

# Presidential Transitions: The New Rules

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*The Trump Administration was unusually aggressive in using an obscure set of tools to undo the Obama Administration’s regulatory legacy: Congressional Review Act disapprovals, requests that courts hold in abeyance pending cases challenging Obama-era regulations, and suspensions of final regulations. These actions could be seen as part of the Trump Administration norm-breaking approach to regulatory policy, under which it also provided shoddy justifications for its actions, ignored statutory commands, and failed to comply with procedural requirements. There has been a general assumption that the norm-breaking was a result of the Trump Administration’s lack of respect for the rule of law and that it would subside when a new administration took office.*

*This Article challenges this assumption, showing that the Trump-era toolkit on rollbacks has now also been used aggressively—in some cases more aggressively—by the Biden Administration. Actions that might have been seen as an aberration four years ago should now be regarded as integral components of the administrative state.*

*In a 2019 Article describing the Trump Administration’s aggressive rollback tools, we predicted that the nature of the presidency would change in significant ways as a result. A one-term president will likely not be able to implement much regulatory policy that is durable. And to do so, a president has a much shorter period during which regulations are likely to be protected from quick undoing by a successor of the opposite party, from roughly three-and-a-half years to about two years. The impact of this trend is particularly significant because, during the current era of congressional gridlock, presidents rely on regulations as the primary way in which to implement their domestic policy programs. In this Article, we provide new evidence from the Biden Administration showing that these changes are here to stay.*

Introduction.....	1102
I. The Congressional Review Act.....	1106
A. An Overview of the Act.....	1107
B. The Trump Administration’s Use of the Act.....	1109
C. The Biden Administration’s Use of the Act .....	1110

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Presidential Transitions: The New Rules

1. Expectations .....	1110
2. Rules Targeted for Disapproval by the 117th Congress....	1112
3. The Biden Administration’s Disapprovals.....	1115
II. Court Strategies .....	1118
A. Abeyances.....	1118
1. Background .....	1119
2. The Trump Administration’s Practice .....	1120
3. The Biden Administration’s Practice.....	1121
B. Withdrawing Appeals .....	1127
1. The Trump Administration’s Practice .....	1127
2. The Biden Administration’s Practice.....	1128
C. Conceding Error.....	1130
1. The Trump Administration’s Practice .....	1131
2. The Biden Administration’s Practice.....	1132
III. Regulatory Strategies .....	1134
A. Suspensions .....	1134
1. The Trump Administration’s Practice .....	1135
2. The Biden Administration’s Practice.....	1136
a. Sixty-Day Delays.....	1137
b. Longer Delays.....	1139
c. Suspensions Challenged in Court.....	1143
d. Comparison to Trump Administration Suspensions....	1143
B. Interim Final Rules .....	1144
1. The Trump Administration’s Practice .....	1145
2. The Biden Administration’s Practice.....	1146
IV. Implications.....	1148
A. The Pressures Faced by the Biden Administration.....	1149
B. Other Strategic Considerations.....	1152
Conclusion .....	1153

## Introduction

Five years ago, the new Trump Administration debuted the use of a set of tools that allow a president to roll back a predecessor's policies outside of textbook administrative law.<sup>1</sup> The tools facilitate speedy rollbacks of rules beyond just the most recent midnight rules from the prior administration and thus allowed the Trump Administration to make a significant dent in Obama-era policies. For example, President Trump signed fourteen resolutions passed under the Congressional Review Act to disapprove (and thus repeal) Obama-era regulations.<sup>2</sup> The Trump Administration also asked courts to put litigation over Obama-era regulations on hold through orders known as abeyances.<sup>3</sup> It asked for abeyances in cases that were already briefed and in one case that had already been argued, foreclosing the possibility of a judicial decision upholding rules that had been promulgated by the Obama Administration. And Trump-era agencies suspended implementation or compliance with Obama-era regulations even though at least some of the regulations had been final for some time.<sup>4</sup>

The Trump Administration's unusually aggressive effort to undo the regulatory output of its predecessor could be seen as part of a broader pattern under which the Administration broke down norms as it used agencies to make policy—a pattern that has received attention in the academic literature. For example, some scholars have looked at the ways that the Trump Administration eroded the administrative state from within.<sup>5</sup> And scholars predicted<sup>6</sup> and found<sup>7</sup> that the Trump Administration would lose in court at unprecedented levels because of procedural and statutory violations. The general assumption has been that the norm-breaking was a result of the Trump Administration's lack of respect for the rule of law<sup>8</sup> and that it would subside as an aberration or exception.<sup>9</sup>

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1. See Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 14-23 (2019) (identifying and analyzing the tools).

2. See *id.* at 19-21.

3. See *id.* at 28-33.

4. See *id.* at 37-41.

5. Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021); David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753 (2022); Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 378 (2019) (discussing the “perils of concentrated executive policy-making authority”); William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509 (2019).

6. Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 HARV. L. & POL'Y REV. 13, 48 (2018) (predicting losses).

7. Bethany A. Davis Noll, “Tired of Winning”: *Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353, 357 (2021) (finding a win rate of 23% for the Trump Administration).

8. See, e.g., Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Stop and Strategy*, 68 DUKE L.J. 1651, 1653 (2019) (concluding that Trump-era agencies could not be counted on to consider the threat of judicial review when promulgating rules); David M. Driesen, *President Trump's Executive Orders and the Rule of Law*, 87 UMKC L. REV. 489, 514-17 (2019) (arguing that Trump-era executive orders “attacked numerous core principles of our constitutional order”).

9. See Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1 (2020) (sketching reasons for optimism about the future of American democracy).

This Article challenges that assumption with respect to the manner in which presidential transitions are conducted by showing that the Trump-era toolkit on rollbacks has now also been used aggressively (and in some cases more aggressively) by the Biden Administration. On abeyances, the Biden Administration went even further than the Trump Administration, asking for abeyances in many more cases that had already been argued.<sup>10</sup> The Administration has pursued suspensions aggressively across many agencies<sup>11</sup>—though not in the illegal ways that were used by the Trump Administration.<sup>12</sup> The Congressional Review Act is a tool that is naturally far more powerful for Republicans because it is anti-regulatory in both the sense that its use competes with the Senate confirmation of presidential appointees to positions key to carrying out an affirmative policy agenda and it allows Congress to speedily disapprove of agency actions. But despite the fundamental unease that at least some members of the Democratic party have had when faced with using the Act,<sup>13</sup> the Biden Administration used it to disapprove three Trump-era regulations.<sup>14</sup> This marks the first time that a Democratic president employed the Congressional Review Act, and it serves as evidence that we are in an era where all aggressive tools are on the table.

Moreover, in each of three arenas—Congress, court, and the regulatory arena—the Biden Administration has pursued multiple rollback tools even beyond the ones used in the prior transition. For example, in several challenges to Trump-era rules, the Biden Administration took advantage of the lack of intervenors who could have defended those rules and conceded error in court, leading to vacatur of the rules.<sup>15</sup> All of these efforts have aided the Biden Administration in working to roll back Trump-era policies.

In our 2019 Article, we predicted that the Trump-era toolkit would form part of the standard transition plan for a new president after an inter-party transition. The Biden Administration's use of these tools is a new data point supporting our hypothesis. Because of the ability of future presidents to use the same toolkit, the tools are now a core facet of the administrative state and the presidency has changed in significant ways as a result. Major durable policies now require a president to serve for two terms. A one-term president now only has approximately two years to finalize major policies, after which she can be reasonably confident that the policies will be undone speedily by a successor. This new reality exists because of the way that the tools can be used to reach backwards. The Congressional Review Act is available for any actions finalized in approximately the last half a year of a presidency.<sup>16</sup> Abeyances can be used to put off judicial decisions for anything still pending in court, and it can take two

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10. See *infra* note 139.

11. See *infra* Section III.A.2.

12. See *infra* notes 337-342 and accompanying text.

13. See *infra* note 32 and accompanying text.

14. See *infra* notes 103-117 and accompanying text.

15. See *infra* notes 240-253 and accompanying text.

16. See Davis Noll & Revesz, *supra* note 1, at 16.

years to move through judicial review on a policy. And many regulations are not implemented immediately. In fact, some regulations have implementation schedules of multiple years. Any regulation not yet implemented can be done away with through suspensions.

The impact of this trend on a presidency is all the more significant because presidents have come to rely on the administrative state as a primary mechanism for accomplishing their policy objectives. For many years, presidents have attempted, but often failed, to accomplish their objectives through Congress<sup>17</sup> and then have turned to a more lengthy and bureaucratic form of policymaking: promulgating rules through executive agencies.<sup>18</sup> But, as Jessica Bulman-Pozen put it, presidential administration could “cannibalize itself,”<sup>19</sup> if rollback tools are used aggressively.

The existence of the toolkit, and the possibility it will be used in the future, has had a significant impact within the Biden Administration. For example, because of the pressure to move fast, on day one, the Administration listed more than a hundred Trump-era environmental rules, directing agencies to review them in accordance with an Executive Order entitled “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.”<sup>20</sup> The White House also set up an office within the White House to address climate policy nationally<sup>21</sup> and another office within the Department of State to address climate change internationally.<sup>22</sup> Agency personnel have been working at breakneck speed to meet the President’s deadlines.<sup>23</sup> At the same time, judicial scrutiny remains an ever-present pressure and agencies must continue to prepare robust records and analysis to support their rules.<sup>24</sup> As the Biden team is

17. See *id.* at 3 (citing Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1518-25 (2018)) (discussing the trend of worsening congressional gridlock); see also Richard L. Revesz, *Congress and the Executive: Challenging the Anti-Regulatory Narrative*, 2018 MICH. ST. L. REV. 795, 799-802 (2018) (same).

18. See, e.g., Shany Winder, *Extraordinary Policymaking Powers of the Executive Branch: A New Approach*, 37 VA. ENV'T L.J. 207, 225 (2019) (explaining how congressional gridlock leads to increased executive policymaking through administrative actions); Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 269-70 (2019) (describing the trend of increasing presidential reliance on agency action); Thomas O. McGarity, *Avoiding Gridlock Through Unilateral Executive Action: The Obama Administration’s Clean Power Plan*, 7 WAKE FOREST J.L. & POL’Y 141 (2017) (discussing President Obama’s reliance on administrative actions to promulgate environmental policies in the face of congressional gridlock); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 698 (2016) (asserting that the Obama Administration exercised an unprecedented level of control over agencies); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248-50 (2001) (discussing the expansion of the president’s role in policymaking through involvement in administrative actions); Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1968 (2015) (same).

19. Bulman-Pozen, *supra* note 18, at 270.

20. *Fact Sheet: List of Agency Actions for Review*, WHITE HOUSE BRIEFING ROOM (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review> [<https://perma.cc/2FK3-22M2>].

21. See Exec. Order No. 14,008, § 202, 86 Fed. Reg. 7619, 7622 (Feb. 1, 2021).

22. See Exec. Order No. 14,027, § 1, 86 Fed. Reg. 25,947, 25,947 (May 12, 2021).

23. See *infra* note 385 and accompanying text.

24. See Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference’s Effects on Agency Rules*, 119 COLUM. L. REV. 85, 157-60 (2019) (explaining the incentives and pressures

experiencing, a new president now must operate within a compressed timeframe, while still facing the challenge of issuing rules that can withstand judicial scrutiny.

Prior literature on presidential power has generally overlooked the transition period, focusing instead on the use of agencies to make policy<sup>25</sup> and the checks on that use more generally.<sup>26</sup> And when it has addressed the transition period, it has focused on notice-and-comment rulemaking and accomplishments of the presidency during the first 100 days.<sup>27</sup> The literature has also not grappled head-on with the use of these tools and deregulation to change the powers of the presidency. For example, in their article on structural deregulation, Jody Freeman and Sharon Jacobs recently described “substantive deregulation”—the traditional deregulatory work of an agency—as “limited,” “relatively transparent,” and “subject to legal challenge.”<sup>28</sup>

Although the legal literature has been slow to recognize the impact of the new rules, executive branch lawyers understand their importance, as evidenced by the number of times these tools have been used already during the Biden presidency.<sup>29</sup> In contrast to prior work, this Article shows that “substantive deregulation” can occur through tools that are relatively unexamined and that the use of these tools has facilitated an era of aggressive speedy and serial rollbacks, which has in turn wrought a significant change in the ability of presidents of both parties to use the administrative state to accomplish their priorities. The impact of these trends had already had a broad effect on an agency’s ability to accomplish its statutory mandates—and it is being perpetrated by both sides. What we highlight here is a side of rollbacks that is far-reaching, *because* both parties can and will use it.

In Parts I through III, we show how the Biden Administration used the same Trump-era tools in the aggressive manner that the Trump-era lawyers debuted to facilitate speedy rollbacks, along with many other below-the-radar tools. Part I focuses on the Biden Administration’s use of the Congressional Review Act,

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that agencies face due to “hard look review”); Nicholas R. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study*, 71 ADMIN. L. REV. 57, 82 (2019) (describing the pressure to build a record and respond to comments).

25. See, e.g., Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration*, 68 UCLA L. REV. 104, 104 (2021) (arguing that President Biden should “diffuse[authority away from the office of the president in ways that empower the federal bureaucracy, state, local, and tribal officials, and civil society”); Merrill, *supra* note 18, at 1968 (describing how presidents have sought to increase their influence over agencies).

26. See, e.g., Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L. J. 1748 (2021); Watts, *supra* note 18, at 698.

27. See, e.g., Joshua Zoffer, Note, *The Law of Presidential Transitions*, 129 YALE L. J. 2500, 2506 (2021) (discussing the literature on presidential transitions); Anne Joseph O’Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 530 (2011) (discussing the variations on notice-and-comment rulemaking that agencies use during transition periods).

28. Freeman & Jacobs, *supra* note 5, at 586.

29. See *infra* Parts I-III; see also GAO *Finds Acting EPA General Counsel Is Serving Lawfully*, INSIDEEPA (Aug. 3, 2021), <https://insideepa.com/daily-feed/gao-finds-acting-epa-general-counsel-serving-lawfully> [<https://perma.cc/587B-Y2E3>] (reporting that a challenge to the appointment of President Biden’s acting general counsel was at least in part motivated by her “efforts to halt challenges to Trump-era EPA actions and rules so the Biden administration can reconsider them”).

even in the face of the party's natural antipathy to the Act. In Part II, we describe the Biden Administration's use of strategies in court to aid in rollbacks, including the Administration's aggressive use of abeyance requests and other moves, such as withdrawing affirmative appeals filed by the Trump Administration, which has allowed the Administration to take maximum advantage of lower court rulings against the Trump Administration. And in Part III, we show that the Biden Administration has aggressively used its powers to suspend Trump-era regulations, along with several other regulatory techniques—such as interim final rules which can be issued without a prior notice-and-comment period—all of which have allowed the Biden Administration to move fast in rolling back and pausing Trump-era rules. In Part IV, we analyze the implications of this new regime. We briefly conclude by hypothesizing that this new regime will be here to stay for some time.

### I. The Congressional Review Act

In our 2019 article, we predicted that “the temptation to make the most use of the Congressional Review Act” would likely be irresistible if President Trump was succeeded by Democratic control of the presidency, House, and Senate.<sup>30</sup> Despite this prediction, once the Biden presidency began, it was not certain that Congress would use the Congressional Review Act as part of the new administration's regulatory transition strategy. Until that point, no Democratic administration had used the Act to disapprove a rule from a prior Republican administration, even though the opportunities had presented themselves.<sup>31</sup> Using the Act struck at least some Democrats as anti-regulatory.<sup>32</sup> Additionally, provisions in the Act allowing for significant Senate debate time and requiring resolutions to pass the Senate early in the new term make use of the Act costly when compared to other urgent early-term congressional priorities: approving executive nominations, passing a budget, enacting legislation to address national crises (when needed), and, in 2021, holding an impeachment trial. Disapproval resolutions passed under the Act further bar an agency from promulgating rules “substantially the same” as the disapproved regulation, an unclear standard that could conceivably prevent an agency from promulgating desirable rules in the future.<sup>33</sup>

But despite the seeming antipathy to the Congressional Review Act among at least some Democrats, the Act was invoked during the early months of the Biden Administration, with the introduction of resolutions in Congress to disapprove six Trump-era regulatory policies: changes to the Equal Employment

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30. Davis Noll & Revesz, *supra* note 1, at 11.

31. *Id.* at 17.

32. See Helaine Olen, *Opinion, Biden and Democrats Have a Powerful Weapon to Overturn Some of Trump's Last Acts. They Should Use It.*, WASH. POST. (Jan. 20, 2021), <https://www.washingtonpost.com/opinions/2021/01/20/biden-democrats-have-powerful-weapon-overturn-some-trump-last-acts-they-should-use-it> [<https://perma.cc/HX9P-G6XF>].

33. See 5 U.S.C. § 801(b)(2) (2018). *But see* Davis Noll & Revesz, *supra* note 1, at 21-22 (explaining the provision is unlikely to be a significant hurdle).

Opportunity Commission (EEOC) conciliation rule,<sup>34</sup> changes to the Securities and Exchange Commission's (SEC) shareholder resolutions 14-8a rule,<sup>35</sup> the Department of Health and Human Services' (HHS) Securing Updated and Necessary Statutory Evaluations Timely rule,<sup>36</sup> changes to the Social Security Administration's (SSA's) administrative appeals process,<sup>37</sup> changes to the Environmental Protection Agency's (EPA) methane emissions standards,<sup>38</sup> and the Office of the Comptroller of the Currency's (OCC) "True Lender" rule.<sup>39</sup>

For the first time, a Democratic Congress used the Congressional Review Act to send disapproval resolutions—those concerning the EEOC, EPA, and OCC rules—to a Democratic White House.<sup>40</sup> With both President Biden and President Trump having used the Act to conduct their regulatory transitions, the Act will likely continue to feature prominently in future regulatory transition strategies.<sup>41</sup>

### A. An Overview of the Act

The Congressional Review Act,<sup>42</sup> part of the Small Business Regulatory Enforcement Fairness Act of 1996, empowers Congress to use a disapproval process to render regulations "of no force or effect."<sup>43</sup> Once a joint resolution of disapproval has passed both chambers and been signed by the President, the regulation is voided. After a disapproval, the regulation that was in effect immediately prior to the disapproved rule becomes effective again.<sup>44</sup> Under the Act, an agency cannot simply reissue a rule that has been disapproved. Rather, a disapproval bars an agency from promulgating a rule that is "substantially the

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34. See Update of Commission's Conciliation Procedures, 86 Fed. Reg. 2974 (Jan. 14, 2021) (to be codified at 29 C.F.R. pts. 1601, 1626).

35. See Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14-a8, 85 Fed. Reg. 70,240 (Nov. 4, 2020) (to be codified at 17 C.F.R. pt. 240).

36. See Securing Updated and Necessary Statutory Evaluations Timely, 86 Fed. Reg. 5694 (Jan. 19, 2021) (to be codified at 21 C.F.R. pt. 6, 42 C.F.R. pts. 1, 404, 1000, 45 C.F.R. pts. 8, 200, 300, 403, 1010, 1390).

37. See Hearings Held by Administrative Appeals Judges of the Appeals Council, 85 Fed. Reg. 73,138 (Nov. 16, 2020) (to be codified at 20 C.F.R. pts. 404, 408, 411, 416, 422).

38. See Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 85 Fed. Reg. 57,018 (Sept. 14, 2020) (to be codified at 40 C.F.R. pt. 60).

39. See National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 7).

40. See President Joseph R. Biden, *Remarks by President Biden Signing Three Congressional Review Act Bills into Law: S.J. Res.13; S.J. Res.14; and S.J. Res.15*, WHITE HOUSE BRIEFING ROOM (June 30, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/30/remarks-by-president-biden-signing-three-congressional-review-act-bills-into-law-s-j-res-13-s-j-res-14-and-s-j-res-15/> [<https://perma.cc/J58W-FM9J>].

41. Regarding President Trump's use of the Act, see Davis Noll & Revesz, *supra* note 1, at 14-23; see also Thomas O. McGarity, *The Congressional Review Act: A Damage Assessment*, AM. PROSPECT (Feb. 6, 2018), <https://prospect.org/article/congressional-review-act-damage-assessment> [<https://perma.cc/89EA-QSR9>].

42. See 5 U.S.C. §§ 801-808 (2018).

43. *Id.* § 801(f).

44. See Davis Noll & Revesz, *supra* note 1, at 14.

same” as a disapproved rule, unless Congress specifically grants power to make such a rule in subsequent legislation.<sup>45</sup>

In general, using ordinary legislative procedures, Congress can void *any* agency-promulgated regulation by garnering a majority vote in the House and a filibuster-proof sixty votes in the Senate. By using the Act, however, Congress can disapprove recently promulgated regulations with simple majorities in both chambers, as long as particular timing requirements are met.

The Act provides an expanded eligibility window for regulations when a new Congress is seated, allowing the new Congress to review and disapprove rules made within sixty legislative days of the prior Congress’ final adjournment, a span known as the “lookback period.”<sup>46</sup> In the case of the Biden Administration, rules promulgated by the Trump Administration after August 21, 2020 fell within the lookback period.<sup>47</sup>

After the promulgation of a rule, the Senate has sixty session days (and the House sixty legislative days) to introduce a disapproval resolution.<sup>48</sup> During a new Congress, that clock begins ticking on the fifteenth working day of the session.<sup>49</sup> For the 117th Senate, for example, this period began on February 3 and ended on April 4, 2021.<sup>50</sup>

To take advantage of the Act’s simple-majority rule in the Senate, the chamber must pass disapproval resolutions within sixty session days of Congress’ receipt of the rule (or, during a new Congress, within sixty session days of the fifteenth legislative day); for the 117th Congress, this period ended on May 27, 2021.<sup>51</sup> After this sixty-session-day period elapses in the Senate, regulations can be voided by Congress only through ordinary legislation, which requires sixty Senate votes to defeat the filibuster. The House, in contrast, is not bound to vote on resolutions within a specific time frame.<sup>52</sup>

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45. 5 U.S.C. § 801(b)(2) (2018); *see also* MAEVE P. CAREY ET AL., CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 1 (2016).

46. 5 U.S.C. § 801(d)(1)(A) (2018).

47. *See Unrig the Rules Explainer: The Application of the Congressional Review Act to Recent Trump Administration Rulings*, CONG. PROGRESSIVE CAUCUS CTR. (Jan. 29, 2021), [https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/CPCC-PC\\_CRAexplainer.pdf](https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/CPCC-PC_CRAexplainer.pdf) [<https://perma.cc/5THC-4RDP>].

48. *See* 5 U.S.C. § 802(e)(1) (2018).

49. *See* Daniel R. Pérez, *Congressional Review Act Fact Sheet*, REGUL. STUD. CTR. (Nov. 21, 2016), [https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/t/downloads/RegInsight\\_Perez-CRA-Factsheet-2016.pdf](https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/t/downloads/RegInsight_Perez-CRA-Factsheet-2016.pdf) [<https://perma.cc/8HPY-MXJG>].

50. *See* 5 U.S.C. § 801(d)(2)(A) (2018); *Days in Session of the U.S. Congress: 117th Congress, First Session*, CONGRESS.GOV, <https://www.congress.gov/days-in-session> [<https://perma.cc/3HH8-S76X>].

51. *See Days in Session of the U.S. Congress*, *supra* note 50.

52. *See* Pérez, *supra* note 49.

*B. The Trump Administration's Use of the Act*

Since the Act's adoption in 1996, each incoming Congress after an inter-party transition has introduced resolutions for disapproving regulations.<sup>53</sup> However, prior to the Trump Administration, the Act was successfully used to void a regulation only once: under the new George W. Bush Administration, the 107th Congress disapproved the Occupational Safety and Health Administration's Clinton-era Ergonomics Rule.<sup>54</sup>

Capitalizing on its control of the legislative and executive branches, the Trump Administration used the Act aggressively to undo Obama-era regulations.<sup>55</sup> Between January 2017 and May 2017, the 115th Congress introduced thirty-four rules for consideration under the Act and passed fourteen disapproval resolutions, all of which were signed by the President.<sup>56</sup> The same Congress later disapproved two Consumer Financial Protection Bureau actions, promulgated during the Obama Administration.<sup>57</sup> The voided regulations concerned labor, energy, gun control, healthcare, and education.<sup>58</sup>

The Trump Administration's successful use of the Congressional Review Act demonstrated its potential as a powerful tool for rolling back a prior administration's regulatory scheme. The chief practical obstacle to its use then—and a possible reason that the Trump Administration did not succeed in voiding more of the thirty-four regulations introduced—was the provision for ten hours of debate in the Senate required to pass each disapproval resolution. Still, so long as a Congress determines that passing disapproval resolutions is more important than other early-term priorities, disapprovals under the Act can save agencies from undergoing time-consuming rescission procedures—which requires months or years of gathering information, drafting, soliciting public comment, and revising, even before undergoing judicial review<sup>59</sup>—and enable an administration to quickly revert to the regulatory policies it prefers.

53. See Bridget C.E. Dooling, Daniel Pérez & Steven J. Balla, *Where Are the Congressional Review Act Disapprovals?*, BROOKINGS, fig.1 (Mar. 24, 2021), <https://www.brookings.edu/research/where-are-the-congressional-review-act-disapprovals/> [https://perma.cc/G4MB-BZ72].

54. See Michael D. Shear, *Trump Discards Obama Legacy, One Rule at a Time*, N.Y. TIMES (May 1, 2017), <https://www.nytimes.com/2017/05/01/us/politics/trump-overturning-regulations.html> [https://perma.cc/2DEH-SCED] (discussing disapproval of the rule); Ergonomics Program, 65 Fed. Reg. 68,262 (Nov. 14, 2000) (to be codified at 29 C.F.R. pt. 1910); see also Robert Pear, *After Long Delay, U.S. Plans to Issue Ergonomics Rules*, N.Y. TIMES (Nov. 22, 1999), <https://www.nytimes.com/1999/11/22/us/after-long-delay-us-plans-to-issue-ergonomic-rules.html> [https://perma.cc/SZW3-E57Y].

55. See McGarity, *supra* note 41; see also Davis Noll & Revesz, *supra* note 1, at 19-21 (providing an extensive discussion of the Trump Administration's use of the CRA).

56. See Dooling et al., *supra* note 53.

57. One of the actions was a guidance document, and the other was purported guidance that the Government Accountability Office determined to be a rule for the purposes of the CRA. See *Uses of the Congressional Review Act During the Trump Administration*, BALLOTPEdia, [https://ballotpedia.org/Uses\\_of\\_the\\_Congressional\\_Review\\_Act\\_during\\_the\\_Trump\\_administration](https://ballotpedia.org/Uses_of_the_Congressional_Review_Act_during_the_Trump_administration) [https://perma.cc/2WHP-EK4G] (last visited June 15, 2021).

58. See Eric Lipton & Jasmine C. Lee, *Which Obama-Era Rules Are Being Reversed in the Trump Era*, N.Y. TIMES (May 18, 2021), <https://www.nytimes.com/interactive/2017/05/01/us/politics/trump-obama-regulations-reversed.html> [https://perma.cc/RHM5-Q2NG].

59. See Davis Noll & Revesz, *supra* note 1, at 10-11.

*C. The Biden Administration's Use of the Act*

Given the Trump Administration's record-breaking use of the Act to undo Obama-era regulations in 2017, and the many regulations promulgated by Trump agencies during the final months of the Trump presidency, many commentators expected that the new Congress and President Biden would use the Act, despite the fact that it had never before been used during a Democratic presidency.<sup>60</sup> This Section assesses expectations for the use of the Congressional Review Act by the Biden Administration, discusses the rules the new Democratic Congress introduced for disapproval, and situates use of the Act within President Biden's broader regulatory transition strategy.

## 1. Expectations

Even before the 2020 election and throughout the opening weeks of the Biden Administration, elected officials and government observers began to identify regulations that they saw as particularly ripe for congressional disapproval.

On November 25, 2020, ProPublica rolled out a tracker of eighty-one of, in its view, most consequential or controversial "midnight regulations," rules that were (or were to be) promulgated after Election Day and therefore fell within the Congressional Review Act lookback period.<sup>61</sup> The regulations identified concerned the environment, labor, immigration, the financial system, and agency policymaking. ProPublica emphasized that these late-term rules may have been formulated without thorough consideration of public input or may even have been intended to "tie the hands" of the incoming administration.<sup>62</sup>

Some scholars focused their attention primarily on those Trump-era rules that, unless quickly addressed, could restrict agencies' ability to effectively promulgate other regulations. Richard Revesz identified six Trump-era "meta-deregulations," or internal agency rules altering the agency's rulemaking process, which had the potential to restrict the scope of future agency regulatory activity—making them urgent targets for nullification.<sup>63</sup> Among these were EPA's "censored science" rule, meant to hinder the agency's ability to base its regulations on epidemiological studies showing the adverse effects of contaminants on the general population unless underlying data from those studies

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60. *See id.*

61. Isaac Arnsdorf, Lydia DePillis, Dara Lind, Lisa Song, Moiz Syed & Zipporah Osei, *Tracking the Trump Administration's "Midnight Regulations,"* PROPUBLICA (Nov. 25, 2020), <https://projects.propublica.org/trump-midnight-regulations> [<https://perma.cc/LJ28-5S3U>].

62. *Id.*

63. Revesz argues that a regulation is an ideal candidate for disapproval under the Congressional Review Act if it does not need to be replaced and if barring "substantially the same" action in the future is desirable. Richard L. Revesz, *Censored Science, the CRA, and the End of Meta-Deregulation* (Jan. 27, 2021), BLOOMBERG L., <https://news.bloomberglaw.com/us-law-week/censored-science-the-cra-and-the-end-of-meta-deregulation> [<https://perma.cc/KKP6-TE6Z>].

were made public.<sup>64</sup> The list also included several other meta-deregulations: EPA rules that make it more difficult to justify air pollution rules by pointing to their indirect benefits and that prohibit regulating greenhouse gas emissions by industrial classes other than the fossil fuel industry;<sup>65</sup> a Department of Energy rule blocking stringent emissions standards for furnaces, water heaters, and boilers;<sup>66</sup> and a Health and Human Services rule mandating that agency rules expire unless the agency regularly reviews and justifies them.<sup>67</sup>

Other commentators expressed doubt that the Biden Administration would lean on the Congressional Review Act to aid in a regulatory transition, on the grounds that Democrats do not want to be seen as an anti-regulatory party. Washington Post columnist Helaine Olen wrote, “[Democrats] believe the CRA has an anti-regulatory bias, and that any use of it, no matter how well meant, simply legitimizes a fundamentally bad law. In other words, tit-for-tat politics will normalize it.”<sup>68</sup> Moreover, Democrats generally have greater regulatory aspirations than Republicans and have expressed fears regarding the provision of the Act stipulating that disapproval of a regulation bars an agency from promulgating “substantially the same” provision in the future.<sup>69</sup> Of course, these reputational and prudential anxieties may be less material where the regulations being disapproved are themselves deregulatory. Voiding such deregulatory actions is hard to construe as anti-regulatory in spirit, because voiding a deregulatory rule will in most cases lead to the prior regulation coming back into place. In addition, it presents a near-zero likelihood of barring desired regulations in the future under the “substantially the same” provision.<sup>70</sup>

Notwithstanding these concerns, empirical examinations of congressional activity since the Act was instituted show that Democrats are not averse to using the Congressional Review Act in principle, and in fact have consistently

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

65. See Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 84,130 (Dec. 23, 2020) (to be codified at 40 C.F.R. pt. 83); Pollutant-Specific Significant Contribution Finding for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, and Process for Determining Significance of Other New Source Performance Standards Source Categories, 86 Fed. Reg. 2542 (Jan. 13, 2021) (to be codified at 40 C.F.R. pt. 60).

66. See Energy Conservation Program for Appliance Standards: Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters, 86 Fed. Reg. 4776 (Jan. 15, 2021) (to be codified at 10 C.F.R. pts. 430-31).

67. See Securing Updated and Necessary Statutory Evaluations Timely, 86 Fed. Reg. 5694 (Jan. 19, 2021) (to be codified at 21 C.F.R. pt. 6, 42 C.F.R. pts. 1, 404, 1000, 45 C.F.R. pts. 8, 200, 300, 403, 1010, 1390).

68. Olen, *supra* note 32.

69. See Kelsey Brugger, *Dems Weigh Assault on Trump Rules, but Time Is Short*, E&E NEWS (Mar. 17, 2021), <https://www.eenews.net/stories/1063727671> [<https://perma.cc/8WUA-5DFL>] (quoting Senator Brian Schatz (D-Haw.) as saying: “I want their feedback . . . [i]f [using the Act] prohibits us from doing a new rulemaking, maybe it’s better we go through the Administrative Procedure Act and do this the old-fashioned way”); see also Dooling et al., *supra* note 53.

70. “[Concern over preempting future regulatory action] is not particularly serious in instances where the Trump administration weakened Obama administration protections and the Biden administration would want to strengthen the Obama baseline. Under no plausible linguistic interpretation is weakening a baseline ‘substantially the same’ as strengthening a baseline.” Revesz, *supra* note 63.

introduced disapproval resolutions under the Act since its passage in 1996.<sup>71</sup> These resolutions came at times when Democrats lacked control over one chamber of Congress or over the White House, so the disapproval actions were extremely unlikely to succeed and were likely only symbolic. During the only congressional term in which Democrats controlled both chambers and the presidency, after the election of President Obama in 2009, they opted not to use the Act, purportedly out of caution regarding the “substantially the same” provision.<sup>72</sup>

## 2. Rules Targeted for Disapproval by the 117th Congress

On Inauguration Day, the Biden White House released a fact sheet naming 104 environmental regulations that it planned to revisit, forty-seven of which were finalized during the lookback period.<sup>73</sup> As indicated above, the 117th Congress had until April 4, 2021 to introduce disapproval resolutions concerning Trump-era rules, and the Senate was empowered to pass such resolutions with a simple majority vote until May 27, 2021.<sup>74</sup> Any Trump-era rules finalized during the lookback period, after August 21, 2020 were eligible for consideration.<sup>75</sup> In total, the House of Representatives introduced disapproval resolutions concerning six Trump-era regulations,<sup>76</sup> which are described below.

*Changes to the EEOC’s conciliation rule.* Amendments to the EEOC’s conciliation procedures, which were promulgated on January 14, 2021, and made effective on February 16, 2021, required the EEOC to give employers certain information when an employee files a discrimination charge, including a list of known facts concerning the dispute.<sup>77</sup> Proponents of the rule argued that it would better inform employers involved in disputes and encourage voluntary dispute resolutions, a necessary change due to EEOC’s limited capacity to litigate cases that are not resolved voluntarily.<sup>78</sup> Critics, including now-Chair of the EEOC Charlotte Burrows, countered that the rule would make it more difficult for

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71. See Dooling et al., *supra* note 53.

72. See Susan Crabtree, *Law Backed by Harry Reid Will Haunt Dems in 2017*, WASH. EXAM’R (Dec. 16, 2016), <https://www.washingtonexaminer.com/law-backed-by-harry-reid-will-haunt-dems-in-2017> [<https://perma.cc/6UED-ZDSK>].

73. See *Fact Sheet: List of Agency Actions for Review*, *supra* note 20.

74. See *supra* notes 50-51 and accompanying text for a discussion of how these periods and deadlines are determined.

75. See *Unrig the Rules Explainer: The Application of the Congressional Review Act to Recent Trump Administration Rulings*, *supra* note 47.

76. See *Congressional Review Act Tracker*, COAL. FOR SENSIBLE SAFEGUARDS, <https://sensiblesafeguards.org/cra-tracker-2021> [<https://perma.cc/AZH9-5HCE>] (last visited June 15, 2021).

77. See Update of Commission’s Conciliation Procedures, 86 Fed. Reg. 2974 (Jan. 14, 2021) (to be codified at 29 C.F.R. pts. 1601, 1626); Allen Smith, *Senate Votes in Favor of Repealing EEOC’s Conciliation Rule*, SOC’Y FOR HUM. RES. MGMT. (May 20, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/senate-votes-in-favor-of-repealing-eec-conciliation-rule.aspx> [<https://perma.cc/MC6J-X8NQ>].

78. See Smith, *supra* note 77.

employees to succeed on discrimination claims, enable employers to drag out claims, and needlessly encourage litigation.<sup>79</sup>

*Changes to the SEC's Shareholder Resolutions 14-8a rule.* Changes to procedural requirements in the Securities and Exchange Commission's rule concerning proxy resolutions for shareholder votes, which were promulgated on November 4, 2020, and became effective on January 4, 2021, made it more difficult for small shareholders to file resolutions with company executives regarding governance, sustainability, and workforce issues.<sup>80</sup> Under the new rule, to raise such issues with management, shareholders needed to hold more stock, for a longer time, than was the case previously.<sup>81</sup>

Under the Trump Administration, the SEC suggested that the new rule reduced the costs borne by companies and shareholders of processing, analyzing, and voting on shareholder resolutions.<sup>82</sup> Opponents of the rule—which included labor unions, asset managers, and consumer groups—countered that the rule overly burdened shareholders and unduly infringed on their right to influence the direction of companies in which they had invested.<sup>83</sup> They also argued that the rule's formulation violated the SEC's own internal rules requiring economic analyses to factor into regulation.<sup>84</sup>

*HHS's SUNSET rule.* The Health and Human Services SUNSET rule, which was promulgated on January 19, 2021 and became effective on March 22, 2021, instituted a mandatory retrospective review process for most HHS regulations.<sup>85</sup> Unless a regulation covered by the rule was reviewed and found justified within a specified time period, it would expire within ten years of its promulgation. Supporters of the rule argued that sunset laws encourage economic growth and, despite concerns about the practicability of such a high volume of regulatory review, have proven to be workable at the state and local level.<sup>86</sup> Opponents of the rule argued that it made extraordinary demands of HHS staff and unduly burdened the agency, pointing out that it would force HHS to review rules twenty times faster than it ever has in the past—and should the

79. *See id.*

80. *See* Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14-a8, 85 Fed. Reg. 70,240 (Nov. 4, 2020) (to be codified at 17 C.F.R. pt. 240); *Congressional Review Act Tracker*, *supra* note 76.

81. *See Investors and Consumer Groups Urge Members of Congress to Overturn Trump-Era SEC Rule Changes*, INTERFAITH CTR. ON CORP. RESP. (Apr. 22, 2021), <https://www.iccr.org/investors-and-consumer-groups-urge-members-congress-overturn-trump-era-sec-rule-changes> [https://perma.cc/3HJH-KTMN].

82. *See* Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, 85 Fed. Reg. at 70,259.

83. *See Investors and Consumer Groups Urge Members of Congress to Overturn Trump-Era SEC Rule Changes*, *supra* note 81.

84. *See id.*

85. *See* Securing Updated and Necessary Statutory Evaluations Timely, 86 Fed. Reg. 5694 (Jan. 19, 2021) (to be codified at 21 C.F.R. pt. 6, 42 C.F.R. pts. 1, 404, 1000, 45 C.F.R. pts. 8, 200, 300, 403, 1010, 1390).

86. *See* James Broughel, *HHS's 'Sunset Rule' Will Save Money and Lives*, STATNEWS (Feb. 2, 2021), <https://www.statnews.com/2021/02/02/hhs-sunset-rule-will-save-money-and-lives> [https://perma.cc/U57V-FDTV].

agency fail to maintain this pace, the rule could cause nearly 17,000 HHS regulations to expire by 2026.<sup>87</sup> Attempting to undertake regulatory review of this scale on such a timeline, observers said, would be a “herculean and likely impossible task.”<sup>88</sup>

*Changes to the SSA’s administrative appeals process.* The Social Security Administration’s November 16, 2020, rule regarding disability determinations, which became effective on December 16, 2020, provided that administrative appeals judges—as distinct from administrative law judges, or ALJs—would be able to preside over a broader range of hearings and appeals than had previously been the case.<sup>89</sup> At the time of issuance, the SSA claimed that administrative appeals judges were already empowered to preside over hearings but had not been formally tasked with doing so.<sup>90</sup> Allocating hearings to administrative appeals judges when necessary, the agency explained, would enable the SSA to expand the agency’s adjudicatory capacity as needed (for example, if a large number of claimants should seek hearings within a short timeframe).<sup>91</sup> Critics argued that the changes contravened congressional intent, and that by threatening to deprive appellants of a hearing before a qualified, independent ALJ, the rule infringed claimants’ right to due process and endangered their access to essential resources like disability and retirement benefits.<sup>92</sup>

*Changes to EPA’s methane emission standards.* Amendments to the Environmental Protection Agency’s methane emission standards, promulgated and effective on September 14, 2020, repealed Obama-era methane limits on oil and gas installations.<sup>93</sup> The Obama-era emissions scheme regulated greenhouse gas emissions, including methane, at several points in the manufacture of fossil fuels, including on-shore production, gas processing, transmission, storage, and during the import and export of liquefied natural gas.<sup>94</sup> The Trump-era

87. See Thomas Sullivan, *HHS Postpones Implementation of the SUNSET Rule*, POLICYMED (Apr. 25, 2021), <https://www.policymed.com/2021/04/hhs-postpones-implementation-of-the-sunset-rule.html> [https://perma.cc/N9AA-7QH4].

88. Jack Lienke, *Azar’s ‘Sunset Rule’ Will Bring a Dangerous New Dawn for Health Regulation*, STATNEWS (Jan. 20, 2021); see also Michael Mezher, *HHS Hits Pause on Trump Era SUNSET Rule*, REGUL. FOCUS (Mar. 22, 2021), <https://www.raps.org/news-and-articles/news-articles/2021/3/hhs-hits-pause-on-trump-era-sunset-rule> [https://perma.cc/VGX8-EH8U].

89. See *Hearings Held by Administrative Appeals Judges of the Appeals Council*, 85 Fed. Reg. 73,138 (Nov. 16, 2020) (to be codified at 20 C.F.R. pts. 404, 408, 411, 416, 422).

90. See *id.* at 73,139.

91. See *id.* at 73,145.

92. See Press Release, H.R. Ways & Means Comm., Neal, Larson and Davis Slam Harmful Trump Administration Social Security Rule (Nov. 13, 2020), <https://waysandmeans.house.gov/media-center/press-releases/neal-larson-and-davis-slam-harmful-trump-administration-social-security> [https://perma.cc/9329-UT3A]; see also Press Release, Off. of U.S. Rep. John Larson, Larson, Davis Introduce Bill to Overturn Harmful Trump Social Security Rule (Apr. 1, 2021), <https://larson.house.gov/media-center/press-releases/larson-davis-introduce-bill-overturn-harmful-trump-social-security-rule> [https://perma.cc/5ZYZ-M3RE].

93. See *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review*, 85 Fed. Reg. 57,018 (Sept. 14, 2020) (to be codified at 40 C.F.R. pt. 60).

94. See *EPA’s Final Methane Emissions Rules Roll Back Standards and Statutory Authority*, HARV. L. SCH. ENV’T & ENERGY L. PROGRAM (Sept. 9, 2020), <https://eelp.law.harvard.edu/2020/09/epas->

amendments eliminated regulations of greenhouse gas emissions during storage and transmission, and more significantly, eliminated regulation of methane emissions in the manufacture of fossil fuels (the sector most responsible for methane emissions in the United States<sup>95</sup>) entirely.

The elimination of methane emissions regulations was broadly condemned by environmental groups as endangering public health and the environment.<sup>96</sup> Critics, including some fossil-fuel companies, encouraged Congress to void the rule changes.<sup>97</sup> Supporters of the Trump-era rollback argued that regulating methane emissions would unduly burden American fossil-fuel producers and disadvantage them in competing against foreign producers.<sup>98</sup>

*The OCC's "True Lender" Rule.* The Treasury Office of the Comptroller of the Currency's "True Lender" rule, promulgated on October 30, 2020, and effective on December 29, 2020, established that a bank is the lender in a loan if it is named as such or if it funded the loan.<sup>99</sup> The rule purported to encourage banks to enter into lending partnerships with third parties by clarifying legal obligations, and thereby expand access to affordable credit.<sup>100</sup> Critics argued that the rule would in fact encourage the "rent-a-charter" schemes that it aimed to discourage, enabling lenders to evade local and state laws intended to protect consumers.<sup>101</sup> Several state attorneys general complained that the rule effectively allowed lenders to exceed states' maximum limits on interest rates, exposing citizens of those states to usury.<sup>102</sup>

### 3. The Biden Administration's Disapprovals

As indicated above, resolutions concerning all six of the above regulations were introduced for consideration under the Congressional Review Act in the House, and four—the EEOC conciliation amendments, SEC rule 14-8a, the EPA

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final-methane-emissions-rule-rolls-back-standards-and-statutory-authority [https://perma.cc/DK9L-L8E].

95. See Emissions of Greenhouse Gases in the U.S., U.S. ENERGY INFO. ADMIN. (Mar. 31, 2011), [https://www.eia.gov/environment/emissions/ghg\\_report/ghg\\_methane.php](https://www.eia.gov/environment/emissions/ghg_report/ghg_methane.php) [https://perma.cc/LJ52-LP77].

96. See Rachel Frazin, *Collins Joins Democrats in Bid to Undo Trump Methane Emissions Rollback*, HILL (Apr. 20, 2021), <https://thehill.com/policy/energy-environment/549358-collins-joins-democrats-in-bid-to-undo-trump-methane-emissions?rl=1&Type=EmailBlastContent&eId=f5937e24-8f84-413b-a7c7-0a85bd3575fc> [https://perma.cc/PS5S-5PLJ].

97. See Chris Knight, *Oil Executives Push Carbon Fee Idea in U.S. Senate*, ARGUS MEDIA (Apr. 14, 2021), <https://www.argusmedia.com/en/news/2205262-oil-executives-push-carbon-fee-idea-in-us-senate> [https://perma.cc/KBA6-ZGQA].

98. See *Congress Votes to Reinstate Methane Rules Loosened by Trump*, PBS (June 25, 2021), <https://www.pbs.org/newshour/politics/congress-votes-to-reinstate-methane-rules-loosened-by-trump> [https://perma.cc/7YRQ-4GP2].

99. See National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (to be codified at 12 C.F.R. pt. 7).

100. See *id.*

101. *Id.* at 68,742-43.

102. See Sylvan Lane, *Seven States Sue Regulator Over "True Lender" Rule on Interest Rates*, HILL (Jan. 5, 2021), <https://thehill.com/policy/finance/532759-seven-states-sue-regulator-over-true-lender-rule-on-interest-rates?> [https://perma.cc/K5SU-U94Q].

methane emissions changes, and the True Lender rule—were also introduced in the Senate before the April 4 Senate deadline;<sup>103</sup> the HHS SUNSET rule and the SSA administrative appeals rule were not. Of these four, only three—the EEOC conciliation amendments, the EPA methane emissions changes, and the OCC True Lender rule—came up for a vote in the Senate and were passed before the May 27, 2021 deadline for Senate simple-majority approval. The votes were 50-48, 52-42, and 52-47, respectively, and the number of Republican Senators voting in favor was zero, six, and three, respectively.<sup>104</sup> Each of the three disapproval resolutions passed the House,<sup>105</sup> and on June 30, 2021, President Biden signed each of the three disapproval resolutions into law.<sup>106</sup>

The three regulations disapproved by the Biden Administration represent only a small fraction of the total number of Trump-era agency actions that could have been reached under the Congressional Review Act. In part, the Biden Administration's limited use of the Act can be chalked up to the vicissitudes of congressional action. Even if the Biden White House had wanted to void more rules using the Act, the Democratic Congress was restricted by its slim majorities and busy early-term agenda.<sup>107</sup> Congress may also have exercised restraint due to lingering Democratic discomfort with the apparently deregulatory nature of the tool.

The early day-to-day activity of the 117th Congress—and especially of the Senate, where the provisions of the Congressional Review Act require dedicating significant floor time early in the new congressional term—reveals how other priorities crowded out opportunities to use the Act more aggressively. For roughly two months following Election Day, it was not at all clear that Democrats would obtain a Senate majority. They held only 48 seats to the

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103. See *Congressional Review Act Tracker*, *supra* note 76; 5 U.S.C. § 801(d)(2)(A) (2018).

104. The resolution concerning the EEOC conciliation amendments was passed in the Senate on May 19, 2021 by a 50-48 party-line vote. Republican Senators Marco Rubio and Lisa Murkowski did not vote. See 167 CONG. REC. S2752 (May 19, 2021). The resolution concerning EPA's methane emissions rule was passed in the Senate on April 28, 2021 by a margin of 52-42, with six Senators not voting. All Democrats voting, as well as Republican Senators Susan Collins, Lindsey Graham, and Rob Portman, voted in favor of the resolution. See 167 CONG. REC. S2284 (Apr. 28, 2021). The resolution concerning the Office of the Comptroller's True Lender rule was passed in the Senate on May 11, 2021, by a margin of 52-47. All Democrats voting, as well as Senators Susan Collins, Cynthia Lummis, and Marco Rubio, voted in favor of the resolution. See 167 CONG. REC. S2441 (May 11, 2021).

105. The resolution concerning the EEOC conciliation amendments was passed in the House on June 24, 2021 by a margin of 219-210. All Republicans voted against the measure, except for one Republican member who did not vote. See 167 CONG. REC. H3115-16 (June 24, 2021). The resolution concerning EPA's methane emissions rule was passed in the House on June 25, 2021 by a margin of 229-191. Twelve Republicans voted for the measure, and eight did not vote. See 167 CONG. REC. H3139 (June 25, 2021). The resolution concerning the OCC's True Lender rule was passed in the House on June 24, 2021 by a margin of 218-208. All Republicans voted against the measure except one, Glenn Grothman (R-WI), who voted for the measure. See 167 CONG. REC. H3114 (June 24, 2021).

106. See President Joseph R. Biden, *supra* note 40 (announcing the signing of the three resolutions).

107. During the opening months of the Biden Administration, the Democrats controlled the Senate by 50-50 votes (with Vice President Kamala Harris as the tiebreaking vote) and the House variously by 222-213, 222-212, 220-212, and 220-211 votes. See *Party Breakdown*, H.R. PRESS GALLERY, <https://pressgallery.house.gov/member-data/party-breakdown> [<https://perma.cc/LUP6-GGWW>] (last visited June 22, 2021).

Republicans' 50, until Raphael Warnock and Jon Ossoff won their runoff elections for Georgia's Senate seats on January 5, 2021.<sup>108</sup> Unlike the other members of the new Congress, who were seated two days prior to the runoff on January 3,<sup>109</sup> Warnock and Ossoff were not seated until Inauguration Day, leaving Democrats without their Senate majority for the first seventeen days of the new Congress.<sup>110</sup>

Democrats finally took control of Senate committees on February 3, 2021,<sup>111</sup> exactly a month after most members of Congress were seated for the new term, and therefore became able to report Congressional Review Act disapproval resolutions to the Senate floor for debate. First, however, Democrats turned their attention to the typical priorities of a Senate working under a new President: securing a federal budget and confirming executive nominations.<sup>112</sup> Confirmation hearings consumed much of the Senate's time in March, April, and May 2021, through the May 27 Senate action deadline.<sup>113</sup> The Senate also had the extraordinary task of holding the second impeachment trial for then former-President Trump, from February 9 to February 13.

Moreover, the Senate also spent significant time passing legislation related to the COVID-19 pandemic. On March 4-6, March 25, April 14-20, and April 22, the Senate debated the American Rescue Plan Act, Medicare and Medicaid legislation, and a coronavirus-related hate crimes bill, all of which were oriented toward alleviating coronavirus-related crises.<sup>114</sup>

While the Senate considered other legislation between February 3 and May 27—namely, bills related to the National Science Foundation, funding for the border wall, national defense, and drinking water and wastewater infrastructure<sup>115</sup>—the impeachment trial and coronavirus pandemic placed even

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108. See Alana Wise, *Jon Ossoff Wins Georgia Runoff, Handing Democrats Senate Control*, NPR (Jan. 6, 2021, 8:56 AM ET), <https://www.npr.org/2021/01/06/952417689/democrat-jon-ossoff-claims-victory-over-david-perdue-in-georgia-runoff> [<https://perma.cc/G7KZ-E3TL>].

109. See Clare Foran, Kristin Wilson & Ted Barrett, *117th Congress Sworn in Sunday Amid Pandemic*, CNN (Jan. 3, 2021, 7:00 PM ET), <https://www.cnn.com/2021/01/03/politics/new-congress-swearing-in-117th/index.html> [<https://perma.cc/4KNU-T86G>].

110. See Gabby Birenbaum, *Warnock and Ossoff Join the Senate, Officially Giving Democrats the Majority*, VOX (Jan. 20, 2021), <https://www.vox.com/2021/1/20/22239456/warnock-ossoff-harris-senate-democrats> [<https://perma.cc/C4SA-RTDE>].

111. See Jacob Pramuk, *Senate Fully Transfers Power to Democrats by Passing Organizing Resolution*, CNBC (Feb. 3, 2021, 5:21 PM ET), <https://www.cnbc.com/2021/02/03/senate-reaches-deal-on-organizing-resolution-chuck-schumer-says.html> [<https://perma.cc/9LK9-42WQ>].

112. See Senate Democrats, *The Floor: Senate Schedule*, SENATE.GOV, <https://www.democrats.senate.gov/floor/daily-summary> (last visited June 22, 2021); Daniel Wolfe, Kate Sullivan & Janie Boschma, *Here's Where President Biden's Cabinet Nominees Stand: Delivering on His Ambitious Agenda Will Depend on Getting His Team Up and Running*, CNN (June 4, 2021), <https://www.cnn.com/interactive/2021/politics/biden-cabinet-confirmations-tracker/> [<https://perma.cc/6NMS-4GUF>].

113. See Senate Democrats, *The Floor: Senate Schedule*, SENATE.GOV, <https://www.democrats.senate.gov/floor/daily-summary> [<https://perma.cc/B5LS-MSNJ>] (last visited June 22, 2021).

114. Jacob Pramuk, *Biden Signs \$1.9 Trillion Covid Relief Bill, Clearing Way for Stimulus Checks, Vaccine Aid*, CNBC (Mar. 11, 2021, 3:03 PM ET), <https://www.cnbc.com/2021/03/11/biden-1point9-trillion-covid-relief-package-thursday-afternoon.html> [<https://perma.cc/9LGG-X5J5>].

115. *Id.*

greater constraints on the Senate's time than typically exist after a new president is inaugurated.

The Biden Administration's use of the Congressional Review Act, even while it faced these constraints, marks a first by a Democratic administration and reflects the urgency felt by the President and Congress of quickly rolling back Trump-era regulations. The Trump Administration's aggressive use of the Act to disapprove fourteen Obama-era regulations may have provided the impetus for Democrats to respond in kind, in a tit-for-tat escalation of aggressive regulatory transitional policy in an era of congressional gridlock.<sup>116</sup> Use of the Act was not only constrained by its burdensome procedural provisions and the Democrats' slim Senate majority, but it was also dictated by which regulations could be handled by other actors or in other ways; the HHS SUNSET rule, for instance, one of the most clearly harmful Trump-era regulations, is being dealt with through agency delays and court action, rather than through Congressional Review Act disapproval.<sup>117</sup> In the context of other regulatory transitional tools, therefore, the Act served as a strong tool.

## II. Court Strategies

The Biden Administration also followed the Trump Administration's aggressive approach in litigation challenging its predecessor's policies. In adopting this approach, the Biden Administration employed three primary strategies. First, in over thirty instances the new administration requested that courts place cases in abeyance while the relevant agency reviews the challenged rule. The Trump Administration pioneered a significantly more expansive application of this tool than prior administrations by requesting abeyances in cases in late stages of the litigation process. The Biden Administration followed suit by requesting just as many late-term abeyances, including in at least six cases where oral argument had already taken place. Second, the Biden Administration withdrew appeals where lower courts had struck down a Trump Administration rule. Third, the new Administration asked courts to vacate challenged Trump-era rules and remand them to the agency, arguing that the rules are legally invalid. Together, these tools offer a new administration multiple rollback opportunities.

### A. Abeyances

Like its predecessors, the Biden Administration sought abeyances in litigation challenging disfavored regulatory policies adopted by the prior administration. The Biden Administration followed the Trump Administration's strategy by requesting these abeyances in far more advanced stages of the

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116. See Dooling et al., *supra* note 53; Davis Noll & Revesz, *supra* note 1, at 3 (citing Revesz, *supra* note 17, at 1518-25 (discussing congressional gridlock in the tax system)).

117. See *HHS To Repeal SUNSET Rule*, NAT'L L. REV. (Apr. 27, 2021), <https://www.natlawreview.com/article/hhs-to-repeal-sunset-rule> [<https://perma.cc/3M6A-HCZW>] (detailing HHS' plan to issue a notice of proposed rulemaking to repeal the rule).

litigation process than had previous administrations. This Section discusses abeyances and similar strategies as tools for rolling back previous administrations' regulatory policies and describes the ways in which the Biden Administration has implemented them.<sup>118</sup>

### 1. Background

An abeyance is a court order that delays further litigation.<sup>119</sup> Abeyances can help incoming administrations prevent the previous administration's regulatory policies from receiving unwanted judicial legitimacy. In cases challenging regulatory policies, administrations can use abeyances to put off court decisions until agencies decide whether to repeal or amend the rule.<sup>120</sup> Courts generally grant abeyances on the grounds that they "conserve judicial resources" when an agency is planning to rethink a rule,<sup>121</sup> which would in turn render the pending suit moot. Even if the agency does not ultimately repeal the challenged rule, if the agency adopts changes to the rule the abeyance still potentially saves time, effort, and resources by narrowing the justiciable issues the court must address.<sup>122</sup>

Abeyances are useful to new administrations following inter-party transitions because they mitigate the risk of a court upholding the previous administration's regulations, which could hinder the new administration's policy agenda. For example, a judicial decision upholding an interpretation of the prior administration and determining that the agency has no interpretative discretion under the statute<sup>123</sup> would significantly complicate the drafting of a new regulation.<sup>124</sup> Abeyances prevent courts from making such rulings. Abeyances

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118. Abeyance requests were researched by reviewing court dockets in cases documented in several online sources. See *Tracking Biden's Environmental Actions*, WASH. POST, <https://www.washingtonpost.com/graphics/2021/climate-environment/biden-climate-environment-actions> [https://perma.cc/34MF-ZZCS] (last visited June 14, 2021) (identifying pending environmental cases); *Regulatory Rollback Tracker*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, <https://eelp.law.harvard.edu/portfolios/environmental-governance/regulatory-rollback-tracker> [https://perma.cc/78TZ-NCWM] (last visited June 14, 2021) (identifying Trump Administration regulations currently in litigation); *Round-Up: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY (Apr. 1, 2021), <https://policyintegrity.org/trump-court-roundup> [https://perma.cc/V265-3KSS] (tracking Trump-era policies challenged in the courts); Katie Keith, *ACA Litigation Round-Up, Part 1: Fight Over Reimbursements for Cost-Sharing Reductions Continues*, HEALTH AFFS. (Apr. 7, 2021), <https://www.healthaffairs.org/doi/10.1377/hblog20210407.782901/full> [https://perma.cc/TR7E-S8GD] (identifying pending Affordable Care Act litigation). Other cases were researched using individual internet searches.

119. See, e.g., *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 389 (D.C. Cir. 2012) ("[W]e can hold the case in abeyance pending resolution of the proposed rulemaking.").

120. *Id.* at 386 (describing abeyances in the context of "letting the administrative process run its course before binding parties to a judicial decision").

121. *Id.*

122. See *id.*; *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73 (D.D.C. 2015).

123. Under *Chevron, U.S.A., Inc. v. NRDC*, courts may not grant deference to agencies' statutory interpretations of an issue when Congress, through the statute, unambiguously addressed its intent towards the issue. 467 U.S. 837, 842-43 (1984).

124. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (holding that a prior court's statutory construction trumps an agency's own statutory interpretation under *Chevron* if the court determined the statute's terms were unambiguous).

also help new administrations when courts would otherwise find that deference to an agency's interpretation is warranted.<sup>125</sup> When presidents want to repeal their predecessor's policies, it is more difficult to argue the previous policy exceeded legal bounds if courts have legitimized that policy.<sup>126</sup> Abeyances prevent courts from potentially upholding the previous administration's interpretation while the new administration is considering whether to repeal or replace it. Moreover, the Justice Department, which represents federal agencies in court,<sup>127</sup> traditionally opposes changing its litigation approach in administrative law cases without the agency first changing the rule.<sup>128</sup> Abeyances give agencies the opportunity to make rule changes before the Justice Department litigates the prior administration's position.

## 2. The Trump Administration's Practice

Before the Trump Administration, new administrations used abeyances to delay early-stage litigation challenging their direct predecessors' policies.<sup>129</sup> The Obama and George W. Bush Administrations, for example, generally requested abeyances in cases where briefing had not yet begun, and never after briefing had been completed.<sup>130</sup> The Trump Administration similarly requested abeyances in cases in early stages of litigation,<sup>131</sup> but departed from this pattern by also requesting abeyances in many cases where briefing had already been

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125. When Congress has explicitly left a statute ambiguous on an issue, courts must defer to agencies' statutory interpretations of the issue unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44. When a court determines that Congress left the issue ambiguous only implicitly, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.

126. See Steven Mufson & Juliet Eilperin, *Trump Officials Turn to Courts To Block Obama-Era Legacy*, WASH. POST (Apr. 17, 2017), [https://washingtonpost.com/business/economy/trump-officials-turn-to-courts-to-block-obama-era-legacy/2017/04/17/b825d732-1ba0-11e7-855e-4824bbb5d748\\_story.html](https://washingtonpost.com/business/economy/trump-officials-turn-to-courts-to-block-obama-era-legacy/2017/04/17/b825d732-1ba0-11e7-855e-4824bbb5d748_story.html) [<https://perma.cc/K8LF-ANTD>].

127. See 5 U.S.C. § 3106 (2018) ("Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice."); cf. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 799-801, 801 n.171 (2013) (identifying statutes that authorize certain agencies to conduct their own litigation).

128. See Jody Freeman, *The Limits of Executive Power: The Obama-Trump Transition*, 96 NEB. L. REV. 545, 551 (2018) ("If the DOJ lawyers have already briefed a case, they typically do not change their position until the client agency has taken steps to reverse its position.").

129. See, e.g., *B.J. Alan Co. v. ICC*, 897 F.2d 561, 563, 582 n.1 (D.C. Cir. 1990) (explaining that the court had granted an abeyance because the agency had granted reconsideration and the court had "not yet taken up the case for preparation and argument" at that time).

130. See, e.g., Order at 1, *Am. Petroleum Inst. v. EPA*, No. 08-1277 (D.C. Cir. Apr. 1, 2009) (granting the Obama Administration's abeyance request, made before briefings were filed, in case challenging Bush-era emissions regulations); Order at 1, *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2004) (No. 02-1135) (granting joint motion from the Bush EPA and the opposing party filed before briefings had begun to hold case in abeyance "pending completion of the agency proceedings").

131. See, e.g., Davis Noll & Revesz, *supra* note 1, at 28 n.129 (identifying cases in which the Trump Administration requested abeyances before briefs had been filed).

completed.<sup>132</sup> Unlike abeyance requests made by previous administrations, these abeyance requests often faced significant opposition from intervening parties supporting the challenged rule.<sup>133</sup> Despite the opposition, courts granted the Administration's late-stage requests in many instances.<sup>134</sup> In one case, challenging the Obama Administration's Clean Power Plan, which regulated greenhouse gas emissions of existing power plants, the D.C. Circuit granted the Administration's abeyance request even after oral argument had already taken place, and despite the objection of parties intervening in support of the policy.<sup>135</sup>

### 3. The Biden Administration's Practice

In our 2019 article, we predicted that a future Democratic president would likely follow the Trump Administration's lead in aggressively seeking abeyances to undo its predecessor's policies.<sup>136</sup> As predicted, the Biden Administration has adopted a similar strategy to the Trump Administration in requesting abeyances even in cases that are in advanced stages of litigation. Since President Biden's inauguration, the Administration has filed dozens of requests to place cases in abeyance or to otherwise stay proceedings. While some requests were filed early in the litigation,<sup>137</sup> many requests for abeyances were made in cases in which both parties have already filed briefs.<sup>138</sup> In at least six cases, abeyances were

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132. *See, e.g., id.* at 28-29 n.130 (identifying cases in which the Trump Administration requested and received abeyances after substantial litigation had already taken place).

133. *See id.* at 29 n.131 (identifying cases in which the Trump Administration's abeyance requests were opposed by intervening parties, and in some cases even opposed by the petitioners challenging the rule).

134. *See, e.g., id.* at 30 n.136 (identifying instances in which courts granted the Trump Administration's abeyance requests).

135. *See* Order at 2, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 28, 2017) (granting opposed abeyance after en banc oral argument had been held).

136. *See* Davis Noll & Revesz, *supra* note 1 ("In this climate, a Democratic president is not likely to shy away from following the aggressive approach mapped out by the Trump administration after the next inter-party transition. . . . [F]uture administrations will be under similar pressure to use these aggressive tools to cut back on the prior administration's policies as much as possible.").

137. *See, e.g.,* Order at 1, *Env't Integrity Project v. Wheeler*, No. 20-01734 (D.D.C. Jan. 28, 2021) (granting unopposed abeyance requested before briefings were filed); Order, *Am. Acad. of Pediatrics v. Regan*, No. 20-01221 (D.C. Cir. Feb. 16, 2021) (granting abeyance requested before briefings were filed); Order at 1, *California v. EPA*, No. 21-01034 (D.C. Cir. Mar. 31, 2021) (granting abeyance less than two months after petitioners filed their petition for review); Order at 1, 5, *Del. Riverkeeper Network v. EPA*, No. 20-3412 (E.D. Pa. Mar. 31, 2021) (granting parties' joint stipulation filed before briefings to hold case in abeyance for 60 days); Order, *Ill. Com. Comm'n v. FERC*, No. 20-01645 (7th Cir. June 9, 2021) (granting request for continued abeyance filed before briefings); Order at 1, *Massachusetts v. HHS*, No. 21-01076 (1st Cir. Mar. 12, 2021) (granting unopposed abeyance requested before briefings were filed); Order, *California v. Azar*, No. 19-02552 (N.D. Cal. Feb. 10, 2021) (granting unopposed abeyance before briefings were filed).

138. *See, e.g.,* Order, *Asapansa-Johnson Walker v. Azar II*, No. 20-03827 (2d Cir. Mar. 18, 2021) (granting abeyance in case challenging HHS's repeal of a 2016 requirement that healthcare providers treat individuals in a manner consistent with their gender identity); Order, *California v. Regan*, No. 20-01357 (D.C. Cir. Feb. 12, 2021) (granting unopposed abeyance in case challenging the Trump administration's rollback of methane emissions regulations); Order, *NRDC v. Regan*, No. 20-01150 (D.C. Cir. June 2, 2021) (revising briefing schedule to delay due dates by nearly two months following an unopposed abeyance request submitted by the EPA); Order at 1, *New York v. U.S. Dep't of Energy*, No. 19-03652 (2d Cir. Mar. 9, 2021) (granting unopposed abeyance request in case challenging Trump

requested and granted even after oral argument was held.<sup>139</sup> In contrast, during the Trump Administration only one such request was made.<sup>140</sup> The majority of the Biden Administration's abeyance requests were unopposed,<sup>141</sup> but several of them were met with stiff opposition, especially from intervening parties supporting the rule.<sup>142</sup> These objections parallel the significant opposition the Trump Administration faced to many of its abeyance requests in cases after President Trump's inauguration.<sup>143</sup>

While multiple courts of appeals have granted abeyances since President Biden's inauguration, the U.S. Courts of Appeals for the D.C. Circuit and for the Second Circuit have been especially receptive to the Administration's requests even after significant litigation had already taken place.<sup>144</sup> Some courts, including the D.C. Circuit, have also granted abeyance requests made over other parties' objections.<sup>145</sup> For example, in a case concerning EPA's withdrawal of a

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Administration rule exempting certain lamps from federal energy conservation standards); Order at 2, *New York v. HHS*, No. 1:19-cv-04676 (S.D.N.Y. Feb. 16, 2021) (granting unopposed abeyance request in case challenging HHS rule expanding protections for healthcare workers who deny care to individuals on moral or religious grounds); Order at 1, *O.A. v. Biden*, No. 19-5272 (D.C. Cir. Feb. 24, 2021) (granting unopposed abeyance request in case challenging Trump policy barring asylum seekers arriving outside official ports of entry); Order at 1, *California v. HHS*, No. 20-16802 (9th Cir. Feb. 2, 2021) (granting unopposed abeyance request one month after appellants had filed their brief; at issue in this case was a Trump Administration rule requiring insurers to bill for abortion coverage separately from other coverage); Order, *Hambrick v. Becerra*, No. 20-02006 (4th Cir. Jan. 28, 2021) (granting unopposed abeyance request two months after appellants had filed their brief; at issue in this case was a Trump Administration rule requiring insurers to bill for abortion coverage separately from other coverage).

139. See Order at 1, *New York v. U.S. Dep't of Lab.*, No. 19-05125 (D.C. Cir. Feb. 8, 2021) (granting unopposed abeyance request over a year after oral argument had been held in case concerning association health plans); Order at 1, *TikTok Inc. v. Trump*, No. 20-05302 (D.C. Cir. Oct. 8, 2020) (per curiam) (granting unopposed abeyance request after oral argument had been held in case regarding the Department of Commerce's removal of TikTok from U.S. app stores); Order at 1, *U.S. WeChat Users Alliance v. Biden*, No. 20-16908 (9th Cir. Feb. 11, 2021) (granting unopposed abeyance request after oral argument in case challenging the Department of Commerce's removal of WeChat from U.S. app stores); Order, *Gilliam v. Dep't of Agric.*, No. 20-3152 (3d Cir. Jan. 26, 2021) (granting unopposed abeyance request in case challenging policy barring certain families from receiving nutritional assistance under the Families First Coronavirus Response Act); Order at 1, *Gomez v. Biden*, No. 20-05292 (D.C. Cir. Feb. 9, 2021) (remanding the case and ordering the case into abeyance after oral argument had been held in suit challenging Trump's proclamation banning foreign guest workers from entering the country); Order, *Saget v. Trump*, No. 19-01685 (2d Cir. Mar. 9, 2021) (granting unopposed abeyance in case challenging DHS's termination of Temporary Protected Status for individuals from Haiti); Order, *Washington v. EPA*, No. 2:19-cv-00884 (W.D. Wash. July 6, 2021) (granting unopposed abeyance request while EPA proposes a new rule replacing the Trump EPA's rule governing water quality criteria for toxics in Washington state).

140. See Order at 2, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 28, 2017) (granting unopposed abeyance after en banc oral argument had been held).

141. See, e.g., *supra* note 138 (identifying instances in which the abeyance requests were unopposed).

142. See, e.g., *infra* notes 144-153, 154-158, 173 and accompanying text (describing instances in which parties objected to the administration's abeyance request).

143. See *Davis Noll & Revesz, supra* note 1, at 29 (noting "stiff opposition" to many Trump abeyance requests and noting that prior administrations did not experience this phenomenon).

144. See *supra* note 138 (identifying several instances in which the D.C. Circuit and the Second Circuit, among other courts, granted abeyance requests after briefings had been filed).

145. *But see* Order at 1, *Evans v. FERC*, No. 20-1161 (D.C. Cir. June 7, 2021) (denying an abeyance request after briefs had been filed following opposition from the petitioners challenging the policy; this case concerned FERC's approval of the Jordan Cove liquified natural gas export project in Oregon).

waiver permitting California to place its own limits on tailpipe emissions, the administration moved to hold the case in abeyance while it reconsidered its withdrawal.<sup>146</sup> Several states that had intervened in support of the government’s withdrawal opposed the motion.<sup>147</sup> The states argued that the court should determine the constitutionality of the Clean Air Act provision empowering the government to grant emissions waivers before the government reconsidered whether to use that provision to grant California’s waiver.<sup>148</sup> Despite these objections, the D.C. Circuit granted the abeyance, without elaboration.<sup>149</sup> In another case, the D.C. Circuit, also without elaboration, placed in abeyance a challenge to EPA’s SAFE Vehicles Rule,<sup>150</sup> which modified fuel economy standards for car model years 2021 through 2026.<sup>151</sup> This grant occurred despite the objections of intervening respondents—including states and environmental groups—that opposed the regulations and argued that continued delay would cause continued harm in the interim.<sup>152</sup> In a case in the Northern District of California regarding the Trump EPA’s interpretation of “waters of the United States” under the Clean Water Act, the court granted a continuance of an existing stay nearly a year after the case was first filed, over the opposition of the plaintiffs.<sup>153</sup>

In at least four instances, however, courts of appeals have denied the Biden Administration’s abeyance requests made after briefs were filed. The Tenth Circuit denied an abeyance in an appeal from a decision out of the U.S. District Court for the District of Colorado regarding the Navigable Waters Protection Rule.<sup>154</sup> Intervening defendants in the case opposed the abeyance request,<sup>155</sup> and oral argument had taken place several months earlier.<sup>156</sup> In that case, the court had apparently already finished its work on the case as the court issued its

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146. See Motion To Hold Cases in Abeyance Pending Implementation of Executive Order and Conclusion of Potential Reconsideration at 1-2, *Union of Concerned Scientists v. NHTSA*, No. 19-01230 (D.C. Cir. Feb. 1, 2021).

147. See Intervenor States’ Response in Opposition to Respondent’s Motion To Hold Case in Abeyance at 1-2, *Union of Concerned Scientists*, No. 19-01230 (D.C. Cir. Feb. 3, 2021).

148. See *id.* at 2.

149. See Order at 1, *Union of Concerned Scientists*, No. 19-01230 (D.C. Cir. Feb. 8, 2021) (per curiam).

150. See Order, *Competitive Enter. Inst. v. NHTSA*, No. 20-01145 (D.C. Cir. Apr. 2, 2021) (per curiam) (granting opposed abeyance in case challenging rollback of vehicle emissions standards).

151. See The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174, 24,174 (Apr. 30, 2020) (to be codified at 40 C.F.R. pts. 86, 600, 49 C.F.R. pts. 523, 531, 533, 536, 537).

152. See State and Local Government Petitioners’ Opposition to Respondents’ Motion for Abeyance, *Competitive Enter. Inst.*, No. 20-01145 (D.C. Cir. Mar. 1, 2021) (“[T]he harms resulting from these unlawfully lax standards grow larger and larger with each passing model year of vehicle sales. The sheer magnitude of these accumulating harms . . . warrants continued judicial oversight.”).

153. See Order Granting Further Stay and Extension of Deadlines, *California v. Regan*, No. 20-cv-03005 (N.D. Cal. Apr. 16, 2021) (granting opposed motion to stay proceedings in case challenging the Trump administration’s interpretation of “Waters of the United States”).

154. See Order at 2, *Colorado v. EPA*, No. 20-01238 (10th Cir. Mar. 1, 2021).

155. See Pleading in Opposition to Motion To Hold Appeals in Abeyance for 60 Days, *Colorado*, No. 20-01238 (10th Cir. Feb. 11, 2021).

156. See Order, *Colorado*, No. 20-01238 (10th Cir. Feb. 11, 2021) (noting that oral argument took place on November 18, 2020).

unanimous decision on the merits of the case the day after denying the abeyance request.<sup>157</sup>

In another case, the Second Circuit denied the Administration's abeyance request even though briefs had not yet been filed, noting the objection of intervening appellants that supported the regulation.<sup>158</sup> This case concerned the Trump Administration's Joint Employer rule, which interprets the Fair Labor Standards Act and establishes standards for determining when entities are joint employers collectively liable for employees' minimum wage and overtime pay.<sup>159</sup> In a third case challenging the Department of Homeland Security's (DHS) policy barring asylum for individuals arriving outside official ports of entry, the Ninth Circuit denied the Biden Administration's abeyance request made over a year after oral argument.<sup>160</sup> The court issued its denial even though both parties either supported or stated that they would not oppose holding the case in abeyance.<sup>161</sup> Dismissing concerns that the case could be rendered moot by future regulations, the court held that "[t]he parties may address future developments related to Appellants' review of the interim final rule and whether any such developments render the case moot in the district court on remand."<sup>162</sup> In a parallel case challenging the same issues, the D.C. Circuit had granted the Administration's unopposed request to place the case in abeyance while the Department reviewed the policy.<sup>163</sup>

The Supreme Court has granted three of the Biden Administration's abeyance requests after briefing had been completed.<sup>164</sup> One such grant occurred in a case challenging the Trump Administration's decision to divert \$2.5 billion from military construction projects to fund a wall on the southern border of the United States.<sup>165</sup> The motion requesting the abeyance noted that President Biden had directed the government to conduct an "assessment of the legality of funding and contracting methods used to construct the wall" and of "the administrative

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157. See Order at 2, *Colorado*, No. 20-01238 (10th Cir. Mar. 2, 2021).

158. See Order at 1-2, *New York v. Walsh*, No. 20-03806 (2d Cir. Apr. 8, 2021).

159. See Brief for Appellees at 12-15, *New York*, No. 20-03806 (2d Cir. Apr. 16, 2021) (describing the rule and the appellees' contentions).

160. See Order and Amended Opinion at 20, *E. Bay Sanctuary Covenant v. Biden*, No. 18-17274 (9th Cir. Mar. 24, 2021).

161. See Appellants' Supplemental Brief at 2-4, *E. Bay Sanctuary Covenant*, No. 18-17274 (9th Cir. Feb. 26, 2021) (arguing that holding the case in abeyance would be proper); Letter Brief in Response to Court's Order at 1-2, *E. Bay Sanctuary Covenant*, No. 18-17274 (9th Cir. Feb. 26, 2021) (arguing that if the court chose not to deny rehearing en banc, "the Court should hold the petition in abeyance while the government reviews whether to rescind what remains of the policy").

162. Order and Amended Opinion at 20, *E. Bay Sanctuary Covenant*, No. 18-17274 (9th Cir. Mar. 24, 2021).

163. See Order at 1, *O.A. v. Biden*, No. 19-5272 (D.C. Cir. Feb. 24, 2021).

164. Some circuit courts have been less willing to grant abeyances in these cases. See, e.g., *supra* notes 154-157, 160 and accompanying text.

165. See Order at 1, *Biden v. Sierra Club*, No. 20-138 (U.S. Feb. 3, 2021) (granting abeyance despite the fact that briefs had already been filed).

and contractual consequences of ceasing each wall construction project.”<sup>166</sup> Though the Court did not explain its rationale in granting the motion, it may have looked favorably on the consent of both sides to the request.<sup>167</sup> The Court sent the case back to the district court, vacating all previous judgments, with instructions to consider what new proceedings are necessary given that the current administration no longer supported the wall’s construction.<sup>168</sup> In a separate case regarding DHS’s “Remain in Mexico” asylum program<sup>169</sup> the Supreme Court granted an abeyance request despite the fact that oral argument was scheduled to take place less than a month later.<sup>170</sup> As in the border wall case, the respondents in the case consented to the abeyance request.<sup>171</sup>

The Supreme Court placed a third case in abeyance even over the opposition of one of the parties. The case concerned a challenge to state Medicaid amendments that would make eligibility contingent on fulfilling a minimum number of monthly work or volunteer hours.<sup>172</sup> Arkansas, a petitioner in the case, had opposed the Biden Administration’s abeyance request, claiming that the legal issues in the case would likely arise again even if the new administration were to withdraw its approval of the Medicaid amendments.<sup>173</sup> Despite Arkansas’s opposition, the Court ordered the case placed in abeyance without elaboration.<sup>174</sup> The Biden Administration had moved to vacate and remand the case as well, but the Court declined to take those additional steps.<sup>175</sup>

These cases suggest that the combination of a party’s opposition to abeyance and the completion of oral argument may occasionally lead a court to deny an administration’s request. But that is not generally the case. For example, in the case challenging the Clean Power Plan, the D.C. Circuit granted the Trump Administration’s abeyance request despite these hurdles.<sup>176</sup>

An alternative but related strategy that a new administration may seek to employ (in order to aid it in undoing a predecessor’s policies) involves seeking

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166. Motion of the Petitioners To Hold the Briefing Schedule in Abeyance and To Remove the Case from the February 2021 Argument Calendar at 1, 3-4, *Sierra Club*, No. 20-138 (U.S. Feb. 1, 2021) (quoting Proclamation No. 10,142, 86 Fed. Reg. 7225, 7225 (Jan. 27, 2021)).

167. See *id.* at 2 (noting respondents’ consent to the motion).

168. See Order, *Sierra Club*, No. 20-138 (U.S. July 2, 2021).

169. For a description of the program, see *Q&A: Trump Administration’s “Remain in Mexico” Program*, HUM. RTS. WATCH (Jan. 29, 2020), <https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program> [<https://perma.cc/E9K4-3NK3>].

170. See Order, *Mayorkas v. Innovation L. Lab*, No. 19-1212 (U.S. Feb. 3, 2021).

171. See Motion of the Petitioners To Hold the Briefing Schedule in Abeyance and To Remove the Case from the February 2021 Argument Calendar, *Mayorkas*, No. 19-1212 (U.S. Feb. 1, 2021).

172. See Brief for Petitioners at 8-12, *Becerra v. Gresham*, No. 20-37 (U.S. Jan. 19, 2021).

173. See Arkansas’s Opposition to the Federal Government’s Motion To Vacate at 2, *Gresham*, No. 20-37 (U.S. Feb. 22, 2021).

174. See Order, *Gresham*, No. 20-37 (U.S. Apr. 5, 2021).

175. See Motion To Vacate the Judgment of the Court of Appeals and Remand, To Remove the Cases from the March 2021 Argument Calendar, and To Hold Further Briefing in Abeyance Pending Disposition of this Motion at 2, *Gresham*, No. 20-37 (U.S. Feb. 22, 2021).

176. See Order at 2, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 28, 2017) (granting opposed abeyance after en banc oral argument had been held).

remands without vacatur.<sup>177</sup> Remands without vacatur occur when the court sends the rule back to the agency for review without vacating it.<sup>178</sup> Remanding a case is similar to holding a case in abeyance because in both instances the agency may reconsider the policy without having to simultaneously defend it in court.<sup>179</sup> However, the two processes differ in several respects. Cases in abeyance are still under the court's jurisdiction; unlike remanded cases, a case in abeyance may be revived at any time by the court or by motion of the parties.<sup>180</sup> If parties wish to relitigate cases that have been remanded, they must file a completely new lawsuit and file completely new briefs.<sup>181</sup> This opens the door for forum shopping, as plaintiffs need not refile in the court that remanded the original case.<sup>182</sup> The Trump Administration made some use of remands in litigating Obama-era policies. For example, the Trump-era EPA sought to remand without vacatur several provisions of a challenged coal residuals disposal regulation.<sup>183</sup> The court granted the Administration's request to remand some,<sup>184</sup> but not all,<sup>185</sup> of the provisions.

The Biden Administration has similarly sought remands without vacatur in cases challenging Trump-era policies. The Administration sought such a remand in a Ninth Circuit case challenging the Trump EPA's evaluation of methylene chloride under the Toxic Substances Control Act, which the court granted.<sup>186</sup> In a separate case regarding the Trump Council on Environmental Quality's regulation accelerating the infrastructure project approval process under National Environmental Policy Act (NEPA), the Western District of Virginia originally denied the Biden Administration's motion to stay the case pending new regulations.<sup>187</sup> The court noted that "[b]riefing is nearly completed in the case, and in essence [the plaintiffs] argue that time is wasting for the relief they hope to receive," and concluded that "adding lengthy additional delay to [the court's] decision would not be appropriate."<sup>188</sup> The Biden Administration responded by moving to remand the case without vacatur.<sup>189</sup> Ultimately, the court did not rule

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177. See Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, 70 ADMIN. L. REV. 361, 375 (2018) (describing remands without vacatur).

178. See *id.*

179. See *id.* at 404.

180. See *id.* at 404-05.

181. See *id.* at 405 (describing differences between voluntary remand and abeyance).

182. See *id.* (describing how voluntary remand enables forum shopping more so than abeyance).

183. See *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 420 (D.C. Cir. 2018).

184. See *id.* at 437 (granting EPA's motion to remand three parts of the challenged rule).

185. See *id.* (denying EPA's request that a provision of the rule be remanded). The court denied EPA's request to place the case in abeyance as well; it used the same rationale for both denials. *Id.* at 436-37.

186. See Filed Order, Respondents' Motion for Voluntary Remand, *Neighbors for Env't Justice v. EPA*, No. 20-72091 (9th Cir. Jul 14, 2021); Respondents' Motion for Voluntary Remand, *Neighbors for Env't Justice*, No. 20-72091 (9th Cir. May 13, 2021).

187. See Order Denying Defendants' Motion for Stay of Case at 2, *Wild Va. v. Council on Env't Quality*, No. 3:20-cv-00045 (W.D. Va. Feb. 19, 2021).

188. *Id.*

189. See Defendants' Motion for Remand without Vacatur, *Wild Va.*, No. 3:20-cv-00045 (W.D. Va. Mar. 17, 2021).

on the remand request, instead dismissing the case on justiciability grounds.<sup>190</sup> The Biden EPA also sought remands without vacatur in two suits concerning the Clean Water Act. One rule concerns another challenge to the Trump Administration's interpretation of "waters of the United States."<sup>191</sup> The other case concerns the Trump EPA's Water Certification rule, which alters the requirements for granting water quality certifications to projects affecting waters of the United States.<sup>192</sup> The original plaintiffs oppose the motions to remand in both cases,<sup>193</sup> and intervening defenders in the "waters of the United States" rule suit oppose the motion.<sup>194</sup> Ultimately, a district court in the Northern District of California vacated the Water Certification rule case.<sup>195</sup> The District of South Carolina granted without elaboration the Biden Administration's remand motion in the case challenging the "waters of the United States" rule.<sup>196</sup>

In sum, the Biden Administration has used the strategy adopted by the Trump Administration of seeking abeyances, and other related orders, in many cases in advanced stages of litigation. Like the Trump Administration, the Biden Administration has been largely successful in obtaining abeyances, though, in the case of both administrations, courts denied them in a few instances.

### *B. Withdrawing Appeals*

Another litigation tool employed by the Biden Administration has involved withdrawing appeals in cases where a lower court struck down a Trump-era regulation. When a lower court has vacated a predecessor's rule, a new administration that wishes to undo the rule benefits greatly from withdrawing any pending appeals from that decision. Not only does the lower court's ruling effectively roll back the rule indefinitely, the new administration can also use the ruling to support future regulatory rollback work. This tool generally requires the consent and cooperation of all parties, so it is likely to be effective only when, at the time of the adverse decision, there are no intervenors supporting the rule.

#### 1. The Trump Administration's Practice

The Trump Administration used this strategy where possible. For example, in the challenge to the Fiduciary Rule, an Obama-era regulation relating to the

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190. See *Wild Va.*, No. 3:20-cv-00045, 2021 U.S. Dist. LEXIS 114616, at \*2 (W.D. Va. June 21, 2021).

191. See Defendants' Notice of Motion and Motion for Voluntary Remand Without Vacatur, *Waterkeeper All. v. Regan*, No. 3:18-cv-03521 (N.D. Cal. June 22, 2021).

192. See Defendants' Motion for Remand Without Vacatur, *S.C. Coastal Conservation League v. Wheeler*, No. 2:20-cv-03062 (D.S.C. July 1, 2021).

193. See Defendants' Notice of Motion and Motion for Voluntary Remand Without Vacatur at 2, 6, *Waterkeeper All.*, No. 18-03521 (N.D. Cal. June 22, 2021).

194. See *id.* at 6.

195. *In re Clean Water Act Rulemaking*, No. 20-4869, 2021 WL 4924844 (N.D. Cal. Oct. 21, 2021).

196. See Order at 1, *S.C. Coastal Conservation League*, No. 2:20-cv-03062 (D.S.C. July 15, 2021).

fiduciary obligations of financial service providers, the Fifth Circuit vacated the rule in 2018.<sup>197</sup> The Trump Administration declined to appeal, leaving the rule vacated. When state attorneys general sought leave to intervene to appeal the decision,<sup>198</sup> the court denied those motions because litigation had already been completed.<sup>199</sup> While the private plaintiffs opposed the states' intervention motion, the Trump Administration did not take a position on that motion.<sup>200</sup>

## 2. The Biden Administration's Practice

The Biden Administration has been able to use the strategy in many more cases, perhaps as a result of the greater number of times that the Trump Administration lost in court.<sup>201</sup> For example, the Biden Administration used the strategy in a series of cases concerning the Trump DHS's Public Charge Rule.<sup>202</sup> In 2020, the Northern District of Illinois vacated the rule entirely,<sup>203</sup> but the Seventh Circuit stayed the implementation of this judgment pending its own review.<sup>204</sup> After the Biden Administration took over, the agency moved to dismiss the Seventh Circuit appeal, a motion that was unopposed by the plaintiffs.<sup>205</sup> Meanwhile, in February 2021, the Supreme Court granted certiorari to review the Ninth Circuit's decision on the rule. A number of states subsequently sought to intervene in the Ninth Circuit litigation in order to defend the rule.<sup>206</sup> But before that motion could be decided, the Administration stipulated to dismiss three pending public charge cases before the Supreme Court with the consent of the opposing parties.<sup>207</sup> Under the Supreme Court's rules, such an agreement among all parties automatically terminates the case.<sup>208</sup> These stipulations were possible only because there were no intervening parties in these

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197. See *Chamber of Com. v. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018).

198. Motion To Intervene of the States of California, New York, and Oregon, *Chamber of Com.*, No. 17-10238 (5th Cir. Apr. 26, 2018).

199. See Order at 3, *Chamber of Com.*, No. 17-10238 (5th Cir. May 2, 2018) (per curiam) (denying the states' motion to intervene after judgment had been entered).

200. See Motion To Intervene of the States of California, New York, and Oregon at 2, *Chamber of Com.*, No. 17-10238 (5th Cir. Apr. 26, 2018) ("Counsel for plaintiffs indicated that they oppose this motion. . . . Counsel for the government takes no position on this motion to intervene.").

201. See Davis Noll, *supra* note 7, at 357 (showing that the Trump Administration succeeded on only 23% of cases challenging agency actions, compared to a success rate of approximately 70% for prior administrations).

202. For a background on the rule, see *The Public Charge Rule*, BOUNDLESS (Apr. 22, 2021), <https://www.boundless.com/blog/public-charge-rule-explained> [<https://perma.cc/KU8G-TV6A>].

203. See *Cook Cnty. v. Wolf*, No. 1:19-cv-06334, at \*6-7 (N.D. Ill. Nov. 2, 2020).

204. See *Cook Cnty. v. Wolf*, No. 20-3150 (7th Cir. Nov. 19, 2020).

205. See Unopposed Motion To Voluntarily Dismiss Appeal, *Cook County*, No. 20-3150 (7th Cir. Mar. 9, 2021).

206. See Motion To Intervene, *San Francisco v. USCIS*, No. 19-17213 (9th Cir. Mar. 10, 2021).

207. See Joint Stipulation to Dismiss, *U.S. Dep't of Homeland Sec. v. New York*, No. 20-449 (U.S. Mar. 9, 2021); Joint Stipulation to Dismiss, *Mayorkas v. Cook Cnty.*, No. 20-450 (U.S. Mar. 9, 2021); Joint Stipulation to Dismiss, *USCIS v. San Francisco*, No. 20-962 (U.S. Mar. 9, 2021).

208. See SUP. CT. R. 46.1.

three cases.<sup>209</sup> Less than a week later, the Biden Administration issued a final rule repealing the Trump Administration’s public charge rule, citing the Northern District of Illinois’s vacatur as its justification.<sup>210</sup> Ultimately, in April 2021, after the Supreme Court dismissed the three public charge cases before it, the Ninth Circuit rejected the states’ motion to intervene to defend the rule.<sup>211</sup> In dissenting to that decision, Judge VanDyke remarked that the Administration had essentially used this technique to bypass the notice-and-comment process required by the Administrative Procedure Act (APA).<sup>212</sup> He complained that the Biden Administration’s actions terminated the rule “with extreme prejudice—ensuring not only that the rule was gone faster than toilet paper in a pandemic, but that it could effectively never, ever be resurrected, even by a future administration.”<sup>213</sup>

Even when lower courts have not definitively vacated the challenged rule, withdrawing appeals is still beneficial for a new administration because it allows agencies to propose new regulations without the potential restrictions that unfavorable court opinions would pose. The Biden Administration made use of this strategy in a case before the Supreme Court challenging the HHS’s 2019 rule implementing Title X’s family planning program.<sup>214</sup> The rule had been upheld in the Ninth Circuit,<sup>215</sup> but found to be arbitrary and capricious in the Fourth Circuit,<sup>216</sup> creating a circuit split. After the Supreme Court granted certiorari in February 2021, the petitioners—including medical groups like the American Medical Association—and the administration respondents filed a joint stipulation to dismiss the case.<sup>217</sup> The agency then published a proposed rule to roll back the Trump-era rule.<sup>218</sup> The appellate courts were split on the 2019 rule’s validity; thus, the agency did not cite lower courts as the rationale for immediately repealing the rule. But the agency did note that the Fourth Circuit had found the rule to be arbitrary and capricious and a violation of both the non-

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209. See cases cited *supra* note 207 (stating that in each case the parties consisted of only petitioners and respondents, with no parties intervening to defend or oppose the rule).

210. See *Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14,221, 14,221 (Mar. 15, 2021) (“Because this rule simply implements the district court’s vacatur of the August 2019 rule, as a consequence of which the August 2019 rule no longer has any legal effect, DHS is not required to provide notice and comment or delay the effective date of this rule.”).

211. See *Order, San Francisco v. USCIS*, No. 19-17213, at 13 (9th Cir. Apr. 8, 2021), *cert. granted*, 142 S. Ct. 417 (2021) (No. 20-1775).

212. See *id.* at 13-14 (VanDyke, J., dissenting).

213. *Id.* at 14 (VanDyke, J., dissenting).

214. This rule prevents Title X grant recipients from referring patients for abortion care and requires that recipients maintain physical separation from abortion facilities. See *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7788-89 (Mar. 4, 2019) (to be codified at 42 C.F.R. pt. 59).

215. See *California v. Azar*, 950 F.3d 1067, 1105 (9th Cir. 2020) (en banc).

216. See *Mayor of Baltimore v. Azar*, 973 F.3d 258, 276 (4th Cir. 2020) (en banc).

217. See *Joint Stipulation To Dismiss at 1, Am. Med. Ass’n v. Becerra*, No. 20-429 (U.S. Mar. 12, 2021) (jointly stipulating dismissal under Supreme Court Rule 46.1).

218. See *Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services*, 86 Fed. Reg. 19,812 (Apr. 15, 2021) (to be codified at 42 C.F.R. pt. 59).

directive mandate and provisions within the Affordable Care Act.<sup>219</sup> Nineteen states and several pro-life organizations quickly moved for leave to intervene in the Supreme Court, in order to support the Trump-era rule.<sup>220</sup> In response, the Biden Administration submitted a letter representing that it would continue to enforce the rule as long as it remained on the books, and that if future litigation arose it would seek an abeyance until the notice-and-comment period had closed on the replacement rule.<sup>221</sup> The Supreme Court then ordered the case dismissed pursuant to the parties' joint stipulation.<sup>222</sup>

The Biden Administration has also withdrawn appeals in lower courts in cases challenging rules that had not been fully vacated. In the Ninth Circuit, the Administration voluntarily moved to dismiss the government's appeal of a district court injunction of operational changes at the U.S. Postal Service, which had been implemented prior to the 2020 presidential election.<sup>223</sup> This appeal concerned a lower court's preliminary injunction of the changes, rather than a vacatur of the rule itself.<sup>224</sup>

### C. Conceding Error

A third strategy employed by the Biden Administration to undo Trump-era policies in the courts involves conceding error and seeking remands with vacatur. Remands with vacatur are requests by the Administration to send the case back to the agency for review while simultaneously striking down the challenged rule.<sup>225</sup> This type of decision is appropriate only if the court also rules on the legality of the rule, because otherwise it would allow an agency to effectively repeal rules without undergoing public notice and comment.<sup>226</sup> There are two important factors the court must consider before vacating the rule. These factors are "the seriousness of the order's deficiencies"—a measure of whether the rule is legally valid and, if not, whether the agency can fix the issues—and whether vacatur would cause any "disruptive consequences" in the interim.<sup>227</sup> To make

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219. See *id.* at 19,814 & n.11. The Ninth Circuit did not rule on whether the rule violated the non-directive mandate. *Id.*

220. See Motion of Ohio and 18 Other States for Leave To Either Intervene or To Present Oral Argument as Amici Curiae, *Am. Med. Ass'n*, No. 20-429 (U.S. Mar. 8, 2021); Motion of the American Association of Pro-Life Obstetricians & Gynecologists et al. To Intervene or To Present Oral Argument as Amici Curiae, *Am. Med. Ass'n*, No. 20-429 (U.S. Mar. 12, 2021).

221. See Letter Brief at 1-3, *Am. Med. Ass'n*, No. 20-429 (U.S. May 3, 2021).

222. See Order, *Am. Med. Ass'n*, No. 20-429 (U.S. May 17, 2021) (ordering the dismissal "in light of" the government's representation).

223. See Unopposed Motion To Dismiss Case Voluntarily, *Washington v. Trump*, No. 20-36047 (9th Cir. Jan. 21, 2021).

224. See Order, *Washington*, No. 20-36047 (9th Cir. Dec. 3, 2021) (stating that the appeal is a preliminary injunction appeal).

225. See Revesz, *supra* note 177, at 375-76 (describing remands with vacatur).

226. See *id.* at 390.

227. *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (quoting *Int'l Union, Mine Workers of Am. v. Fed. Mine Safety and Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)).

use of this tool, therefore, administrations must convince the court that the challenged rule is legally invalid in some way.

### 1. The Trump Administration's Practice

The Trump Administration made use of a related strategy in two cases challenging Obama-era regulations. Instead of explicitly conceding error and moving to remand with vacatur, the Administration first attempted to repeal the rules and then when those repeals faltered, it offered weak defenses of the challenged rules in court, resulting in the courts finding the Obama-era rules invalid and subsequently vacating them in whole or in part. The first case concerned a challenge to the Department of the Interior's 2016 Waste Prevention Rule, which limited when oil and gas operators could vent natural gas and required operators to capture portions of the gases they produce.<sup>228</sup> The Trump Administration had repeatedly tried and failed to rescind the rule, with multiple courts striking down the administration's rollbacks as legally invalid.<sup>229</sup> When ultimately forced to defend the Waste Prevention Rule on the merits, the Trump Administration argued that the rule violated the APA and that vacatur was the proper remedy.<sup>230</sup> The court agreed and vacated the rule,<sup>231</sup> despite the opposition of several states and environmental groups that had intervened to defend it.<sup>232</sup>

The second instance in which the Trump Administration conceded error and argued for vacatur concerned the Department of the Interior's 2016 Valuation Rule, which amended the valuation regulations for oil, gas, and coal produced from federal leases.<sup>233</sup> Previously, as in the case of the Waste Prevention Rule, the Trump Administration had tried and failed to repeal the rule through the regulatory process, with the Northern District of California finding the repeal rule in violation of the APA.<sup>234</sup> When the rule was later challenged in the District of Wyoming, the court enjoined multiple parts of the rule<sup>235</sup> over the objections of intervening states and environmental groups.<sup>236</sup> The Administration then

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228. See Federal Respondents' Response to Petitioners' Merits Briefs and Motion To Dismiss, or, in the Alternative, for a Stay of Proceedings at 2, *Wyoming v. U.S. Dep't of Interior*, 493 F. Supp. 3d 1046 (D. Wyo. Dec. 11, 2017) (No. 16-cv-00285) (describing the rule).

229. See *California v. Bernhardt*, 472 F. Supp. 3d 573, 587-88 (N.D. Cal. 2020) (detailing failed rollbacks).

230. See Federal Respondents' Supplemental Merits Response Brief at 23-25, *Wyoming*, 493 F. Supp. 3d 1046 (D. Wyo. Aug. 18, 2020) (No. 16-cv-00285) (arguing that vacatur is appropriate because the rule violates the Administrative Procedure Act and because vacatur would not lead to "disruptive or harmful consequences").

231. See *Wyoming*, 493 F. Supp. 3d at 1085-86.

232. See Citizen Groups and State Respondents' Supplemental Response Brief, *Wyoming*, 493 F. Supp. 3d 1046 (D. Wyo. Aug. 25, 2020) (No. 16-cv-00285) (arguing in support of the rule).

233. See Respondents' Opposition to Motion for Preliminary Injunction at 2, *Cloud Peak Energy, Inc. v. U.S. Dep't of Interior*, 415 F. Supp. 3d 1034 (D. Wyo. 2019) (No. 2:19-cv-00120) (describing the rule).

234. See *California v. U.S. Dep't of Interior*, 381 F. Supp. 3d 1153, 1179 (N.D. Cal. 2019).

235. See *Cloud Peak Energy*, 415 F. Supp. 3d at 1053.

236. See Response in Opposition to Joint Motion for Preliminary Injunction, *Cloud Peak Energy*, 415 F. Supp. 3d 1034 (D. Wyo. Aug. 16, 2019) (No. 2:19-cv-00120).

argued that the District of Wyoming’s ruling highlighted “fundamental flaws” in the rule’s new valuation methods for coal, and that the court should convert the preliminary injunction into a final judgment vacating the flawed parts of the rule.<sup>237</sup> Interestingly, though the Trump Administration ended before the resolution of this issue, the Biden Administration has not completely reversed course. The new administration agreed that the court should vacate the portions of the rule regarding coal valuation, but argued that the court should leave the remaining regulations for oil and gas valuation intact.<sup>238</sup> In September 2021, the court agreed.<sup>239</sup>

## 2. The Biden Administration’s Practice

The Biden Administration used remands with vacatur to undo at least four Trump-era policies promulgated by EPA. These cases differ from the cases in which the Trump Administration argued for vacatur because none had any intervening parties defending the rule. In addition, the Biden Administration used this strategy very quickly after the transition rather than after attempting and failing to repeal the rules, as the Trump Administration had done. The first case concerned the “Secret Science” rule, which prohibited EPA from promulgating rules justified by epidemiological studies showing the adverse health effects of contaminants, unless the studies’ underlying data were publicly disclosed.<sup>240</sup> The Trump EPA justified the rule as a procedural rule, issued under the Federal Housekeeping Statute.<sup>241</sup> The Biden EPA then argued that the rule violated the APA, because the statute permits agencies to use the Federal Housekeeping Statute only to promulgate procedural rules.<sup>242</sup> The district court agreed and granted the motion the next day, vacating and remanding the rule back to the agency.<sup>243</sup>

In a second instance, the Biden EPA sought unopposed remand with vacatur in a case concerning the Trump-era Municipal Solid Waste Alignment rule, which extended deadlines for states to submit plans implementing federal

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237. Memorandum of Law in Support of Motion for Final Judgment at 4, *Cloud Peak Energy*, No. 2:19-cv-00120 (D. Wyo. Dec. 4, 2020). According to the court, one such “fundamental flaw” was that the rule valued coal based on the sale of the electricity generated from the coal. *See* Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Form, 81 Fed. Reg. 43,338, 43,390 (July 1, 2016) (to be codified at 30 C.F.R. pts. 1202, 1206).

238. *See* Respondents’ Answering Brief at 22, *Cloud Peak Energy*, No. 2:19-cv-00120 (D. Wyo. Apr. 6, 2021).

239. *Cloud Peak Energy Inc. v. U.S. Dep’t of the Interior*, No. 2:19-cv-00120, 2021 WL 5150682 (D. Wyo. 2021).

240. *See* Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Fed. Reg. 469 (Jan. 6, 2021) (to be codified at 40 C.F.R. pt. 30).

241. *Id.* at 471.

242. *See* Defendants’ Unopposed Motion for Vacatur and Remand at 2, *Env’t Def. Fund v. EPA*, No. 4:21-cv-00003 (D. Mont. Jan. 31, 2021).

243. *See* Order at 2, *Env’t Def. Fund*, No. 4:21-cv-00003 (D. Mont. Feb. 1, 2021).

emissions guidelines.<sup>244</sup> Again with consent from the plaintiffs,<sup>245</sup> EPA argued that remand with vacatur was permissible because the challenged rule was invalid, as the timelines established by the rule relied on the same justifications as another EPA rule that had been struck down under a previous court ruling.<sup>246</sup> The court granted the motion one month after the motion was filed.<sup>247</sup>

The Biden Administration's third unopposed remand with vacatur request occurred in an EPA case challenging the Trump-era Significant Contribution rule. This rule set a higher threshold for determining whether greenhouse gas emissions from a point source contribute significantly to dangerous air pollution, and are therefore subject to stricter regulatory requirements.<sup>248</sup> As in the previous cases, the Biden Administration argued that vacating the rule was proper because the rule was invalid.<sup>249</sup> In this case, the Administration claimed that the criteria for meeting the significant contribution threshold were promulgated without the public notice and comment required of such regulations under the Clean Air Act.<sup>250</sup> The court granted the Administration's motion without elaboration several weeks later.<sup>251</sup>

The Biden EPA also sought remand with vacatur in a case about exemption permits that the Trump EPA had granted to an oil refinery in January 2021, allowing it to sell fuel products without incorporating a minimum volume of renewable fuels into their product.<sup>252</sup> Again with no intervenors and no opposition from the petitioners, the Administration sought and received a remand with vacatur, after conceding that the agency failed to properly analyze whether the petitioners legally qualified for the exemption permits.<sup>253</sup>

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Through abeyances, withdrawing appeals, and conceding error, the Biden Administration has continued the aggressive litigation approach adopted by the Trump Administration in cases challenging the prior administration's policies. Abeyances persist as the most commonly employed tool in this effort. President Biden has gone even further than President Trump in using this tool by, for

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244. See Petitioner's Proof Brief at 15, *Env't Def. Fund v. EPA*, No. 19-1222 (D.C. Cir. Aug. 12, 2020) (describing the rule).

245. See Respondent's Consent Motion for Voluntary Vacatur and Remand at 2, *Env't Def. Fund*, No. 19-1222 (D.C. Cir. Mar. 4, 2021).

246. See *id.* at 12. For the other rule struck down by the court, see 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); and *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 991-95 (D.C. Cir. 2021) (vacating the rule's timing provisions).

247. See Order, *Env't Def. Fund*, No. 19-1222 (D.C. Cir. Apr. 5, 2021) (per curiam).

248. See Respondent EPA's Unopposed Motion for Voluntary Vacatur and Remand at 3-4, *California v. EPA*, No. 21-1035 (D.C. Cir. Mar. 17, 2021) (explaining the 2017 rule).

249. See *id.* at 7.

250. See *id.*

251. See Order, *California*, No. 21-1035 (Apr. 5, 2021) (per curiam); see *supra* note 247.

252. See Petition for Review at 1-2, *Sinclair Wyo. Refining Co. v. EPA*, No. 21-09528 (Mar. 15, 2021).

253. See Order at 1, *Sinclair Wyo. Refining Co.*, No. 21-09528 (May 19, 2021).

example, requesting and receiving multiple abeyances even after the completion of oral argument, compared to only a single instance in which President Trump attempted such a strategy. Abeyances also remain the only one of these tools in which administrations occasionally succeed despite the objections of the other party or of intervening parties. When intervening parties are absent and the opposing parties are cooperative, the Biden Administration has also succeeded in undoing several Trump-era policies by withdrawing pending appeals and by requesting remands with vacatur. These strategies require a greater confluence of circumstances to be viable, explaining why, for both the Biden and Trump Administrations, they have been employed less frequently than abeyances. Nonetheless, when these strategies are available, they present the strongest opportunity to permanently roll back the prior administration's regulations.

### III. Regulatory Strategies

As we discussed in our 2019 article, the Trump Administration made aggressive use of suspensions as a deregulatory tool, in ways not seen in previous administrations.<sup>254</sup> We predicted that the Trump Administration's use of suspensions to prevent Obama-era policies from coming into effect would provide a blueprint for future Democratic administrations seeking to reverse Trump's own policies.<sup>255</sup> As expected, the Biden Administration has aggressively used suspensions to delay Trump-era regulations, though Biden agencies have seemingly made greater efforts to comply with legal requirements than Trump-era agencies did. This Part describes how suspensions aid incoming administrations after inter-party transitions and discusses how the Biden Administration's use of this tool compares to that of the Trump Administration. This Part also details how the Biden Administration, by more closely adhering to federal rulemaking requirements, has avoided many of the litigation losses suffered by Trump agencies attempting the same strategy in 2017. It also describes other regulatory tools that the Biden Administration has used to quickly roll back Trump-era policies.

#### A. Suspensions

As we explained in our 2019 article, suspensions are useful for incoming administrations following inter-party transitions because it is easier to repeal a previous administration's regulations if they have not yet gone into effect.<sup>256</sup> This Section surveys the use of suspensions in prior administrations and shows how the Biden Administration continued to make aggressive use of them.

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254. See Davis Noll & Revesz, *supra* note 1, at 37-41.

255. See *id.* at 47 (describing how incoming administrations from both parties are likely to find aggressive use of suspensions to be a useful tool).

256. See *id.* at 43-47.

## 1. The Trump Administration's Practice

Before the Trump Administration, other administrations made use of suspensions to delay the previous administration's regulations. President Reagan used this strategy especially aggressively, issuing suspensions both with and without notice and comment and using suspensions to indefinitely delay regulations.<sup>257</sup> These delays often did not hold up in court, with courts holding that indefinitely delaying a rule is "tantamount to a revocation" that could not be promulgated without going through the proper APA procedural requirements.<sup>258</sup> In general, before the Trump Administration, subsequent administrations limited the suspensions to sixty days,<sup>259</sup> and targeted only regulations promulgated towards the end of the outgoing President's term that had not yet become effective.<sup>260</sup> So-called "midnight regulations" are often easier to delay and to challenge in court because they are more likely to be rushed and of poor legal quality.<sup>261</sup>

While he carried on the technique of suspending laws before their effective date,<sup>262</sup> President Trump departed from his predecessors by suspending rules that had already gone into effect but had yet to reach their compliance dates.<sup>263</sup> Courts frequently struck down these suspensions on substantive grounds, as well as for failing to undergo the proper notice-and-comment procedures required by the APA.<sup>264</sup>

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257. See *id.* at 34 (citing William M. Jack, *Taking Care That Presidential Oversight of the Regulatory Process Is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479, 1498-99 (2002) (explaining that President Reagan delayed as many as 119 regulations and that many of those suspensions led to lawsuits)).

258. Nat. Res. Def. Council v. EPA, 683 F.2d 752, 763 n.23 (3d Cir. 1982); accord *Env't Def. Fund v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) ("The suspension or delayed implementation of a final rulemaking normally constitutes substantive rulemaking.").

259. See, e.g., PETER R. ORSZAG, OFF. OF MGMT. & BUDGET, MEMORANDUM FOR THE HEADS AND ACTING HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, IMPLEMENTATION OF MEMORANDUM CONCERNING REGULATORY REVIEW 1-2 (2009) ("Consider extending for 60 days the effective date of regulations that have been published in the Federal Register but not yet taken effect, . . . for the purpose of reviewing questions of law and policy raised by those regulations.").

260. See Davis Noll & Revesz, *supra* note 1, at 35 n.169 (identifying suspensions issued during the Bush and Obama Administrations targeting regulations that had not yet become effective).

261. See Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441, 1448 (2005) (exploring the argument that midnight rules are more rushed and are therefore less likely to satisfy high standards of administrative rulemaking).

262. See Davis Noll & Revesz, *supra* note 1, at 38 n.186.

263. See *id.* at 37-38 (detailing Trump Administration suspensions of rules that had already gone into effect). Some regulations establish "compliance dates" that occur after the "effective date" of the rule. When a rule establishes both dates, the effective date refers to the date when the rule is added to the Code of Federal Regulations, while the compliance date refers to the date by which regulated entities must conform to the requirements of the rule. See NAT'L ARCHIVES AND RECS. ADMIN., DOCUMENT DRAFTING HANDBOOK loc. 3-7 to 3-9 (2018), <https://www.archives.gov/federal-register/write/handbook> [<https://perma.cc/GT44-HTGV>].

264. See Davis Noll & Revesz, *supra* note 1, at 39.

## 2. The Biden Administration's Practice

The Biden Administration has used suspensions to aggressively limit the implementation of regulations promulgated late in President Trump's term. Unlike the previous administration, however, the Biden Administration has generally conformed to APA requirements by either allowing notice and comment or by properly justifying the suspension under 5 U.S.C. § 705.<sup>265</sup> When Biden agencies have opted for comment periods on final rules, these periods have almost universally been opened after the suspensions were promulgated, rather than before their promulgation.<sup>266</sup> And so far, the Biden Administration has avoided the litigation defeats regarding suspensions that plagued the Trump Administration in its first year.<sup>267</sup> Many Biden suspensions draw justification from a memorandum issued by President Biden's Chief of Staff Ronald Klain on inauguration day.<sup>268</sup> For Trump-era rules that are not yet effective, the memorandum urges agencies to "consider postponing the rules' effective dates for sixty days from the date of this memorandum . . . for the purpose of reviewing any questions of fact, law, and policy the rules may raise."<sup>269</sup> The memorandum recommends that agencies "consider" opening a thirty-day comment period for these suspensions.<sup>270</sup> When agencies find further review necessary, they are also permitted by the memorandum to extend the suspension beyond the original sixty days.<sup>271</sup>

The Klain memorandum largely follows similar post-inauguration guidance issued by the incoming Obama Administration, though the Obama-era memorandum instructs agencies that they "should immediately reopen" thirty-day notice-and-comment periods for sixty-day suspensions.<sup>272</sup> In contrast, the

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265. See 5 U.S.C. § 705 (2018) ("When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.").

266. Agencies often justify their actions by citing the "good cause" exception in 5 U.S.C. § 553(b)(B), which allows agencies to forego advance notice and comment when the agency finds such a comment period would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B); see, e.g., *Fraud and Abuse; Removal of Safe Harbor Protection for Rebates Involving Prescription Pharmaceuticals and Creation of New Safe Harbor Protection for Certain Point-of-Sale Reductions in Price on Prescription Pharmaceuticals and Certain Pharmacy Benefit Manager Service Fees*, 86 Fed. Reg. 7815, 7815 (Feb. 2, 2021) (to be codified at 42 C.F.R. pt. 1001) (citing the good cause exception as justification for not allowing advance notice and comment).

267. The Trump Administration lost an important suspension case in its first six months. See *Clean Air Council v. Pruitt*, 862 F.3d 1, 14 (D.C. Cir. 2017) (vacating suspension of EPA's methane rule on statutory authority grounds). The Administration also lost several other cases later in 2017. See, e.g., *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1124-25 (N.D. Cal. 2017) (ruling against agency for violating APA section 705); *Becerra v. U.S. Dep't of the Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (same).

268. See Memorandum for the Heads of Executive Departments and Agencies, 86 Fed. Reg. 7424 (Jan. 20, 2021).

269. *Id.* at 7424.

270. *Id.*

271. See *id.* ("As appropriate and consistent with applicable law, and where necessary to continue to review these questions of fact, law, and policy, consider further delaying, or publishing for notice and comment proposed rules further delaying, such rules beyond the 60-day period.").

272. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435 (Jan. 26, 2009).

Trump Administration’s instructions on sixty-day suspensions did not mandate or even suggest that agencies consider any notice-and-comment period, but rather simply suggested that agencies consider further rules to delay effective dates beyond sixty days when necessary.<sup>273</sup>

a. Sixty-Day Delays

The Biden Administration sought several sixty-day suspensions of Trump-era policies. These suspensions primarily cite the Klain memorandum as justification. While some agencies adhered closely to the recommendation in the Klain memorandum in opening full thirty-day comment periods alongside their suspensions,<sup>274</sup> other agencies did not open full thirty-day comment periods for their sixty-day suspensions.<sup>275</sup> For example, on February 5, 2021, the Department of Labor proposed delaying the effective date of the Trump-era Independent Contractor Status Rule by sixty days<sup>276</sup> and opened an accompanying nineteen-day comment period.<sup>277</sup> A full thirty-day comment period would have left only two days between the close of the comment period and the rule’s effective date.<sup>278</sup> Labor then issued a final sixty-day delay rule on March 4 that went into immediate effect.<sup>279</sup> Labor claimed that the suspension could be effective immediately, rather than thirty days later, because Labor had good cause to waive the procedures, due to the impracticability of the timeline, the potential confusion caused by the rule activating before the delay, and the lack of impact a delay would have on the individuals and entities covered by the rule.<sup>280</sup> Labor eventually withdrew the Independent Contractor Status Rule entirely.<sup>281</sup>

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273. See Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review, 82 Fed. Reg. 8346 (Jan. 24, 2017).

274. For example, the Department of Energy opened thirty-day periods for notice and comment on two suspensions, despite their effective dates being only days after the suspensions were published. See Procedures for the Issuance of Guidance Documents, 86 Fed. Reg. 7799, 7799 (Feb. 2, 2021) (to be codified at 10 C.F.R. pt. 1061); Energy Conservation Program: Test Procedures for Small Electric Motors and Electric Motors, 86 Fed. Reg. 7798, 7798 (Feb. 2, 2021) (to be codified at 10 C.F.R. pt. 431).

275. See, e.g., *infra* note 277.

276. See Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795). This rule sets forward a new “economic realities” test for determining whether an individual is an employee covered under the Fair Labor Standards Act (FLSA) or an independent contractor not covered under the FLSA. *Id.* at 1168.

277. See Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date, 86 Fed. Reg. 8326, 8326 (Feb. 5, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).

278. A thirty-day comment period would end on March 6, 2021; the rule’s original effective date was March 8, 2021. See *id.*

279. See Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date, 86 Fed. Reg. 12,535 (Mar. 4, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).

280. See *id.* at 12,537. Labor argued that these factors entitled the suspension to be made immediately effective despite 5 U.S.C. § 553(d), which typically requires a thirty-day wait time for substantive rules. See *id.* Labor also did not concede that the suspension amounted to a substantive rule subject to § 553(d). See *id.*

281. See Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 Fed. Reg. 24,303 (May 6, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).

While most of the Biden Administration's suspensions allow for notice and comment, in some cases, agencies suspended Trump-era rules for sixty days without a notice-and-comment period. For example, HHS suspended portions of the Trump Administration's Prescription Rebate Safe Harbor Rule<sup>282</sup> for sixty days, without the opportunity for comments, as the rule was scheduled to become effective the day the suspension was issued.<sup>283</sup> This suspension was issued as a final rule, like the March 4 suspension of the Independent Contractor Status Rule;<sup>284</sup> unlike Labor in that suspension, however, here HHS did not precede that suspension with a proposed rule or with a comment period.<sup>285</sup> HHS justified issuing the delay without advance notice and comment by citing pending litigation challenging the rule and its interest in evaluating its position in the litigation before the rule became effective.<sup>286</sup> A court order later postponed the effective date until January 1, 2023,<sup>287</sup> after HHS requested a suspension under 5 U.S.C. § 705.<sup>288</sup> HHS also issued a sixty-day delay<sup>289</sup> of a final rule entitled Secure Electronic Prior Authorization for Medicare Part D, which adopts new transaction standards for electronic prescriptions covered under Medicare.<sup>290</sup> This suspension was not accompanied by a comment period.<sup>291</sup>

In at least one instance the Administration opted for delaying a rule's effective date by less than sixty days. The U.S. Fish and Wildlife Service delayed the effective date of Trump's Migratory Bird Treaty Act Rule by only twenty-eight days, noting that the new effective date, March 8, 2021, was sixty days removed from the initial publication of the Trump rule on January 7, 2021.<sup>292</sup> It is not clear why this shorter period was desirable.

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282. See Fraud and Abuse; Removal of Safe Harbor Protection for Rebates Involving Prescription Pharmaceuticals and Creation of New Safe Harbor Protection for Certain Point-of-Sale Reductions in Price on Prescription Pharmaceuticals and Certain Pharmacy Benefit Manager Service Fees, 85 Fed. Reg. 76,666 (Nov. 30, 2020) (to be codified at 42 C.F.R. pt. 1001). This rule amends safe harbor protections for rebates involving prescription pharmaceuticals. See *id.* at 76,666.

283. See Fraud and Abuse; Removal of Safe Harbor Protection for Rebates Involving Prescription Pharmaceuticals and Creation of New Safe Harbor Protection for Certain Point-of-Sale Reductions in Price on Prescription Pharmaceuticals and Certain Pharmacy Benefit Manager Service Fees, 86 Fed. Reg. 7815, 7815 (Feb. 2, 2021).

284. See Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date, 86 Fed. Reg. 12,535 (Mar. 4, 2021).

285. See Fraud and Abuse; Removal of Safe Harbor Protection for Rebates Involving Prescription Pharmaceuticals and Creation of New Safe Harbor Protection for Certain Point-of-Sale Reductions in Price on Prescription Pharmaceuticals and Certain Pharmacy Benefit Manager Service Fees, 86 Fed. Reg. at 7815.

286. See *id.*

287. See Order, *Pharm. Care Mgmt. Ass'n v. Dep't of Health & Hum. Servs.*, No. 1:21-cv-00095 (D.D.C. Mar. 15, 2021).

288. See Stipulation, *Pharm. Care Mgmt. Ass'n*, No. 1:21-cv-00095 (D.D.C. Mar. 15, 2021).

289. See Medicare Program; Secure Electronic Prior Authorization for Medicare Part D Program; Delay in Effective Date, 86 Fed. Reg. 7813 (Feb. 2, 2021) (to be codified at 42 C.F.R. pt. 423).

290. Medicare Program; Secure Electronic Prior Authorization for Medicare Part D, 85 Fed. Reg. 86,824, 86,824-25 (Dec. 31, 2020) (to be codified at 42 C.F.R. pt. 423).

291. See Medicare Program; Secure Electronic Prior Authorization for Medicare Part D Program; Delay in Effective Date, 86 Fed. Reg. at 7813.

292. See Regulations Governing Take of Migratory Birds; Delay of Effective Date, 86 Fed. Reg. 8715, 8716 (Feb. 9, 2021) (to be codified at 50 C.F.R. pt. 10). After this period elapsed and the rule became

b. Longer Delays

The Biden Administration also issued suspensions spanning multiple months or years, often using initial sixty-day delays to buy time while the agency works on issuing a longer delay. While some agencies allowed comment periods during the initial delay, others postponed the comment period until the longer suspension was proposed. For example, citing the Klain memorandum, DHS suspended the Trump-era Security Bars and Processing Rule, which added emergency public health concerns as a reason to deny asylum eligibility.<sup>293</sup> First, on January 25, 2021, DHS delayed the effective date of the rule for sixty days, without opportunity for notice and comment, because the effective date was the day after the suspension was issued.<sup>294</sup> DHS stated that it had good cause to not seek notice and comment beforehand “because a permissible path to implementation of the rule is not apparent due to a preliminary injunction against a related rule.”<sup>295</sup> Then, on March 22, DHS published an interim final rule delaying the effective date until December 31, 2021, with a thirty-day comment period following that publication date.<sup>296</sup> DHS also justified this longer suspension by citing the preliminary injunction on the related rule.<sup>297</sup>

HHS similarly delayed<sup>298</sup> the effective date of the Trump-era Affordable Life-Savings Medications Rule.<sup>299</sup> Opponents of the rule had claimed that its provisions, which required certain medical centers to provide insulin and epinephrine to low-income patients at lower prices, would cause significant administrative and healthcare problems because of how it defined “low-income” individuals.<sup>300</sup> After Biden’s inauguration, HHS delayed the effective date by sixty days with no comment period, citing the Klain memorandum.<sup>301</sup> One week before this period lapsed, HHS proposed a further four-month delay, again citing only the Klain memorandum, while opening a five-day comment period.<sup>302</sup> In

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effective, the Service proposed revoking the rule entirely. *See* Regulations Governing Take of Migratory Birds; Proposed Rule, 86 Fed. Reg. 24,573, 24,573 (May 7, 2021) (to be codified at 50 C.F.R. pt. 10).

293. *See* Security Bars and Processing, 85 Fed. Reg. 84,160, 84,160 (Dec. 23, 2020) (to be codified at 8 C.F.R. pts. 208, 1208).

294. *See* Security Bars and Processing; Delay of Effective Date, 86 Fed. Reg. 6847, 6847 (Jan. 25, 2021) (to be codified at 8 C.F.R. pts. 208, 1208).

295. *Id.* The related rule is Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80,274 (Dec. 11, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235). This rule was preliminarily enjoined in January 2021. *See* Order Re Preliminary Injunction, Pangea Leg. Servs. v. Dep’t of Homeland Sec., No. 20-cv-09253 (N.D. Cal. Jan. 8, 2021).

296. *See* Security Bars and Processing; Delay of Effective Date, 86 Fed. Reg. 15,059 (Mar. 22, 2021) (to be codified at 8 C.F.R. pts. 208, 1208).

297. *See id.* at 15,070.

298. *See* Implementation of Executive Order on Access to Affordable Life-Saving Medications, 86 Fed. Reg. 7059 (Jan. 26, 2021) (to be codified at 42 C.F.R. pt. 51).

299. *See* Implementation of Executive Order on Access to Affordable Life-Saving Medications, 85 Fed. Reg. 83,822 (Dec. 23, 2020) (to be codified at 42 C.F.R. pt. 51).

300. *Id.* at 83,825.

301. *See* Implementation of Executive Order on Access to Affordable Life-Saving Medications, 86 Fed. Reg. at 7059.

302. *See* Implementation of Executive Order on Access to Affordable Life-Saving Medications; Delay of Effective Date, 86 Fed. Reg. 13,872 (Mar. 11, 2021) (to be codified at 42 C.F.R. pt. 51).

the final rule promulgating the delay, HHS stated that “no resources are required to implement the requirements in this [suspension]” because the status quo would not change.<sup>303</sup> HHS did not address any forgone benefits from the delay, but determined that the suspension “would have no major effect on the economy or federal expenditures” and would “not be disruptive because the underlying rule has not yet been implemented or taken effect.”<sup>304</sup>

The Administration allowed comments for several initial sixty-day suspensions preceding longer suspensions; however, the length of the comment periods differed. For example, the Department of Labor opened twelve- and fifteen-day comment periods, respectively, on two sixty-day suspensions of Trump-era rules: portions of the Tip Regulations Rule<sup>305</sup> and the Strengthening Wage Protections Rule,<sup>306</sup> respectively. Labor then opened thirty- and twenty-four-day comment periods, respectively, on the longer subsequent suspensions.<sup>307</sup> For the Tip Regulations Rule, Labor acknowledged that suspending the rule, which among other provisions modifies penalties for employers that unlawfully keep employee tips, may affect commercial businesses, especially casinos, hotels, bars, and restaurants.<sup>308</sup> However, Labor stated that it “does not believe that the proposed delay . . . [would] have an impact on costs or transfers, as these provisions only apply when an employer violates the [Fair Labor Standards Act].”<sup>309</sup> For the Strengthening Wage Protections rule suspension, Labor quantified the impacts of the delay by assessing the net transfers between employers and employees on H-1B visas should the rule be delayed by one year. Labor calculated that employers would retain approximately \$30 billion in forgone wages over ten years due to the delay, but treated this amount as a transfer rather than a cost or benefit of the suspension.<sup>310</sup>

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303. Implementation of Executive Order on Access to Affordable Life-Saving Medications; Final Rule; Delay of Effective Date, 86 Fed. Reg. 15,423, 15,426 (Mar. 23, 2021) (to be codified at 42 C.F.R. pt. 51).

304. *Id.*

305. See Tip Regulations Under the Fair Labor Standards Act (FLSA): Delay of Effective Date, 86 Fed. Reg. 8325, 8325 (Feb. 5, 2021) (to be codified at 29 C.F.R. pts. 10, 516, 531, 578-80). For the suspended rule, see Tip Regulations Under the Fair Labor Standards Act (FLSA), 85 Fed. Reg. 86,756 (Dec. 30, 2020) (to be codified at 29 C.F.R. pts. 10, 516, 531, 578-80).

306. See Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States: Proposed Delay of Effective Date, 86 Fed. Reg. 7656, 7656 (Feb. 1, 2021) (to be codified at 20 C.F.R. pts. 655-56). For the suspended rule, see Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States, 86 Fed. Reg. 3608 (Jan. 14, 2021) (to be codified at 20 C.F.R. pts. 655-56).

307. See Tip Regulations Under the Fair Labor Standards Act (FLSA); Delay of Effective Date, 86 Fed. Reg. 15,811, 15,811 (Mar. 25, 2021) (to be codified at 29 C.F.R. pts. 10, 516, 531, and 578-80); Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States: Proposed Delay of Effective and Transition Dates, 86 Fed. Reg. 15,154, 15,154 (Mar. 22, 2021) (to be codified at 20 C.F.R. pts. 655-56).

308. See Tip Regulations Under the Fair Labor Standards Act (FLSA); Delay of Effective Date, 86 Fed. Reg. at 15,816.

309. *Id.*

310. See Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States: Proposed Delay of Effective and Transition Dates, 86 Fed. Reg. at 15,159.

Conversely, the Department of the Interior allowed a full thirty-day comment period on one of its initial sixty-day suspensions,<sup>311</sup> when it delayed the 2020 Valuation Reform and Civil Penalty Rule,<sup>312</sup> but then did not allow any comments on the subsequent six-month suspension.<sup>313</sup> While not formally analyzing costs and benefits of the suspension, in responding to public comments Interior stated that delaying implementation would simply “leave[] in place the requirements that have been applicable since January 1, 2017,” and that no comments received provided any evidence that the delay would “affect the operational decision-making” of the lessees affected by the underlying rule.<sup>314</sup> On June 11, 2021, Interior proposed withdrawing the rule altogether.<sup>315</sup>

EPA took an alternative approach in dealing with the Lead and Copper Rule Revisions.<sup>316</sup> This rule, which commenters claimed ignored substantial sources of lead exposure in revising drinking water standards,<sup>317</sup> was initially suspended for ninety-three days; EPA justified this delay by citing a White House fact sheet identifying the rule as an agency action to be reviewed under Executive Order 13,990.<sup>318</sup> EPA did not explain why it suspended the rule for ninety days rather than the sixty days recommended in the Klain memorandum, stating only that the sole purpose of the delay was “to provide a short delay of the effective date of the [rule] so that EPA can request comment on a longer extension.”<sup>319</sup> While other agencies and departments waited until close to the end of the initial delay period to promulgate their second, longer delays, EPA issued the proposed subsequent delay—until December 16, 2021—on the same day as the initial suspension, and opened a thirty-day comment period.<sup>320</sup> EPA also conducted a quantitative analysis of the costs and benefits from this delay that would accrue over the following thirty-five years, finding that monetized benefits exceeded

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311. See ONRR 2020 Valuation Reform and Civil Penalty Rule: Delay of Effective Date; Request for Public Comment, 86 Fed. Reg. 9286, 9286-87 (Feb. 12, 2021) (to be codified at 30 C.F.R. pts. 1206, 1241).

312. See ONRR 2020 Valuation Reform and Civil Penalty Rule, 86 Fed. Reg. 4612 (Jan. 15, 2021) (to be codified at 30 C.F.R. pts. 1206, 1241).

313. See ONRR 2020 Valuation Reform and Civil Penalty Rule: Delay of Effective Date, 86 Fed. Reg. 20,032, 20,032 (Apr. 16, 2021) (to be codified at 30 C.F.R. pts. 1206, 1241).

314. *Id.* at 20,034.

315. See ONRR 2020 Valuation Reform and Civil Penalty Rule: Notification of Proposed Withdrawal, 86 Fed. Reg. 31,196 (June 11, 2021) (to be codified at 30 C.F.R. pt. 1206).

316. See National Primary Drinking Water Regulations: Lead and Copper Rule Revisions, 86 Fed. Reg. 4198 (Jan. 15, 2021) (to be codified at 40 C.F.R. pts. 141-42).

317. See National Primary Drinking Water Regulations: Lead and Copper Rule Revisions; Delay of Effective and Compliance Dates, 86 Fed. Reg. 31,939, 31,940 (June 16, 2021) (to be codified at 40 C.F.R. pts. 141-42).

318. See National Primary Drinking Water Regulations: Lead and Copper Rule Revisions; Delay of Effective Date, 86 Fed. Reg. 14,003, 14,003 (Mar. 12, 2021) (to be codified at 40 C.F.R. pt. 141) (citing *Fact Sheet: List of Agency Actions for Review*, *supra* note 20)).

319. *Id.*

320. See National Primary Drinking Water Regulations: Lead and Copper Rule Revisions; Delay of Effective and Compliance Dates, 86 Fed. Reg. 14,063, 14,063 (Mar. 12, 2021) (to be codified at 40 C.F.R. pt. 141).

monetized costs when using a 7% discount rate but not when using a 3% discount rate.<sup>321</sup>

In at least one instance, however, the Biden Administration issued a sixty-day suspension and a subsequent suspension without a comment period in either case. The Bureau of Land Management delayed a Public Land Order<sup>322</sup> issued on January 19, 2021 which allowed mining operations and leasing on over nine million acres of federal land.<sup>323</sup> The sixty-day delay, issued as an “amended opening order” rather than a final rule, was followed by a two-year suspension providing time for the Bureau to cure numerous “defects” in the original land order.<sup>324</sup> These cited defects include insufficient analysis under NEPA and the Endangered Species Act, among other purported flaws.<sup>325</sup> During this time the Bureau will re-analyze the impacts of the order and correct defects.<sup>326</sup>

In several instances, the Biden Administration issued initial suspensions for longer than sixty days. However, in those instances the Administration typically either issued an accompanying thirty-day comment period or properly justified not including one under 5 U.S.C. § 705. For example, U.S. Customs and Immigration Services suspended Trump’s H-1B Registration Requirements Rule<sup>327</sup> for over nine months—until December 31, 2021—and opened a thirty-day comment period.<sup>328</sup> The Administration justified the suspension by claiming that implementing the rule on its original effective date would require the government to make and test major H-1B registration system modifications, revise internal procedures, train staff, and offer training to the regulated public before the effective date, all of which the agency deemed “impracticable.”<sup>329</sup> The agency noted that the Office of Information and Regulatory Affairs had deemed the suspension “economically significant” and reviewed it pursuant to Executive Order 12,866.<sup>330</sup>

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321. See EPA, CALCULATING COST AND BENEFIT IMPACT OF DELAYING LCRR COMPLIANCE DATE, REGULATIONS.GOV (June 16, 2021), <https://www.regulations.gov/document/EPA-HQ-OW-2017-0300-1891> [<https://perma.cc/WEK9-2QBS>]. This analysis simply removes one year of benefits and costs as calculated in the underlying rule’s economic analysis. The underlying rule was calculated to provide annual net benefits at a 3% discount rate and be an annual net detriment at a 7% discount rate, so delaying implementation provided net benefits only in the 7% calculation.

322. See Public Land Order No. 7899; Partial Revocation of Public Land Orders No. 5169, 5170, 5171, 5173, 5179, 5180, 5184, 5186, 5187, 5188, 5353, Alaska, 86 Fed. Reg. 5236 (Jan. 19, 2021).

323. See Extension of the Opening Order in Public Land Order No. 7899, Alaska, 86 Fed. Reg. 10,131 (Feb. 18, 2021).

324. Extension of the Opening Order in Public Land Order No. 7899 and Addressing Pending Public Land Orders in Alaska, 86 Fed. Reg. 20,193, 20,193 (Apr. 16, 2021).

325. See *id.*

326. See *id.*

327. See Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions, 86 Fed. Reg. 1676 (Jan. 8, 2021) (to be codified at 8 C.F.R. pt. 214).

328. See Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions; Delay of Effective Date, 86 Fed. Reg. 8543, 8543 (Feb. 8, 2021) (to be codified at 8 C.F.R. pt. 214).

329. *Id.* at 8546.

330. *Id.* at 8547.

Lastly, HHS invoked 5 U.S.C. § 705 to justify a one-year suspension of the Trump-era Securing Updated and Necessary Statutory Evaluations Timely (SUNSET) rule without notice and comment.<sup>331</sup> The suspended SUNSET Rule established automatic expiration dates for HHS regulations that were not reviewed every five years.<sup>332</sup> The suspension noted ongoing litigation challenging the SUNSET Rule and stated that delaying the effective date was therefore proper under section 705.<sup>333</sup>

### c. Suspensions Challenged in Court

Relatively few of the Biden Administration's suspensions have been challenged in court. One pending case concerns the suspension of a Trump-era rule,<sup>334</sup> issued by the U.S. Fish and Wildlife Service, excluding certain areas from critical habitat designation for the northern spotted owl. The petitioners allege that the rule, which delays the effective date by forty five days and opens a thirty-day comment period, violates the APA, by not providing advance notice and a comment period, and substantive land use statutes.<sup>335</sup> The Service justified this action by claiming that the suspension is procedural, rather than substantive, and therefore exempt from 5 U.S.C. § 553(d), which only requires that advance notice be provided for substantive rules.<sup>336</sup>

### d. Comparison to Trump Administration Suspensions

While the Biden Administration followed the Trump Administration's lead in suspending a significant number of policies in its first six months, the Biden Administration's approach has differed in several respects. The Biden Administration has largely refrained from extending compliance dates for rules that have already gone into effect, doing so only once so far. This one suspension delayed for three months a Consumer Financial Protection Bureau rule defining types of qualified mortgages under the Truth in Lending Act; the proposed

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331. See Securing Updated and Necessary Statutory Evaluations Timely; Administrative Delay of Effective Date; Correction, 86 Fed. Reg. 15,404 (Mar. 23, 2021) (to be codified at 21 C.F.R. pt. 6, 42 C.F.R. pts. 1, 404, 1000, 45 C.F.R. pts. 8, 200, 300, 403, 1010, 1300).

332. See Securing Updated and Necessary Statutory Evaluations Timely, 86 Fed. Reg. 5694 (Jan. 19, 2021) (to be codified at 21 C.F.R. pt. 6, 42 C.F.R. pts. 1, 404, 1000, 45 C.F.R. pts. 8, 200, 300, 403, 1010, 1390).

333. See Securing Updated and Necessary Statutory Evaluations Timely; Administrative Delay of Effective Date; Correction, 86 Fed. Reg. at 15,405.

334. See Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Northern Spotted Owl, 86 Fed. Reg. 4820 (Jan. 15, 2020) (to be codified at 50 C.F.R. pt. 17).

335. See Complaint for Declaratory and Injunctive Relief at 3, *Am. Forest Res. Council v. Williams*, No. 1:21-cv-00601 (D.D.C. Mar. 5, 2021).

336. See Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Northern Spotted Owl; Delay of Effective Date, 86 Fed. Reg. 11,892, 11,895 (Mar. 1, 2021) (to be codified at 50 C.F.R. pt. 17). In October 2021, the court denied a motion for an injunction. See *Am. Forest Res. Council v. Williams*, No. 21-601, 2021 U.S. Dist. LEXIS 199142, at \*1 (D.D.C. Oct. 13, 2021).

suspension was issued two days after the rule's effective date,<sup>337</sup> and the final suspension was issued one month later, after the close of a thirty-day comment period.<sup>338</sup> The Bureau accompanied this rule with a discussion of the likely costs and benefits of the three-month suspension.<sup>339</sup> The Trump Administration, conversely, used this tactic at least eight times in its first six months to suspend Obama-era policies, often filing the suspensions months or even years after the rules went into effect.<sup>340</sup> In two instances, the Trump Administration attempted to justify these suspensions by invoking 5 U.S.C. § 705; courts deemed these challenges unlawful for violating the APA's arbitrary and capricious standard.<sup>341</sup>

Overall, the Biden Administration has made aggressive use of suspensions to prevent President Trump's late-term regulations from becoming effective. For the most part, however, the Biden Administration has allowed notice and comment and otherwise adhered to APA timing and justification requirements in promulgating these suspensions, unlike the Trump Administration. As a result of these departures from the prior administration's more brazen approach, the new administration has faced fewer challenges in court.<sup>342</sup>

### *B. Interim Final Rules*

Avoiding a lengthy notice-and-comment process that can take months or years enables a new administration to roll back the prior administration's regulations and implement its own agenda more quickly than would be possible otherwise. But promulgating a legislative rule without proper notice-and-comment procedures would normally violate the APA. It is permissible, however, to dispense with such procedures when the rule is interpretive rather

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337. See Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): General QM Loan Definition; Delay of Mandatory Compliance Date, 86 Fed. Reg. 12,839, 12,857 (Mar. 5, 2021) (to be codified at 12 C.F.R. pt. 1026) (noting the filing date as March 3, 2021—two days after the underlying rule's effective date).

338. See Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): General QM Loan Definition; Delay of Mandatory Compliance Date, 86 Fed. Reg. 22,844 (Apr. 30, 2021) (to be codified at 12 C.F.R. pt. 1026).

339. See *id.* at 22,857-58.

340. See Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments; Extension of Compliance Date, 82 Fed. Reg. 14,437 (Mar. 21, 2017) (to be codified at 14 C.F.R. pt. 234); Enhancing Airline Passenger Protections III: Extension of Compliance Date for Provision Concerning Baggage Handling Statistics Report, 82 Fed. Reg. 14,604 (Mar. 22, 2017) (to be codified at 14 C.F.R. pt. 234); Definition of the Term "Fiduciary," 82 Fed. Reg. 16,902 (Apr. 7, 2017) (to be codified at 29 C.F.R. pt. 2510); Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date; Request for Comments, 82 Fed. Reg. 20,825 (May 4, 2017) (to be codified at 21 C.F.R. pts. 11, 101); Improve Tracking of Workplace Injuries and Illnesses: Proposed Delay of Compliance Date, 82 Fed. Reg. 29,621 (June 28, 2017) (to be codified at 29 C.F.R. pt. 1904); Lease and Interchange of Vehicles; Motor Carriers of Passengers, 82 Fed. Reg. 27,766 (June 16, 2017) (to be codified at 49 C.F.R. pt. 390). For the two other rules, see *infra* note 341 (identifying cases striking down these rules).

341. See Davis Noll & Revesz, *supra* note 1, at 40 n.193 (identifying cases in which courts struck down rules that improperly used 5 U.S.C. § 705 to justify extending compliance dates after the rules had already become effective).

342. For a discussion of the numerous challenges to the Trump Administration's suspensions, see *id.* at 39-41.

than legislative, is a statement of policy, or is limited to internal agency procedures or practice; or when the agency with “good cause” finds that it is in the public’s interest to promulgate the rule immediately.<sup>343</sup> Kyle Schneider recently explored how agencies have begun employing the “good cause” exception more regularly in order to get around notice-and-comment procedures.<sup>344</sup> Using the good cause exception, an agency can promulgate an interim final rule (IFR), which takes effect before the notice-and-comment period, though the IFR is vulnerable to judicial review concerning the agency’s determination of good cause.<sup>345</sup> While an IFR must later be followed by a notice-and-comment final rule, it prevents the existing undesirable regulation from controlling while the new rule is being formulated. This Section surveys the use of interim final rules to accomplish the goal of speedy rollbacks.

### 1. The Trump Administration’s Practice

The Trump Administration used IFRs to change rules and to suspend the implementation of Obama-era rules not yet in effect, giving agencies time to consider alternate formulations or build up justifications for rolling back the suspended regulations.<sup>346</sup> Occasionally, but rarely, agencies used IFRs to give immediate effect to policy changes during the early months of President Trump’s term, such as when the National Marine Fisheries Service granted a spate of regulatory exemptions to several fishing fleets in April 2017.<sup>347</sup> In the first six months of the Trump Administration, agencies did not use IFRs to effectuate significant regulatory changes.<sup>348</sup> Later on, however, agencies used IFRs to immediately effectuate a number of important regulations. The Department of

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343. See 5 U.S.C. § 553(b)(A), (B) (2018).

344. See Kyle Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237 (2021).

345. See *Pennsylvania v. President United States*, 930 F.3d 543, 569 (3d Cir. 2019), *as amended* (July 18, 2019), *cert. granted sub nom.* *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 918 (2020), *cert. granted sub nom.* *Trump v. Pennsylvania*, 140 S. Ct. 918 (2020), *rev’d and remanded sub nom.* *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). The Third Circuit’s verdict was overturned by the Supreme Court in 2020, which did not reach the question of whether lack of good cause can fatally undermine an IFR’s validity, partially due to the fact that the IFRs at issue “contained all the elements of a notice of proposed rulemaking” and so should be treated as precursors to a final rule, not as final action themselves. *Little Sisters of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2384-85; see also *Coalition for Parity v. Sebelius*, 709 F. Supp. 2d 10, 19-24 (D.D.C. 2010) (finding that a statutorily mandated deadline for agency action did not suffice to establish good cause for promulgating an IFR).

346. See, e.g., Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 9489 (Feb. 2, 2017) (to be codified at 9 C.F.R. pt. 201) (extending the comment period for an Obama Administration rule published on December 20, 2016 concerning grain inspections).

347. See Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; 2017 and 2018 Sector Operations Plans and 2017 Allocation of Northeast Multispecies Annual Catch Entitlements, 82 Fed. Reg. 19,618 (Apr. 28, 2017) (to be codified at 50 C.F.R. pt. 648).

348. Though several IFRs were published in the Federal Register between January 20, 2017 and July 20, 2017, the majority pertain to civil monetary penalty inflation adjustments that are implemented annually by many agencies. See [www.federalregister.gov](http://www.federalregister.gov) (search: “interim” for publication date: “01/20/2017 to 07/20/2017”), results on file with author, <https://drive.google.com/file/d/12wICD8-sS4UkavWe15qBtTUF0depoaqJ/view?usp=sharing>.

Labor and HHS promulgated an IFR in October 2017 that expanded religious exemptions from the Affordable Care Act's contraceptive mandate.<sup>349</sup> The rule was upheld by the Supreme Court in 2020 in a verdict that gives broad latitude to agencies to use interim rules.<sup>350</sup> On the other hand, the U.S. District Court for the District of Columbia struck down a July 2019 IFR promulgated by DOJ and DHS, on the grounds that the Trump Administration's prediction of a "surge" of asylum-seekers at the country's southern border did not satisfy the APA's "good cause" exception to the procedural notice-and-comment requirement.<sup>351</sup>

## 2. The Biden Administration's Practice

The Biden Administration has also made use of IFRs to skip over notice-and-comment hurdles to rulemaking. For instance, Biden's EPA used the APA's notice-and-comment exception for rules concerning internal agency procedures to promulgate an IFR rescinding with immediate effect a December 23, 2020 rule that has become known as the Benefit-Cost Rule.<sup>352</sup> The Trump EPA, arguing that the Benefit-Cost Rule governed only internal agency procedures and was thus exempt from APA notice-and-comment requirements, had promulgated the regulation as a final rule with immediate effect. The rule purported to enshrine best practices for considering the benefits and costs of a rule in EPA rulemaking processes, which EPA officials argued would provide the private sector with much-needed policy clarity and consistency.<sup>353</sup> Critics charged that the rule would make it more difficult for EPA to cite indirect public health benefits to support regulations implementing the Clean Air Act in the future.<sup>354</sup>

Opponents of the Benefit-Cost Rule worried that because the rule became final before Inauguration Day, the Biden Administration would have relatively fewer tools available to quickly rescind it.<sup>355</sup> In fact, however, the Trump EPA's

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349. See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

350. "Section 553(b) [of the APA] obligated the Departments to provide adequate notice before promulgating a rule that has legal force . . . the IFRs provided sufficient notice. Aside from these notice requirements, the APA mandates that agencies 'give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments,' . . . states that the final rules must include 'a concise general statement of their basis and purpose,' . . . and requires that final rules must be published 30 days before they become effective. . . . The Departments complied with each of these statutory procedures." *Little Sisters*, 140 S. Ct. at 2386.

351. *Cap. Area Immigrants' Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 35 (D.D.C. 2020).

352. See *Rescinding the Rule on Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process*, 86 Fed. Reg. 26,406 (May 14, 2021) (to be codified at 40 C.F.R. pt. 83) (rescinding *Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process*, 85 Fed. Reg. 84,130 (Dec. 23, 2020)).

353. See *Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process*, 85 Fed. Reg. at 84,130-31; Sean Reilly, *Trump's New Cost-Benefit Rule Will Curb EPA's Regulatory Power*, SCI. MAG. (Dec. 9, 2020), <https://www.sciencemag.org/news/2020/12/trump-s-new-cost-benefit-rule-will-curb-epa-s-regulatory-power> [<https://perma.cc/YCV7-XHRK>].

354. See Reilly, *supra* note 353.

355. See Mack McGuffey et al., *EPA Promulgates Final Cost-Benefit Analysis Rule for Clean Air Act Regulations*, ENV'T L. & POL'Y (Jan. 12, 2021), <https://www.environmentallawandpolicy>

decision to characterize the Benefit-Cost Rule as a procedural rule opened the door for the Biden Administration to rescind it using the same procedural exemption from APA notice-and-comment requirements that the Trump EPA used. While the Biden EPA agreed with the Trump EPA that the rule was procedural in nature, it also cited several substantive reasons for rescinding the rule. The agency argued that EPA had failed to articulate a rational basis for the rule that accorded with the Clean Air Act provision pursuant to which the rule had been promulgated and that the procedures the rule required were not needed, useful, or advisable.<sup>356</sup> Moreover, EPA noted that the Trump-era rule would have locked the agency into using practices that were outdated or that conflicted with the best scientific methods, in a manner inconsistent with the Clean Air Act's statutory mandate to make decisions based on the best scientific data available.<sup>357</sup> The use of an IFR gave the agency time to seek input without needing to leave the Trump-era rule in place.

Similarly, on June 29, 2021, the Council on Environmental Quality (CEQ) promulgated an IFR extending by two years the period in which agencies can develop or revise procedures for implementing the National Environmental Policy Act.<sup>358</sup> NEPA requires federal agencies to prepare environmental impact statements for significant regulatory action. Revisions made during the Trump Administration to the CEQ rules implementing the statute would have substantially weakened its provisions.<sup>359</sup> To justify the IFR, CEQ claimed both the procedural and good cause exemptions to the APA's notice-and-comment requirements.<sup>360</sup> This suspension delayed compliance by two years and was accompanied by a thirty-day comment period.<sup>361</sup> The agency justified the suspension by citing the Biden White House fact sheet designating the rule for review pursuant to Executive Order 13,990 and by stating that the agency "has substantial concerns about the legality of the [rule], the process that produced it, and whether the [rule] meets the nation's needs and priorities."<sup>362</sup> The agency noted that because the rule was not economically significant for the purposes of Executive Order 12,866, it was not subject to the requirements imposed by the order on such rules.<sup>363</sup>

The Biden Administration also used the good cause exemption to revoke with immediate effect a Trump-era Department of the Interior IFR that imposed

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.com/2021/01/epa-promulgates-final-cost-benefit-analysis-rule-for-clean-air-act-regulations/ [https://perma.cc/Q5U3-9TPP].

356. See Rescinding the Rule on Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 86 Fed. Reg. 26,406, 26,408 (May 14, 2021) (to be codified at 40 C.F.R. pt. 83).

357. See *id.* at 26,411.

358. See Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34,154 (June 29, 2021) (to be codified at 40 C.F.R. pt. 1507).

359. See *id.* at 34,155.

360. See *id.* at 34,156.

361. See *id.* at 34,154.

362. *Id.* at 34,155 (citing *Fact Sheet: List of Agency Actions for Review*, *supra* note 20).

363. See *id.* at 34,157.

stringent constraints on the Department's ability to issue guidance documents.<sup>364</sup> The October 26, 2020, regulation was promulgated as an IFR and never reissued as a final rule. Pursuant to President Biden's Executive Order 13,992, which targeted "policies . . . that threaten to frustrate the Federal Government's ability to . . . use robust regulatory action," the Department of the Interior revoked the final rule with immediate effect on April 15, 2021.<sup>365</sup> The Trump-era rule had cited the APA good cause exemption to avoid notice-and-comment requirements.<sup>366</sup> In turn, the Biden Administration's rescission simply cited the existing rule's "good cause" exemption to justify not providing for notice and comment.<sup>367</sup>

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All of these possible regulatory actions, from suspensions to interim final rules to action on direct final rules, provide a new administration with tools to roll back rules finalized in the prior administration. Along with the rest of the tools surveyed in this Article, they can and have had a significant impact on first President Trump's and then President Biden's ability to make regulatory changes without needing to resort to cumbersome and time-consuming notice-and-comment rulemaking.

#### IV. Implications

The challenges that new presidents face can be immense, from an economic crisis to a global pandemic just in recent memory. As shown in this Article, the pressures of possible rollbacks at the end of the term are now part of that picture. Rollbacks can take the form of congressional action, court strategies that range from abeyances that deny the president a chance to defend a policy in court to swift vacatur, and regulatory maneuvers to put off the applicability of a prior president's rules. Each of these tools may seem, in isolation, as though they can only have a relatively minor impact. But combined, they give a new president the opportunity to aggressively rewrite policy and to erode the prior president's policymaking power. The new order also means that the new president faces pressures to move fast as well. These tools have changed the presidency by circumscribing severely what lasting achievements an executive can make through agencies. The Section surveys the implications of these changes and the strategic calls that advocates may make.

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364. See Procedures for Issuing Guidance Documents, 85 Fed. Reg. 67,666 (Oct. 26, 2020) (to be codified at 43 C.F.R. pt. 51).

365. Procedures for Issuing Guidance Documents, 86 Fed. Reg. 19,786 (Apr. 15, 2021) (to be codified at 43 C.F.R. pt. 51).

366. See Procedures for Issuing Guidance Documents, 85 Fed. Reg. at 67,667.

367. See Procedures for Issuing Guidance Documents, 86 Fed. Reg. at 19,787.

*A. The Pressures Faced by the Biden Administration*

When an agency issues a new rule, it can take anywhere from months to years to go through the process of analysis and drafting, seeking and reviewing public comments, and then finalizing the rule.<sup>368</sup> In light of this time line, the Biden Administration’s actions to take innovative steps and move quickly on its policy priorities during its first year demonstrate the impact of the new rollback pressures—even as the Biden Administration makes use of the rollback tools itself. On his first day in office, President Biden signed Executive Order 13,990, laying out a detailed plan for tackling regulations that the administration thought may need to be rolled back.<sup>369</sup> The order also directed agency heads to review *all* regulations promulgated during the Trump era, submit a preliminary list within thirty days of regulations being targeted for repeal by the end of 2021, and submit a more complete list within ninety days of regulations that should be targeted for repeal by 2025.<sup>370</sup>

E.O. 13,990 is unusual in that, beyond merely setting out policy priorities, it also set out explicit, near-term deadlines for rolling back certain regulations.<sup>371</sup> And agencies have missed very few of these deadlines. For example, the order set a July 2021 deadline for EPA and National Highway Traffic Safety Administration (NHTSA) to make vehicle emissions standards and fuel economy standards for greenhouse gases more stringent, after the Trump Administration rolled back the Obama-era standards.<sup>372</sup> In May 2021, NHTSA published a proposal to repeal the Trump-era standards.<sup>373</sup> On August 5, EPA finalized its proposal to ratchet up the standards.<sup>374</sup>

The order set May and June 2021 deadlines for the Department of Energy to replace four appliance and building energy-efficiency standards and

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368. See Jason Webb Yackee & Susan Webb Yackee, *Delay in Notice and Comment Rulemaking: Evidence of Systemic Regulatory Breakdown?*, in REGULATORY BREAKDOWN 163, 168 (Cary Coglianese ed., 2012) (studying the average amount of time for notice-and-comment rulemaking); Anne Joseph O’Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 530 (2011) (same).

369. See Exec. Order No. 13,990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037, 7037-38 (Jan. 25, 2021) (issued on Jan. 20, 2021).

370. See *id.* at 7038.

371. “In addition, for the agency actions [identified], the head of the relevant agency, as appropriate and consistent with applicable law, shall consider publishing for notice and comment a proposed rule suspending, revising, or rescinding the agency action *within the time frame specified.*” *Id.* (emphasis added).

372. See *id.* at 7037-38.

373. See Corporate Average Fuel Economy (CAFE) Preemption, 86 Fed. Reg. 25,980 (May 12, 2021) (to be codified at 49 C.F.R. pts. 531, 533) (proposing to repeal in full The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019)).

374. See Proposed Rule to Revise Existing National GHG Emissions Standards for Passenger Cars and Light Trucks Through Model Year 2026, EPA, <https://www.epa.gov/regulations-emissions-vehicles-and-engines/proposed-rule-revise-existing-national-ghg-emissions> [<https://perma.cc/8GNK-D6QC>].

determinations.<sup>375</sup> The Department of Energy published two notices of proposed rulemaking in April 2021<sup>376</sup> and July 2021.<sup>377</sup> And the order also directed EPA to act as soon as possible on three EPA rules relaxing pollutant emissions restrictions,<sup>378</sup> one of which was vacated by a February 1, 2021 court order,<sup>379</sup> and another of which, the Benefit-Cost Rule, was rescinded by EPA on May 14, 2021.<sup>380</sup>

Beyond those deadlines, and despite reports of agencies that are understaffed,<sup>381</sup> the order spurred quick agency action to conduct broad regulatory review in order to file lists of targeted regulations on time. On June 11, 2021, the Department of Agriculture proposed to replace an October 29, 2020 rule that opened Alaska's Tongass National Forest to logging.<sup>382</sup> According to the notice of proposed rulemaking, the agency plans to issue the final rule within the timeframe specified by the order.<sup>383</sup> Similarly, in June 4, 2021, the Fish and Wildlife Service and the National Marine Fisheries Service released a plan to initiate revisions or rescissions of rules concerning critical habitat designations, reinstate endangered species protections, and revive interagency cooperation.<sup>384</sup>

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375. See Exec. Order No. 13,990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. at 7037-38.

376. See Energy Conservation Program for Appliance Standards, 86 Fed. Reg. 18,901 (Apr. 12, 2021) (to be codified at 10 C.F.R. pt. 430) (proposing to revise Energy Conservation Program for Appliance Standards, 85 Fed. Reg. 50,937 (Aug. 19, 2020)).

377. The Department of Energy first proposed to repeal the Trump-era revisions to the Department's "Process Rule" on February 19, 2021. See Energy Conservation Program, 86 Fed. Reg. 10,211 (Feb. 19, 2021) (to be codified at 10 C.F.R. pts. 430, 431) (proposing to revise 85 Fed. Reg. 8626 (Feb. 14, 2020)). On July 7, 2021, the Department proposed additional revisions. See Energy Conservation Program for Appliance Standards: Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 86 Fed. Reg. 35,668 (July 7, 2021) (to be codified at 10 C.F.R. pt. 430). The Department of Energy actions outstanding are the Final Determination Regarding Energy Efficiency Improvements in the 2018 International Energy Conservation Code (IECC), 84 Fed. Reg. 67,435 (Dec. 10, 2019), and the Final Determination Regarding Energy Efficiency Improvements in ANSI/ASHRAE/IES Standard 90.1-2016: Energy Standard for Buildings, Except Low-Rise Residential Buildings, 83 Fed. Reg. 8463 (Feb. 27, 2018).

378. See Exec. Order No. 13,990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. at 7037-38.

379. See Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Fed. Reg. 469 (Jan. 6, 2021) (vacated in *Env't Def. Fund v. EPA*, No. 4:21-cv-00003, 2021 WL 402824 (D. Mont. Feb. 1, 2021) (order granting defendants' unopposed motion for vacatur and remand)).

380. See Rescinding the Rule on Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 86 Fed. Reg. 26,406 (May 14, 2021) (to be codified at 40 C.F.R. pt. 83).

381. Lisa Rein, *The Federal Government Puts Out a "Help Wanted" Notice as Biden Seeks to Undo Trump Cuts*, WASH. POST (May 21, 2021), <https://www.washingtonpost.com/politics/2021/05/21/biden-trump-government-rebuilding/> [<https://perma.cc/V9NH-FM5X>] (describing staff shortages).

382. See NOTICE OF PROPOSED RULEMAKING: ALASKA ROADLESS RULE REVISION, DEP'T OF AGRIC. (June 11, 2021), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0596-AD51> [<https://perma.cc/F4PR-9BZQ>] (rescinding Special Areas; Roadless Area Conservation; National Forest System Lands in Alaska, 85 Fed. Reg. 68,688 (Oct. 29, 2020)).

383. See *id.*

384. See Press Release, U.S. Fish & Wildlife Serv., U.S. Fish and Wildlife Service and NOAA Fisheries to Propose Regulatory Revisions to Endangered Species Act, (June 4, 2021),

In all, by June 30, 2021, Biden-era agencies issued fifteen notices of intent of rulemaking, thirteen proposed rules, and eleven rules citing E.O. 13,990.<sup>385</sup>

Despite this quick work, much remains to be done. The Council for Environmental Quality's work to address the Trump-era changes to the National Environmental Policy Act illustrates the challenges that the new administration faces when it confronts a need to move fast on new policies along with the need to roll back a prior administration's policies.

On July 16, 2020, the Trump Administration finalized a set of vast changes to its National Environmental Policy Act regulations.<sup>386</sup> Plaintiffs then filed several challenges to those rules, some of which are still pending.<sup>387</sup> Under President Biden, Brenda Mallory, CEQ's new Chair, was quoted recently as saying that the "[A]dministration is 'working as fast as possible to review and evaluate' the Trump-era regulation."<sup>388</sup> In June 2021, the agency published an interim final rule to put off the deadlines of the Trump-era rule.<sup>389</sup> But it is also working on a new rule that will address climate change and environmental justice, which could take some time to finalize.<sup>390</sup> Meanwhile, plaintiffs have opposed any abeyances and recently appealed a district court decision dismissing their challenge as unripe.<sup>391</sup> Plaintiffs are likely to keep up the pressure on the agency to move fast to undo the Trump-era rule.

EPA's response to the Trump-era Clean Water Act rules is another example of the difficulties of undoing regulations. EPA has laid out a plan to roll back the Trump-era rule in two stages, first by restoring the regulations "that were in place for decades until 2015, with updates to be consistent with relevant Supreme Court decisions" and second, by refining the approach to "establish an updated and durable definition of 'waters of the United States.'"<sup>392</sup> But advocates fear

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[https://www.fws.gov/news/ShowNews.cfm?ref=u.s.-fish-and-wildlife-service-and-noaa-fisheries-to-propose-regulatory-&\\_ID=36925](https://www.fws.gov/news/ShowNews.cfm?ref=u.s.-fish-and-wildlife-service-and-noaa-fisheries-to-propose-regulatory-&_ID=36925) [<https://perma.cc/E9RF-Z5QJ>].

385. See [federalregister.org](https://www.federalregister.gov) for "13990 | 13,990" and publication date: "01/20/2021 to 06/30/2021," search results on file with author, see [https://drive.google.com/file/d/1vUGYiw9YRPQN-SGYj8ps6I-uT1q\\_5U9o/view?usp=sharing](https://drive.google.com/file/d/1vUGYiw9YRPQN-SGYj8ps6I-uT1q_5U9o/view?usp=sharing).

386. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020).

387. See, e.g., Complaint for Declaratory and Injunctive Relief, *California v. Council on Environmental Quality*, No. 3:20-cv-06057 (N.D. Cal. Aug. 28, 2020); Order, *Wild Virginia v. Council on Environmental Quality*, No. 3:20-cv-00045 (W.D. Va. Jun. 21, 2021) (dismissed without prejudice).

388. Maxine Joselow, *Greens Revive Legal War over Trump NEPA Rule*, E&E NEWS (July 30, 2021), <https://subscriber.politicopro.com/article/eenews/2021/07/30/greens-revive-legal-war-over-trump-nepa-rule-275903> [<https://perma.cc/9ZBY-6DC6>].

389. See *Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures*, 86 Fed. Reg. 34,154 (June 29, 2021) (to be codified at 40 C.F.R. pt. 1507).

390. *Id.* at 34,155.

391. See, e.g., Notice of Appeal, *Wild Virginia v. Council on Environmental Quality*, No. 20-00045 (July 30, 2021 D. W. Va.).

392. *EPA and Army Announce Next Steps for Crafting Enduring Definition of Waters of the United States*, EPA (July 30, 2021), <https://www.epa.gov/newsreleases/epa-and-army-announce-next-steps-crafting-enduring-definition-waters-united-states> [<https://perma.cc/5N4K-BL9J>].

that the new rules will be mired in uncertainty if they take too long to be promulgated and if there is a change in administration.<sup>393</sup>

If these policies do not come out within the next two years, they may be easier to roll back if the Biden Administration does not win reelection. On the other hand, the pressure that an agency is under to act fast means that important tradeoffs will need to be considered. For example, should an agency shorten compliance deadlines to ensure that the rule will be implemented in time for a possible transition? If the agency takes that step, it could make it more difficult to defend the rule in court if it is challenged on the grounds that the implementation deadlines are too tight.

### *B. Other Strategic Considerations*

Along with the President acting faster, other players also have strategic choices to make because of these new rollback pressures. For example, one of the rollback risks surveyed in this Article is that a new administration can forgo appealing or drop a pending appeal after a court ruling against the prior administration.<sup>394</sup> This move can leave the outgoing president's policy enjoined or vacated, easing the job of rolling the rule back for the new administration. To avoid that outcome, intervenors on the side of the prior administration could seek to appeal the adverse ruling—if there are such intervenors in the case. But if those intervenors are not in the case before the adverse ruling or before the administration changes hands, they would need to seek permission to be part of the case. And courts have recently denied those tardy motions.<sup>395</sup> A strategic call for parties that support the outgoing administration will thus be whether to seek to intervene before a decision is made. Those advocates may need to intervene even before knowing whether an election might bring about a transition.

Outgoing presidents may also turn to more aggressive strategies to entrench their policies. For example, a strategy that the Trump Administration attempted to use was to finalize cross-cutting “meta-regulations,” such as the Secret Science Rule and Cost-Benefit Rule, which were meant to have a broad and long-term impact on a future president's rulemaking abilities.<sup>396</sup> That strategy largely failed because the rules were finalized in the waning days of the Trump Administration, and the Biden Administration was able to use different rollback

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393. Hannah Northey, *Biden Bid to Revamp Trump Water Rule Faces Long Slog*, E&E NEWS (July 30, 2021), <https://subscriber.politicopro.com/article/eenews/2021/07/30/biden-bid-to-revamp-trump-water-rule-faces-long-slog-275908> [<https://perma.cc/K9PT-MZFE>] (“It’s also unclear how long it will take EPA to craft a new definition, whether the agency can reach its goal of finding a durable solution to the long-standing politically and legally explosive issue, and what would happen to that definition should the White House change hands in 2024.”).

394. See *supra* notes 197-224 and accompanying text.

395. See, e.g., Order at 3, *Chamber of Commerce v. Dep’t of Labor*, No. 17-10238 (5th Cir. May 2, 2018) (per curiam) (denying the states’ motion to intervene after judgment had been entered); Order, *San Francisco v. USCIS*, No. 19-17213, at 13 (9th Cir. Apr. 8, 2021) (denying intervention).

396. See *supra* note 63 and accompanying text.

strategies to do away with these “meta-regulations.”<sup>397</sup> But a future president could look for ways to finalize those types of rules earlier in the hopes that the rules are more robust.

Outgoing presidents can use other tools of “burrowing,” such as moving their political appointees into civil service positions.<sup>398</sup> An outgoing president can make the new president’s job harder in other ways too, for example, by obstructing the transition, thereby delaying the incoming administration’s work and increasing the probability that it would not end up being durable.<sup>399</sup>

The existence of a set of aggressive rollback tools, which goes beyond notice-and-comment rulemaking, implicates multiple strategic considerations for an outgoing president as well as for an incoming president. And, as a result, managing the administrative state has changed for good.

### Conclusion

The Biden Administration made use of the same aggressive strategies that the Trump Administration used to roll back the prior administration’s policies. They are now part of the standard transition toolkit after an inter-party transition.

To be sure, there have been a few differences. The Biden Administration avoided some of the legal pitfalls of the Trump Administration, by, for example, generally complying with notice-and-comment requirements when suspending rules.<sup>400</sup> President Biden signed only three resolutions under the Congressional Review Act, in comparison to President Trump’s sixteen.<sup>401</sup> But that was the first time that a Democratic president used the Congressional Review Act to disapprove of regulations.<sup>402</sup> The fact that a Democratic president used the tool demonstrates the powerful appeal of this strategy. In a future transition, where there is no impeachment trial or other significant transition-related challenges to face in the Senate, a Democratic president may use the Act even more.

The Biden Administration’s rollback victories have been marked by other trends beyond the ones we noted in the Trump era. For example, the Administration conceded error in four cases challenging Trump-era rules and succeeded in obtaining vacatur of those rules from courts—a strategy not seen during the Trump Administration.<sup>403</sup> Despite these differences, the evidence of the Biden Administration’s similar aggressive use of the rollback tools used by

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397. See, e.g., *supra* notes 240-243 and accompanying text (discussing the Biden Administration’s concession of error which led to vacatur of the Secret Science rule).

398. Nina Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 563 (2003) (describing the “burrowing phenomenon”).

399. Ari B. Rubin, *Grounding the Lame Duck: The President, the Final Three Months, and Emergency Powers*, 109 GEO. L.J. 907, 912 (2021) (discussing these actions at the start of the Bush and Obama transitions); Susan Rice, *Here’s How Trump’s Stalling Risks Our National Security*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/opinion/sunday/transition-national-security.html> [<https://perma.cc/7XJE-YY53>].

400. See *supra* notes 342 and accompanying text.

401. See *supra* notes 55, 56, 106 and accompanying text.

402. See *supra* notes 107-115 and accompanying text.

403. See *supra* notes 240-250 and accompanying text.

the Trump Administration demonstrates that these aggressive rollback strategies are now part of the standard toolkit.

Is it possible that use of these tools will subside as we move further away from the Trump era? That is doubtful. For one, the country is not moving that quickly away from the Trump era. If there is a Republican president after President Biden, early predictions are that it might be Donald Trump himself. He has not announced he is running, but if he does, reportedly, polls show that he would be a frontrunner for the nomination.<sup>404</sup> And even if he does not run, a recent Fox News article calls him “hands down the most popular and influential politician in the GOP,”<sup>405</sup> making it likely that a different Republican president would attempt to emulate his strategies. In any event, even without Trump’s influence, given the usefulness of the strategies in rolling back a predecessor’s policies, it is not likely that a future president of either party will want to ignore them.

Rollback pressures could be alleviated if Congress ends the filibuster rule in the Senate, which requires a sixty-member majority to bring legislation to a vote.<sup>406</sup> Otherwise, gridlock in Congress will likely continue and the pressure to use agencies to make policy will continue.<sup>407</sup> Calls to end the filibuster have increased significantly since the Biden Administration began, but ending the filibuster will likely require more than a bare majority of the Senate, along with control of the House and Presidency,<sup>408</sup> because Democrats in the Senate are splintered between ending, reforming, and keeping the filibuster.<sup>409</sup> Thus, it seems virtually impossible that the Senate would abandon the filibuster, at least at this time.

As presidents adjust to the new normal, rollback strategies are sure to continue to evolve and even more aggressive strategies are likely to be debuted. As a result, the rollback whiplash is likely here to stay, and a one-term president has only half a term to promulgate long-lasting durable policy.

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404. Max Greenwood, *The 10 Republicans Most Likely To Run for President*, HILL (Dec. 29, 2021), <https://thehill.com/homenews/campaign/586002-the-10-republicans-most-likely-to-run-for-president> [https://perma.cc/4YTM-2CKE].

405. Paul Steinhauer, *2024 Watch: Trump Enters 2022 as Clear Frontrunner for Next GOP Presidential Nomination*, FOX NEWS (Jan. 2, 2022), <https://www.foxnews.com/politics/2024-watch-trump-enters-2022-as-clear-frontrunner-for-next-gop-presidential-nomination> [https://perma.cc/64BE-ZPBD].

406. STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, Rule XXII, at 15-17 (2013) (filibuster rule).

407. See Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2085 (2013); Michael J. Teter, *Congressional Gridlock’s Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1103 (2013) (arguing that a gridlocked congress undermines basic principles of checks and balances).

408. See Molly E. Reynolds, *What Is the Senate Filibuster, and What Would It Take To Eliminate It?*, BROOKINGS (Sept. 9, 2020), <https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it/> [https://perma.cc/6ZH5-HLVQ].

409. See Philip Bump, *Calls To End the Filibuster Have Bigger Problems Than Joe Manchin*, WASH. POST (Mar. 8, 2021), <https://www.washingtonpost.com/politics/2021/03/08/calls-end-filibuster-have-bigger-problems-than-joe-manchin/> [https://perma.cc/M4VV-7WAT].