Policies important enough to meet the definition of a rule should not automatically be exempt from comment. To avoid unnecessary delay, most management policies could be promulgated as direct final rules, which go into effect on a specified date if the agency receives no substantial adverse comments.<sup>438</sup> This approach would provide opportunity for comment on controversial changes without unduly increasing ossification or stymieing routine adjustments.

#### CONCLUSION

The main purpose of this Article is to identify and label structural deregulation, and to argue that it is a serious problem with significant implications for American democratic governance. For several decades now, with the approval of the Supreme Court, the American presidency has amassed expansive powers, and Presidents have exerted increasingly tight control over the administrative state. For the most part, scholars have portrayed this development favorably, imagining that good faith chief executives aim to place their stamp on the bureaucracy and take credit for its achievements. As we have explained, however, this portrayal overlooks the dangerous potential of a powerful President bent on undermining the government's core capacities.

We have defined structural deregulation to include those things a President can do that systematically erode and undermine agency staff, limit or sideline expertise, constrict resources, and destroy morale — the foundational capacities on which agencies rely to perform their statutory duties. Structural deregulation causes damage cumulatively and incrementally, relatively invisibly, and largely unaccountably. We have distinguished these measures from what we call substantive deregulation, which consists of more narrowly targeted regulatory rollbacks that use transparent legal procedures, are typically subject to judicial review, and are fairly easily reversed.

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<sup>437</sup> *Id.* at 33–34.

<sup>438</sup> See OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS 9 (2011), [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) [https://perma.cc/H3GZ-LT2G].

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Structural deregulation has troubling long-term implications for the constitutional separation of powers. We have argued that Presidents who embark on a campaign of undermining agency capacity are acting in a manner inconsistent with their constitutional duty to take care to execute the laws faithfully, and they may encroach on Congress's law-making power by disabling agencies from accomplishing their lawfully delegated tasks. Structural deregulation also contravenes well-established administrative law norms such as transparency and accountability, which remain important to a well-functioning democracy that depends on bureaucratic management. Finally, the "stickiness" of structural deregulation challenges democratic norms that disfavor binding the hands of political successors.

We have shown that public law, on the whole, provides few opportunities to redress or prevent structural deregulation. Constitutional law and administrative law both have blind spots when it comes to presidential management of the bureaucracy, especially when the President's mission is incapacitation. Specific statutes meant to protect the civil service or inoculate agency budgets from presidential control do not help much either — they are vulnerable to workarounds. These blind spots and workarounds have allowed structural deregulation to flourish, a situation which we believe requires a political solution that only Congress can provide.