Essay

Promises Unfulfilled: Did the Trump Administration Substantially Change the Administrative State?

*Amy Orlov**

Abstract

In 2019, Professors Robert L. Glicksman and Emily Hammond of The George Washington University Law School examined the Trump Administration's early regulatory behavior during the first half of Donald Trump's presidency. In their article, The Administrative Law of Regulatory Slop and Strategy*, published in* The Duke Law Journal*, they observed that the Trump administration produced an unprecedented volume of agency actions that flouted settled administrative law doctrine and norms—a phenomenon that they term "regulatory slop." Professors Glicksman and Hammond concluded their article by hoping for a change in the Administration's behavior and insisting on a strong judicial response through corrective remedies to ensure that "regulatory slop" does not become the norm. This Essay expands upon Professors Glicksman's and Hammond's article by examining the Trump Administration's regulatory actions during Donald Trump's final two years in office and over the course of his entire presidency. Through analyzing the Administration's regulatory actions, this Essay seeks to answer the question: Following Donald Trump's entire presidency, has administrative law substantially changed? This Essay examines the Trump Administration's compliance with notice-and-comment requirements, effective and compliance dates, reason-giving and fact-finding requirements, statutory interpretation doctrines,*

* J.D., 2021, The George Washington University Law School; B.A., Philosophy, Politics, and Economics, 2018, University of Michigan. I would like to thank Dean Emily Hammond for their support and guidance through the writing of this Essay. I am grateful to the hard-working staff and editors of *The George Washington Law Review* for their editorial assistance.

and separation-of-powers principles. Following this analysis, this Essay argues that the Trump Administration continued to defy established administrative law doctrine and engaged in "regulatory slop" in almost all identified areas of concern. Due to strong responses from the judicial branch as evidenced by numerous cases throughout the nation, the Trump Administration's "regulatory slop" has not substantially changed the administrative state.

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Introduction

When Donald Trump assumed the presidency in early 2017, he promised to act swiftly to cut regulations and decrease the power of the administrative state.[1] Within his first few months in office, Presi-

1 *See, e.g.*, Chris Arnold, *President Trump to Cut Regulations by '75 Percent'—How Real Is That?*, NPR (Jan. 24, 2017, 5:03 AM), https://www.npr.org/transcripts/511341779 [https://perma.cc/8DC5-KTJH]. Other government officials in President Trump's early Administration made similar claims. *See* Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State'*, Wash. Post (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/APB7-XETG] (discussing comments from early White House Chief Strategist Steve Bannon concerning the cutting of regulations and "deconstruction of the administrative state");

dent Trump attempted to fulfill his promises by quickly rolling back regulations, including rules concerning auto emissions, fuel standards, offshore drilling, water pollution, carbon emissions, and payday lending.[2] He furthered his goals by enacting early executive orders limiting agencies' operations.[3] On January 30, 2017, just ten days after his inauguration, President Trump, through Executive Order 13,771, instructed agencies to identify two existing regulations for repeal for every new regulation issued.[4] He further ordered agencies to institute budgets in which total regulatory costs could not increase.[5]

Just like every other presidential administration, however, the Trump Administration could not simply modify rules and deregulate without complying with administrative law requirements.[6] Indeed, the Trump Administration faced numerous lawsuits from regulated entities and advocacy organizations challenging its actions for failing to follow regulatory norms and standards.[7] In *The Administrative Law of Regulatory Slop and Strategy*, Professors Robert Glicksman and Emily Hammond of The George Washington University Law School analyzed administrative law litigation concerning Trump agency actions through the beginning of 2019.[8] In their article, they examined the Administration's suspension of effective and compliance dates, obser-

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Andrew Restuccia & Nancy Cook, *Inside Trump's War on Regulations*, POLITICO (May 28, 2017, 5:00 AM), https://www.politico.com/interactives/2017/trump-war-on-regulations/ [https://perma.cc/TJD2-J38F] (quoting White House Domestic Policy Council Director Andrew Bremberg discussing the need for "systemic reform" within the regulatory space).

2 *See* Scott Horsley, *Progress Report: President Trump's Campaign Promises, 2 Years Later*, NPR (Jan. 20, 2019, 7:07 AM), https://www.npr.org/2019/01/20/686531523/progress-report-president-trumps-campaign-promises-2-years-later [https://perma.cc/7ZCR-QXF7]; Jill Colvin, *Trump Delivered on Some Big 2016 Promises, but Others Unmet*, ASSOCIATED PRESS (Aug. 23, 2020), https://apnews.com/article/virus-outbreak-election-2020-global-trade-ap-top-news-iran-nuclear-c9dc524c21c14957abb8d0ac4963a42b [https://perma.cc/2JUY-MG4R]. For a more detailed analysis concerning the Trump Administration's early rollbacks, as well as a comprehensive tracking list, see Restuccia & Cook, *supra* note 1.

3 *See, e.g.*, Exec. Order No. 13,771, 3 C.F.R. 284 (2018). President Joe Biden later revoked this executive order at the beginning of his presidency to allow for greater regulation. *See infra* note 167 and accompanying text.

4 3 C.F.R. 284. This executive order ultimately led to the removal of some regulations as well as a sharp decrease in the issuance of new regulations. Susan Dudley, Opinion, *A Brief History of Regulation and Deregulation*, REGUL. REV. (Mar. 11, 2019), https://www.theregreview.org/2019/03/11/dudley-brief-history-regulation-deregulation/ [https://perma.cc/S5M8-LZ3H]. President Trump, however, did not come close to achieving his promise of cutting regulations by seventy-five percent. *Id.*

5 3 C.F.R. 284.

6 *See* Horsley, *supra* note 2.

7 *See generally* Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1669–86 (2019).

8 *Id.*

vance of notice-and-comment rulemaking requirements, and attention to reason-giving justifications.[9]

Professors Glicksman and Hammond argued that the Trump Administration "doggedly ignored some settled administrative-law expectations for agency decisionmaking" in order to implement substantive regulatory changes with as little resistance and delay as possible.[10] They further explained that the Administration continuously tested established norms and principles in an effort to urgently halt Obama-era administrative actions.[11] At approximately the halfway point in Trump's presidency, Glicksman and Hammond worried that the Trump Administration's "regulatory slop" could become "embedded in the administrative state with potentially devastating rule-of-law consequences."[12] They asserted that, unless the federal judiciary continued to insist on adherence to core administrative-law requirements or provide strong remedies to alter agency behavior, substantial changes in rule-of-law standards were likely.[13] However, with cases pending and years of Donald Trump's presidency still ahead at the time of their writing, Professors Glicksman and Hammond could not reach any final determinations concerning the Trump Administration's lasting influence on administrative law.[14]

Now, with Donald Trump's presidency at an end, did Professor Glicksman's and Professor Hammond's fears come true? Did the Trump Administration change the administrative state over the past four years due to poor regulatory decision-making and purposeful "slop"? After examining administrative law litigation over the entirety of President Trump's time in office, this Essay confirms that the Trump Administration continued to engage in "regulatory slop" throughout the remainder of Donald Trump's presidency. This Essay will contend, however, that the Administration's actions did not change settled administrative law doctrine because the judicial branch

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9 *Id.*

10 *Id.* at 1653.

11 *See id.* at 1669.

12 *Id.* at 1657–58.

13 *Id.*

14 *Id.* at 1657. Additional scholars have tried to undertake similar analyses as Glicksman and Hammond to determine the early impact of Trump agencies on the broader state of administrative law. *See generally* Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 HARV. L. & POL'Y REV. 13 (2018); Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620 (2018); William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357 (2018).

responded strongly to improper rule promulgations and required that the Administration follow stringent procedural requirements.

Part I of this Essay explores Professor Glicksman's and Professor Hammond's article, *The Administrative Law of Regulatory Slop and Strategy*, and their concerns about the administrative state at the beginning of Donald Trump's presidency. Part II then examines administrative law patterns during the second half of the presidency with regards to specific concerns raised in Glicksman's and Hammond's article. Next, Part III analyzes new trends in "regulatory slop" following Donald Trump's presidency regarding statutory interpretation and separation-of-powers issues. Part IV finishes by observing overall trends and statistics regarding the administrative state and the outcomes of cases concerning agency action over the course of Donald Trump's four years in office. Part IV also argues that, although the Trump Administration has continued to flout regulatory norms, pervasive litigation and strong judicial responses have prevented permanent changes in the core procedural doctrines of administrative law. This Essay concludes by examining Donald Trump's transition out of office and looking ahead to the rest of Joe Biden's presidency to foreshadow how these two time periods might further affect President Trump's influence on the administrative state.

I. The Trump Administration's Previous Dealings in "Regulatory Slop"

New administrations typically promulgate rules and enact agency decisions to further their policy objectives.[15] Furthermore, agencies may act on calculated strategies to advance their administration's regulatory preferences by "pushing" the law in order to determine how the agencies' actions will fare in court.[16] Although such actions are standard and even expected, administrative law scholars noticed a departure from agency norms at the onset of Donald Trump's presidency.[17] They observe that the Trump Administration, going even

15 *See* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. U. L. Rev. 471, 472–73 (2011) ("This regulatory pattern—crack-of-dawn response to midnight regulation—has played out in all recent White House transitions, including those in which the incoming and departing presidents hailed from the same political party."); *see also* Glicksman & Hammond, *supra* note 7, at 1655. For a further analysis of how presidential administrations have interacted with administrative law over time, see Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 Colum. L. Rev. 1953 (2015).

16 *See* Glicksman & Hammond, *supra* note 7, at 1655. The Obama Administration provided notable examples of strategically trying to test its rules for legality, especially within the environmental law sphere. *See id.* at 1655 n.14.

17 *See, e.g.*, Heinzerling, *supra* note 14, at 15 (explaining that the Trump Administration

further than merely pushing the law like other previous administrations, violated the Administrative Procedure Act ("APA") and ignored rulemaking processes on numerous occasions.[18]

Professors Robert Glicksman and Emily Hammond studied agency behavior during the first two years of Donald Trump's presidency.[19] In their article, *The Administrative Law of Regulatory Slop and Strategy*, they identify key flaws, gaps, and issues in the Trump Administration's early deregulatory actions.[20] Glicksman and Hammond categorize these deviations from established administrative law norms as "regulatory slop,"[21] consisting of the purposeful disregard of procedural and reason-giving requirements for administrative actions and the blatant lack of effort to determine what the law requires.[22] The authors identify three types of early "slop": "(1) unlawful postponement of effective and compliance dates in final rules; (2) failure to undertake notice-and-comment rulemaking; and (3) failure to make required findings."[23] These early flaws largely arise from the repeal or delay of implementation of Obama agency rules rather than the promulgation of new regulations under Trump.[24]

This Part explores the Trump Administration's early flaws and procedural mishaps identified by Glicksman and Hammond and how these actions resulted in the blatant neglect of well-settled administrative law principles. Only after exploring the early patterns of the Trump Administration can it be determined whether the Administration as a whole caused a substantial change in the administrative state over the past four years.

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disregarded careful administrative processes and reasoning requirements); William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509, 1511 (2019) (calling attention to the Trump Administration's actions to roll back regulations promulgated at the end of President Obama's Administration with previously rare rationale).

18 *See* Charles S. Clark, *The Trump Administration's War on Regulations*, GOV'T EXEC., https://www.govexec.com/feature/trump-administrations-war-regulations/ [https://perma.cc/944S-5SKA] (recounting a former Department of Labor official's belief that the Department violated the APA by omitting a quantitate analysis and reporting that "to many regulatory professionals in and out of government, the Trump agenda raises questions of process").

19 *See* Glicksman & Hammond, *supra* note 7, at 1653–54.

20 *See id.* at 1669.

21 *See id.* at 1685–86.

22 *See id.* at 1654–55. For an in-depth discussion of the APA and established principles of administrative rulemaking, see *id.* at 1661–69.

23 *Id.* at 1669.

24 *See id.*

A. Improper Suspension of Effective and Compliance Dates

As Professors Glicksman and Hammond explain, the Trump Administration flouted established administrative law principles through the improper suspension of effective and compliance dates.[25] Section 705 of the APA allows agencies to place temporary stays on new rules while the rules are subject to litigation.[26] Courts are careful, however, not to grant agencies too much discretion to delay and alter the status quo.[27] Although courts have generally held that postponing a rule is the act of promulgating a new regulation and requires notice and comment,[28] the Trump Administration often attempted to delay final rules for prolonged periods of time.[29]

The Trump Administration's early attempts to improperly suspend effective and compliance dates were met with backlash and dismay by the general public and courts.[30] Glicksman and Hammond provide several examples of recent cases challenging the Trump Administration's defiance of this administrative doctrine,[31] including an action from tribal groups challenging the Bureau of Land Management's postponement of compliance dates for an Obama-era waste prevention rule governing natural gas waste on federal lands;[32] an action from various states challenging the delay of the effective date of a chemical disaster rule concerning prevention of accidental chemical releases;[33] and an action from environmental groups challenging the indefinite delay of a previously published rule increasing civil penalties for noncompliance with Corporate Average Fuel Economy standards.[34]

In each of these cases, the court admonished the agency for undercutting regulatory predictability and consistency. The courts expressed concern about delays disrupting the status quo, especially when regulated entities had already made concrete preparations for complying with the new rules.[35] Furthermore, the courts made clear

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25 *Id.* at 1670.

26 5 U.S.C. § 705.

27 *See* Glicksman & Hammond, *supra* note 7, at 1670–71.

28 *See id.* at 1670.

29 *See id.* at 1670–71.

30 *See id.* at 1671–74.

31 *Id.* at 1671.

32 *See* California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1111–12 (N.D. Cal. 2017).

33 *See* Air All. Hous. v. EPA, 906 F.3d 1049, 1064 (D.C. Cir. 2018).

34 *See* Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin., 894 F.3d 95, 103 (2d Cir. 2018).

35 *See, e.g.*, California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d at 1120.

that the agencies could not ground their suspensions in statutory authority given the limited nature of section 705 of the APA and the strong precedent concerning the issue.[36] As such, Glicksman and Hammond categorize the Trump Administration's delays of effective or compliance dates as "regulatory slop" because the law and precedent clearly prohibit such improper suspensions.[37]

B. Failure to Provide Notice and Comment

According to Professors Glicksman and Hammond, the second prominent way in which the early Trump Administration disobeyed standard administrative procedures was by failing to provide for notice-and-comment rulemaking.[38] Agencies are generally required to follow notice-and-comment rulemaking procedures when promulgating new regulations.[39] During Donald Trump's first two years in office, however, his Administration attempted to forgo notice-and-comment rulemaking to modify multiple final rules in a quick fashion, often relying on exceptions that did not support the Administration's reasoning.[40]

The failure to provide for notice and comment gave rise to challenges by various states, special interest groups, and regulated entities that claimed that the lack of adherence to strict rulemaking requirements violated the APA.[41] Glicksman and Hammond provide several examples of recent cases challenging the Trump Administration's refusal to engage in notice-and-comment rulemaking,[42] including an action from several states challenging two Department of Health and Human Services ("HHS") interim final rules exempting certain employers from providing insurance for contraception under the Affordable Care Act;[43] an action from a conservation organization

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36 *See, e.g.*, *Nat. Res. Def. Council*, 894 F.3d at 111–12. Section 705 of the APA allows agencies to postpone the effective date of an agency action while it is pending review by a court in order to preserve the status and rights of individuals affected by the action during pending litigation. 5 U.S.C. § 705. Section 705 does not, however, allow agencies to suspend a rule that has already taken effect or suspend compliance dates. *See* California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d at 1120.

37 *See* Glicksman & Hammond, *supra* note 7, at 1673.

38 *See id.* at 1674.

39 *See* 5 U.S.C. § 553(b).

40 *See* Glicksman & Hammond, *supra* note 7, at 1674.

41 *See id.* at 1674–78.

42 *See id.*

43 *See* California v. U.S. Dep't of Health & Hum. Servs., 281 F. Supp. 3d 806, 813 (N.D. Cal. 2017), *aff'd in part, vacated in part, remanded sub nom.* California v. Azar, 911 F.3d 558 (9th Cir. 2018).

challenging a Bureau of Land Management instruction memorandum concerning the lease of oil and gas rights on federal lands impacting the habitat of sage;[44] and an action from various environmental groups challenging the Environmental Protection Agency's ("EPA's") and Army Corps of Engineers' suspension of the Clean Water Rule governing the discharge of pollutants into "navigable waters."[45]

Time and time again, however, courts rejected the Administration's decision to forgo these requirements because the agencies could have achieved the same objectives had they properly conducted notice and comment.[46] Courts explained that the Trump Administration overly relied on the good-cause exception, acting as if it was the rule.[47] Furthermore, courts found that the Administration's failure to engage in notice and comment was an improper shortcut for repudiating prior public positions.[48] Professors Glicksman and Hammond took issue with the Administration's widespread failure to abide by the notice-and-comment requirements and suggested that at least some of the agency action in this area should be classified as "regulatory slop."[49] The failure to provide an opportunity for notice and comment in the promulgation of new rules represents the Administration's early departure from another well-settled administrative law principle.

C. Failure to Make Required Findings

The third area of administrative law with which Professors Glicksman and Hammond identify concern is the Trump Administration's failure to make required findings.[50] This category is quite broad and encompasses various issues with rulemaking. The modern administrative state requires that agencies keep a detailed record when engaging in decision-making[51] and provide an adequate statement of basis and purpose when promulgating a new rule.[52] Although most notice-and-comment requirements are procedural matters, failure to

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44 *See* W. Watersheds Project v. Zinke, 336 F. Supp. 3d 1204, 1211–12 (D. Idaho 2018).

45 *See* S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 961–62 (D.S.C. 2018).

46 *See* Glicksman & Hammond, *supra* note 7, at 1674–78.

47 *See, e.g.*, California v. U.S. Dep't of Health & Hum. Servs., 281 F. Supp. 3d at 828.

48 *See, e.g.*, *id.*

49 Glicksman & Hammond, *supra* note 7, at 1678.

50 *See* Glicksman & Hammond, *supra* note 7, at 1679.

51 *See id.* at 1665–66, 1679. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), which provides the basis for agency record-keeping requirements, holds that judicial review must be based on an agency's "whole record" under section 706 of the APA. *Id.* at 419.

52 *See* 5 U.S.C. § 553(c); Glicksman & Hammond, *supra* note 7, at 1665–66.

provide adequate reasoning can be substantive grounds for invalidating a rule under the arbitrary and capricious standard.[53]

During President Trump's first two years in office, his Administration bypassed reasoning and record-keeping requirements on numerous occasions by failing to give any reasoning at all, reversing Obama-era decisions without providing adequate explanation, and refusing to consider significant comments.[54] Glicksman and Hammond underscore several examples of recent cases challenging the Trump Administration's failure to provide adequate reasoning and explanation,[55] including an action from various environmental and food safety groups challenging an EPA order for failure to make the requisite statutory findings in its denial of a petition to revoke tolerances for use of a pesticide;[56] an action from a disability rights group challenging a Department of Education delay of a regulation concerning the overrepresentation of minority students in special education programs for failing to give adequate reasons for the delay;[57] and an action from a coalition of states challenging the Secretary of Commerce's decision to include a citizenship question on the 2020 census for failing to adequately justify the departure from the practices that have long governed the administration of the census.[58]

In each of these instances, courts ruled against the Trump Administration, finding that the agencies did not provide satisfactory reasoning for their actions.[59] The Ninth Circuit has even gone so far as to admonish the Trump Administration for engaging in continuous tactics to evade statutory reason-giving requirements.[60] Other courts have found that the Administration failed to consider important aspects of a relevant problem, cherry-picked evidence in the record, and inadequately justified departures from past policies and practices.[61]

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53 *See* Glicksman & Hammond, *supra* note 7, at 1666. The Supreme Court articulated its "arbitrary and capricious standard" in the famous *State Farm* case in 1983. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 44–45 (1983).

54 *See* Glicksman & Hammond, *supra* note 7, at 1680–83.

55 *See id.* at 1679–84.

56 *See* League of United Latin Am. Citizens v. Wheeler, 899 F.3d 814, 820–21 (9th Cir. 2018).

57 *See* Council of Parent Att'ys & Advocs., Inc. v. Devos, 365 F. Supp. 3d 28, 37–38 (D.D.C. 2019).

58 *See* New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502, 528–530 (S.D.N.Y. 2019), *aff'd in part, rev'd in part, remanded in part*, 139 S. Ct. 2551 (2019).

59 *See League of United Latin Am. Citizens*, 899 F.3d at 829; *Council of Parent Att'ys & Advocs., Inc.*, 365 F. Supp. 3d. at 48; New York v. U.S. Dep't of Com., 351 F. Supp. 3d at 679.

60 *See League of United Latin Am. Citizens*, 899 F.3d at 817.

61 *See, e.g.*, New York v. U.S. Dep't of Com., 351 F. Supp. 3d at 516.

Overall, Glicksman and Hammond felt that the Trump Administration clearly deviated from reason-giving requirements on many occasions during the early years of the presidency,[62] with courts subjecting the agencies to strong judicial reprimand in response to these actions.[63]

These early departures from well-established administrative law principles created alarming patterns of "regulatory slop" and represented significant divergence from standard procedural and substantive requirements. Rather than merely push the law to its outer bounds like previous administrations, the Trump Administration consistently disregarded administrative law standards set out in the APA and judicial precedent. By the conclusion of their piece, Glicksman and Hammond made clear that consistent, strong judicial remedies were needed to ensure that agency officials adhere to administrative law requirements and rule-of-law norms.[64] Although Glicksman and Hammond documented Trump Administration actions during the first part of Donald Trump's presidency through the beginning of 2019, an analysis of his full four years in office is necessary to determine if the administrative state has indeed subsequently changed. Part II of this Essay discusses patterns concerning agency action and judicial review throughout the remainder of Trump's presidency.

II. "Regulatory Slop" and Judicial Remedies Since 2019

Professors Glicksman and Hammond detailed the Trump Administration's "regulatory slop" and rule-making trends through the beginning of 2019, a little over two years into the Trump presidency.[65] They highlighted the Administration's continued repudiation of longstanding regulatory norms—actions that had the potential to significantly alter the administrative state by setting precedents for flawed action that either went unchallenged or were affirmed by courts.[66] Professors Glicksman and Hammond focused their article on three persistent "regulatory slop" issues: "(1) unlawful postponement of effective and compliance dates in final rules; (2) failure to undertake notice-and-comment rulemaking; and (3) failure to make required

62 *See* Glicksman & Hammond, *supra* note 7, at 1679.

63 *See, e.g.*, *League of United Latin Am. Citizens*, 899 F.3d at 817; New York v. U.S. Dep't of Com., 351 F. Supp. 3d at 516.

64 *See* Glicksman & Hammond, *supra* note 7, at 1686.

65 *See id.* at 1653–54.

66 *See id.* at 1679, 1713–14.

findings."[67] Part I of this Essay detailed their findings and why they categorized each problematic pattern as "slop."

Following the publishing of Glicksman's and Hammond's article, Trump remained in office for approximately two more years. Did the Administration continue to produce "regulatory slop" through inadequate rulemaking and lack of adherence to procedural requirements? After four years of Donald Trump's presidency, has a pattern of problematic agency actions changed administrative law? This Part examines the Administration's regulatory actions and continued "sloppy" approach during the second half of Donald Trump's presidency.[68]

A. The Slight Continuation of Improper Suspension of Effective or Compliance Dates

After examining the first two years of the Trump Administration's regulatory actions, Professors Glicksman and Hammond explained that the Administration frequently attempted to improperly suspend regulation and compliance dates.[69] While this impropriety was a core aspect of the "regulatory slop" present within the first part of the Trump Administration's governance, this issue was curtailed during the second part of Trump's presidency as the amount of Obama-era final rules wound down; indeed, only four lawsuits since the start of 2019 have weighed on the issue of whether the Trump Administration improperly suspended an effective or compliance date.[70] In three out of the four cases, the courts ruled against the Administration and found the delay illegal.[71]

The lawsuits concerning this issue involved prolonged delays of Obama-era final rules that carried into the Trump Administration, including an action from an organization working to eradicate tobacco

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67 *Id.* at 1669; *see also supra* Part I.

68 This Part relies on a continuously updated tracker—provided through the Institute for Policy Integrity at the New York University School of Law—of all federal litigation concerning the Trump Administration's agency actions. *See Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY (Apr. 1, 2021) [hereinafter *Roundup*], https://policyintegrity.org/trump-court-roundup [https://perma.cc/GB5P-LG5Y].

69 *See* Glicksman & Hammond, *supra* note 7, at 1670; *see also supra* Section I.A.

70 *See Roundup*, *supra* note 68.

71 *See* Am. Acad. of Pediatrics v. FDA, 379 F. Supp. 3d 461, 498 (D. Md. 2019); Council of Parent Att'ys & Advocs., Inc. v. Devos, 365 F. Supp. 3d 28, 56 (D.D.C. 2019); California v. EPA, 385 F. Supp. 3d 903, 903 (N.D. Cal. 2019). The Fifth Circuit ruled in favor of the Trump Administration in an action from environmental conservation groups challenging an EPA order revising the compliance dates for regulations concerning waste streams under the Clean Water Act. *See* Clean Water Action v. EPA, 936 F.3d 308, 317 (5th Cir. 2019). The court found that the EPA changed only the earliest of compliance dates, engaging in targeted and specific rulemaking following a period of notice and comment and receiving new information. *Id.*

addiction challenging the Food and Drug Administration's postponement of a rule requiring e-cigarette manufacturers to obtain pre-approval before marketing their products;[72] an action from a non-profit organization of parents of children with disabilities challenging the Department of Education's postponement of regulations designed to limit the disproportionate placement of minority students in special education programs;[73] and an action from various states challenging the EPA's delay of rules requiring the development of state and federal plans for limiting methane emissions at landfills under the Clean Air Act.[74]

The decrease in lawsuits concerning the suspension of effective and compliance dates is a logical result of time passing beyond the end of the Obama Administration. In the few cases mentioned that did concern this issue, courts were more concerned with the lack of notice-and-comment rulemaking and proper adherence to the delegating statute than the actual administrative delays themselves.[75] When the Trump Administration improperly suspended effective and compliance dates, courts generally responded by ruling in favor of the challenging party and enacting remedies, such as vacating or enjoining the suspension, that forced the Administration to follow the effective or compliance date or lawfully enact a delay.[76] Thus, although the Trump Administration attempted to improperly suspend numerous Obama-era regulations, judicial rulings against the Administration, court-imposed remedies, and the overall decline of this issue have prevented substantial changes in this area of administrative law.

B. The Continuation of Failure to Provide Notice and Comment

Unlike the improper suspension of effective and compliance dates, interested parties have continued to challenge the Trump Administration for failing to provide notice-and-comment rulemaking when the law requires it.[77] Professors Glicksman and Hammond found that early efforts by the Trump Administration to evade notice-and-comment requirements often failed in courts.[78] Since the start of 2019, lawsuits concerning notice-and-comment rulemaking requirements

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72 *See Am. Acad. of Pediatrics*, 379 F. Supp. 3d at 471–73.

73 *See Council of Parent Att'ys and Advocs., Inc.*, 365 F. Supp. 3d at 37–38.

74 *See* California v. EPA, 385 F. Supp. 3d at 903.

75 *See Am. Acad. of Pediatrics*, 379 F. Supp. 3d at 498; *Council of Parent Att'ys and Advocs., Inc.*, 365 F. Supp. 3d at 56; California v. EPA, 385 F. Supp. 3d at 903.

76 *See supra* Part I; Glicksman & Hammond, *supra* note 7, at 1670–74.

77 *See Roundup*, *supra* note 68.

78 *See* Glicksman & Hammond, *supra* note 7, at 1674.

have arisen on approximately twenty different occasions through the time of this writing.[79] Courts found that the Trump Administration failed to partake in adequate notice and comment in eighteen of these cases.[80]

Although many early lawsuits concerning notice-and-comment requirements stemmed from the Trump Administration trying to justify its rulemaking process through exceptions, later notice-and-comment cases challenged other aspects of agencies' actions.[81] Interested parties filed lawsuits for improper adherence to notice-and-comment rulemaking based on a variety of grounds, including an action from an immigrant rights organization challenging a Department of Homeland Security rule limiting eligibility for asylum for insufficient commenting period;[82] an action from a consumer advocacy group challenging a Department of Agriculture rule reversing the nutritional standards for school lunches for promulgating a final rule that substantially departed from the proposed rule;[83] and an action from various states challenging an HHS rule that allowed healthcare providers to refuse service based on religious views for failing to apprise recipients of a key definition in the statute.[84]

In these decisions and others, courts have criticized the Trump Administration for violating clear and well-settled principles that should have governed agencies' actions.[85] Courts have found that the Trump Administration intended to disregard public input despite the importance of the subject matters it was regulating.[86] Courts have further chastised the Administration for committing procedural errors that it should have known were incorrect and for depriving the public of its rightful opportunity to provide comment.[87] Finally, courts have found agency arguments that attempt to justify the lack of adherence

79 *See Roundup*, *supra* note 68.

80 *See id.*

81 *See id.*

82 *See* Pangea Legal Servs. v. U.S. Dep't of Homeland Sec., No. 20-cv-07721, 2020 WL 6802474, at *20 (N.D. Cal. Nov. 19, 2020).

83 *See* Ctr. for Sci. in the Pub. Int. v. Perdue, 438 F. Supp. 3d 546, 553 (D. Md. 2020).

84 *See* New York v. U.S. Dep't of Health & Hum. Servs., 414 F. Supp. 3d 475, 506, 508–09 (S.D.N.Y. 2019).

85 *See Roundup*, *supra* note 68.

86 *See, e.g.*, *Pangea Legal Servs.*, 2020 WL 6802474, at *20 ("troubled" by a 30-day notice period over winter holidays for significant changes to asylum regulations).

87 *See, e.g.*, California v. Bernhardt, 472 F. Supp. 3d 573, 606–07 (N.D. Cal. 2020).

to notice-and-comment rulemaking unpersuasive, illogical, and lacking authority.[88]

It is important to note, however, that the Trump Administration succeeded in justifying its notice-and-comment rulemaking procedures in at least two cases since the start of 2019.[89] The first case, *Sierra Club v. EPA*,[90] concerned an action from various environmental organizations challenging the EPA's approval of Louisiana's state plan for controlling regional haze.[91] The petitioners argued that the final rule contained additional reasoning not discussed in the proposed rule, and thus, interested persons lacked notice of a "major legal interpretation."[92] The court found, however, that the agency met the procedural requirements because the additional explanation was not a major interpretation or policy consideration that required additional notice and comment.[93] In the second case, *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*,[94] the Supreme Court upheld HHS rules allowing exemptions for for-profit religious organizations from insuring contraceptives.[95] The Court noted that the rules contained all elements of a notice of proposed rulemaking as required by the APA.[96]

Overall, these two cases represent exceptions to the pattern of judicial outcomes concerning notice and comment. Although the Trump Administration has persisted in engaging in "regulatory slop" in following notice-and-comment requirements, courts have continued to provide strong responses to the Administration's flouting of these

88 *See Ctr. for Sci. in the Pub. Int.*, 438 F. Supp. 3d at 559–60; New York v. U.S. Dep't of Health & Hum. Servs., 414 F. Supp. 3d at 560–61.

89 *See Roundup*, *supra* note 68.

90 939 F.3d 649 (5th Cir. 2019).

91 *Id.* at 653–54.

92 *See id.* at 676. Under the APA, a notice of proposed rulemaking "shall be accompanied by a statement of its basis and purpose" and this "statement of basis and purpose shall include a summary of the *major legal interpretations* and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3) (emphasis added).

93 *Sierra Club*, 939 F.3d at 677.

94 140 S. Ct. 2367 (2020).

95 *Id.* at 2387.

96 *Id.* at 2384. Following this case, administrative law scholars have expressed concern about an agency's ability to deviate more substantially from an interim rule when promulgating a final rule. In this respect, it is perhaps the opinion with the most influence on the administrative state stemming from Donald Trump's presidency. Administrative law expert, Kristin Hickman, has provided a more thorough analysis on this subject. *See* Kristin E. Hickman, *Did* Little Sisters of the Poor *Just Gut APA Rulemaking Procedures?*, YALE J. ON REGUL.: NOTICE & COMMENT (July 9, 2020), https://www.yalejreg.com/nc/did-little-sisters-of-the-poor-just-gut-apa-rulemaking-procedures/ [https://perma.cc/APP6-928L].

procedural norms by enacting preliminary injunctions and vacating improperly promulgated rules.[97] The judiciary thus has continued to affirm the status quo and established administrative law principles. While courts should continue to take issue with rules that fail to provide appropriate notice and comment for future administrations, the Trump presidency has not drastically changed administrative law in this area.

C. The Perpetuation of Failure to Make Required Findings

Similar to the failure to provide notice and comment, litigious parties continued to challenge the Trump Administration's agency actions for failing to make required findings.[98] Due to its breadth, this area constituted the most challenges over the past two years.[99] Professors Glicksman and Hammond identified numerous cases in which the Trump Administration failed to make required findings, including instances where the Administration declined "to attend to even the most rudimentary reason-giving requirements."[100] Since the start of 2019, dozens of cases have arisen that in some way challenge the Trump Administration's adherence to requirements to support agency decisions with adequate reasons.[101] In this area of law, courts have found that the Trump Administration has failed to provide reasoned explanations,[102] failed to consider an important aspect of the relevant problem,[103] failed to take a "hard look" at statistics,[104] and failed to adequately explain and support its reasoning.[105]

Courts continued to find that the Trump Administration provided flawed reasoning under the extremely deferential arbitrary and capricious standard, including an action from visa applicants challenging the State Department's suspension of processing and issuance of non-

97 *See supra* Part I; Glicksman & Hammond, *supra* note 7, at 1670–74.

98 *See Roundup*, *supra* note 68.

99 *See id.*

100 Glicksman & Hammond, *supra* note 7, at 1679.

101 *See Roundup*, *supra* note 68.

102 *See* Grace v. Barr, 965 F.3d 883, 901 (D.C. Cir. 2020).

103 *See* Walker v. Azar, 480 F. Supp. 3d 417, 429 (E.D.N.Y. 2020).

104 *See* WildEarth Guardians v. Bernhardt, No. 16-1724, 2020 WL 6701317, at *15 (D.D.C. Nov. 13, 2020). Hard look review requires that an agency have a justification strong enough to satisfy the demands of "reasoned decisionmaking" at the moment it adopts a new rule. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43, 52 (1983). *State Farm* hard look review "has generally been interpreted as requiring that agencies provide detailed explanations of their behavior, consider viable alternatives, [and] explain departures from past practices." Note, *Rationalizing Hard Look Review After the Fact*, 122 HARV. L. REV. 1909, 1914 (2009) (footnote omitted).

105 *See* Sierra Club v. EPA, 972 F.3d 290, 303 (3d Cir. 2020).

exempt visas for lacking a reasoned explanation;[106] an action from several states challenging an HHS rule requiring health insurance policy holders to make two separate payments on abortion and non-abortion premiums for lacking rationale and ignoring evidence about the high costs and harms of the policy;[107] and an action from numerous states challenging a Department of Agriculture rule limiting work requirement waivers for Supplemental Nutrition Assistance Program ("SNAP") benefit recipients for failing to rationally justify the policy change.[108]

In those decisions and others, courts have found that the Trump Administration deviated from well-established administrative law requirements that it should have followed, especially moving into the latter half of Trump's presidency.[109] Courts have criticized the Administration for making decisions that run counter to evidence and for inadequately explaining those decisions.[110] On one occasion in particular, a court refused to grant deference to agency actions during the Trump Administration, stating that the Administration "cannot reach whatever conclusion it likes and then defend it with vague allusions to its own expertise."[111] Courts further found that the Trump Administration contradicted itself when explaining the reasoning and findings behind its determinations.[112]

Since the start of 2019, some courts ruled in the Trump Administration's favor when evaluating whether agencies provided adequate findings to justify their rules.[113] The vast majority of cases, however, resulted in findings that the Administration did not provide sufficient

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106 *See* Gomez v. Trump, 485 F. Supp. 3d 145, 190, 194 (D.D.C. 2020).

107 *See* California v. U.S. Dep't of Health & Hum. Servs., 473 F. Supp. 3d. 992, 1001–02 (N.D. Cal. 2020).

108 *See* District of Columbia v. U.S. Dep't of Agric., 444 F. Supp. 3d 1, 10, 14 (D.D.C. 2020).

109 *See Roundup*, *supra* note 65.

110 *See, e.g.*, District of Columbia v. U.S. Dep't of Agric., 444 F. Supp. 3d at 22.

111 Sierra Club v. EPA, 972 F.3d 290, 298 (3d Cir. 2020).

112 *See, e.g.*, S.F. Baykeeper v. EPA, No. C 19-05943, 2020 WL 5893392, at *6 (N.D. Cal. Oct. 5, 2020).

113 *See, e.g.*, New York v. U.S. Dep't of Educ., 477 F. Supp. 3d 279, 300, 305 (S.D.N.Y. 2020) (holding that the plaintiffs were not likely to succeed in showing that the Department of Education had failed to provide a reasoned explanation for altering the definition of sexual harassment in educational programs and changing the evidentiary standards for such claims); New York v. EPA, 921 F.3d 257, 262 (D.C. Cir. 2019) (finding that the EPA adequately explained the facts and policy concerns it relied on to justify its denial of a petition seeking to expand the Ozone Transport Region to include more upwind states); California v. Bureau of Land Mgmt., No. 18-cv-00521, 2020 U.S. Dist. LEXIS 53958, at *36 (N.D. Cal. Mar. 27, 2020) (holding that the Bureau of Land Management adequately articulated a reasoned explanation for its change in position to justify a repeal of fracking regulations).

reasoning and findings to justify its agency actions,[114] showing that the Administration continued to engage in "regulatory slop" by blatantly flouting established administrative principles concerning reasoning and justification. The Trump Administration could not meet an arbitrary and capricious standard in many cases—a standard of review that is very deferential to agencies. In the face of such "regulatory slop," however, courts generally acted strongly to condemn these actions and vacated or enjoined rules that did not meet administrative standards.[115] Although the Trump Administration engaged in a pattern of disregarding reason-giving and findings requirements, there has not been a change to the administrative state in this area after the four years of Trump's presidency.

In these three specific areas of administrative law in total—abiding by effective and compliance dates, providing for notice and comment, and making required findings—there has not been any drastic changes, at least not yet. The Trump Administration continued to flout regulatory norms and requirements, just as Professors Glicksman and Hammond observed after analyzing Donald Trump's first two years in office.[116] Due to strong responses from courts in finding the Administration's actions illegal, however, there has not been a change in administrative law for the three aspects discussed. Although the Administration surely tried to make substantive changes to promote its policies, federal courts have provided a necessary check to ensure that the Administration adhered to procedural and substantive requirements. Aside from the three categories of administrative law discussed in this Part, litigants have also challenged the Trump Administration's promulgation of rules on other grounds. Next, Part III discusses the Administration's engagement in new "regulatory slop" trends over the second part of Donald Trump's presidency.

III. New Trends in "Regulatory Slop"

Professors Glicksman and Hammond recognized the three most pervasive forms of "regulatory slop" at the approximate halfway point of Trump's presidency.[117] While the Trump Administration continued to buck regulatory norms in each of those three areas, agencies also engaged in new areas of "regulatory slop" during the second half of Trump's presidency. Most of these new violations concerned agency

114 *See Roundup*, *supra* note 68.

115 *See id.*

116 *See id.*; Glicksman & Hammond, *supra* note 7.

117 *See supra* note 67 and accompanying text.

interpretations of congressional statutes. This Part explores two new areas of "regulatory slop" and whether administrative law has changed in either of these areas: (1) acting beyond the agency's statutory authority and (2) acting contrary to the purpose of the delegating act.

A. Acting Beyond the Agency's Statutory Authority

During the last two years of Donald Trump's presidency, interested parties sued the Trump Administration based on allegations that agencies promulgated rules that went beyond their statutory authority as delegated by Congress. These lawsuits stem from section 706(2) of the APA, which instructs reviewing courts to "hold unlawful and set aside agency action . . . not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[118] In these cases, Trump Administration officials typically acted beyond their capacity by either promulgating rules without statutory authority or misinterpreting the delegating statute.

In at least a dozen cases since the beginning of 2019, courts found that Trump Administration agencies acted in excess of their statutory authority,[119] including an action from various states challenging a National Highway Traffic Safety Administration ("NHTSA") final rule that decreased the maximum penalty for automobile manufacturers who failed to meet the Corporate Average Fuel Economy standards because the rule was based on economic effects that the NHTSA was not permitted to consider;[120] an action from visa applicants challenging State Department proclamations that suspended the issuance of certain visas for immigrants during the COVID-19 pandemic because the Department acted beyond its statutory authority, which only discussed entry and not visa issuance;[121] and an action by noncitizen United States military members challenging a Department of Defense policy that required additional hurdles to naturalization based on military service because it substantially amended the naturalization requirements set out in the delegating statute.[122]

In these decisions and others, courts found that the Trump Administration actively negated congressional instructions set out in stat-

118 5 U.S.C. § 706(2).

119 *See Roundup*, *supra* note 68.

120 *See* New York v. Nat'l Highway Traffic Safety Admin., 974 F.3d 87, 100 (2d Cir. 2020).

121 *See* Gomez v. Trump, 485 F. Supp. 3d 145, 190–94 (D.D.C. 2020).

122 *See* Samma v. U.S. Dep't of Def., 486 F. Supp. 3d 240, 274–76 (D.D.C. 2020).

utory authority.[123] Courts have criticized the Administration for making false assertions about its jurisdiction when the statute made clear that the agency did not have general or specific rulemaking authority concerning certain issues.[124] Furthermore, courts found that certain Trump Administration agencies improperly construed specific statutory formulas with which they should have been well acquainted.[125] These court cases and trends show that the Trump Administration engaged in a new form of "regulatory slop" by ignoring congressional statutes and trying to act beyond its clear authority. These agency actions were especially problematic because they showed the willingness of the Trump Administration to try to override important separation-of-powers principles. Courts generally ruled against the Trump Administration's flouting of regulatory norms and vacated rules that were made in excess of an agency's statutory authority.[126] Thus, this area of the law has not changed after four years of Donald Trump's presidency.

B. Acting Contrary to the Purpose of the Act

Similar to acting in excess of statutory delegation, the Trump Administration often acted contrary to the purpose of the very acts that delegated its rulemaking power. This form of "regulatory slop" is only a slight variation of the administrative law principles requiring agencies to act within their authority as defined by Congress. Courts found, however, that the Trump Administration often specifically acted contrary to the purpose of the act providing its powers, thus warranting a separate discussion of this area of "slop." Under *Chevron*[127] deference, if Congress speaks directly on an issue, then an agency cannot

123 *See, e.g.*, New York v. Nat'l Highway Traffic Safety Admin., 974 F.3d at 100–01; *Samma*, 486 F. Supp. 3d at 279–80; *Gomez*, 485 F. Supp. 3d at 190–94.

124 *See, e.g.*, Washington v. Devos, 481 F. Supp. 3d 1184, 1193 (W.D. Wash. 2020). The court in *Washington v. Devos* held that a Department of Education interim final rule violated the APA and the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. No. 116-136 § 18005(a), 134 Stat. 281, 368 (2020) (codified at 20 U.SC. § 3401 note), for developing a funding scheme that directly contradicted the plain text of the statute by favoring private schools when disbursing aid rather than focusing on students with the greatest need. *See* Washington v. Devos, 481 F. Supp. at 1193.

125 *See, e.g.*, *id.* (explaining that Congress instructed the Department of Education to distribute aid "in the same manner as provided under section 1117 of the [Elementary and Secondary Education Act] of 1965," a specific formula with which the Department should have been familiar as one of the nation's flagship educational funding programs (quoting the CARES Act, Pub. L. No. 116-136 § 18005(a), 134 Stat. 281, 368 (2020) (codified at 20 U.SC. § 3401 note))).

126 *See Roundup*, *supra* note 68.

127 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

act contrary to Congress's directives.[128] Because agencies exhibit quasi-legislative powers through rulemaking, it is crucial that they follow regulatory norms and standards to act within their respective spheres of the federal government. Thus, an agency must act in conformity with the unambiguously expressed intent of Congress.[129]

In the cases challenging an agency's interpretation of a statute, courts found that the Trump Administration acted contrary to the purpose of the congressional act, including an action from environmental groups challenging a Department of the Interior policy permitting the killing of birds through the dumping of oil waste or pressure washing nests from bridges for failing to abide by the broad prohibition against killing birds as defined by the Migratory Bird Treaty Act;[130] and an action from the state of New York challenging a Department of Labor rule excluding the availability of family leave from health care providers under the Families First Coronavirus Response Act for failing to determine an employee's specific role before denying them leave as instructed by the statute.[131]

Courts criticized the agencies for not following long-standing administrative law principles as defined by the *Chevron* framework.[132] This again shows resistance from the Trump Administration to abide by the separation-of-powers doctrine and adhere to Congress's intent. In the face of these challenges, courts have held strong by ordering the Administration to properly promulgate rules that complied with congressional purpose and, in some cases, the plain meaning of the act at issue.[133] The judiciary's consistent response has, therefore, prevented a change in administrative law involving a lack of adherence to congressional intent.

Litigation concerning these areas of administrative law represent an unfortunate increase in the "regulatory slop" tactics used by the Trump Administration. These new trends are just as problematic as the initial areas of "regulatory slop" identified by Professors

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128 *Id.* at 842–43.

129 *See id.*

130 Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d 469, 481 (S.D.N.Y. 2020).

131 New York v. U.S. Dep't of Labor, 477 F. Supp. 3d 1, 14 (S.D.N.Y. 2020).

132 *See, e.g.*, *id.*

133 Overall, there were approximately ten cases during the second half of Donald Trump's presidency that specifically considered whether an agency acted contradictory to a statute under a *Chevron* step one analysis. *See Roundup*, *supra* note 68. Of these cases, courts explicitly ruled in favor of the Trump Administration once. *See* Potomac Riverkeeper, Inc. v. Wheeler, 381 F. Supp. 3d 1, 17 (D.D.C. 2019), *aff'd*, 815 F. App'x 551 (D.C. Cir. 2020) (holding that the EPA's approval of Virginia's impaired waters list was not contrary to the Clean Water Act).

Glicksman and Hammond because they represent pervasive disregard of long-standing administrative law principles concerning separation of powers and statutory interpretation. The judiciary, however, provided a necessary defensive wall against the Trump Administration's actions to ensure that "regulatory slop" is not given a free pass. Aside from these specific categories of "regulatory slop"—both old and new—there are broader patterns concerning the state of administrative law during Donald Trump's presidency. Part IV of this Essay turns to that topic and more fully answers the question of whether the Trump Administration substantially changed administrative law.

IV. Administrative Trends and Statistics

Although Donald Trump prioritized regulation rollbacks during his presidential campaign and early months in office,[134] the Trump Administration's inability to follow administrative law norms deeply affected its actual ability to achieve substantive regulatory success.[135] In total, courts have ruled against the Trump Administration in approximately ninety percent of cases concerning "agenc[y] attempt[s] to pass new regulations, or undo old ones."[136] In observing the overall record for all litigation concerning administrative law during Donald Trump's entire time in office, the Trump Administration has only achieved success in approximately twenty-five percent of cases.[137] This includes all instances in which a court ruled against an agency or when the relevant agency withdrew its action after being sued.[138] President Trump's record stands in contrast with other presidential administrations, both Democratic and Republican, that have generally won approximately seventy percent of their administrative law litigation.[139] Despite the Trump Administration's abstention from regulatory norms, these sta-

134 *See* Donald J. Trump, Donald Trump's Contract with the American Voter (2016), https://assets.donaldjtrump.com/_landings/contract/O-TRU-102316-Contractv02.pdf [https://perma.cc/5ANU-4EL5] (listing deregulation as one of then–presidential candidate Trump's top policy goals for his first 100 days in office); *see also* Rucker & Costa, *supra* note 1 (examining the Trump Administration's early deconstructive regulatory and administrative agenda as described by Steve Bannon, the former White House Chief Strategist).

135 *See* Kimberly Strawbridge Robinson, *High Court Rulings Highlight Trump's Administrative Law Stumbles*, Bloomberg L. (June 19, 2020, 12:50 PM), https://news.bloomberglaw.com/us-law-week/high-court-rulings-highlight-trumps-administrative-law-stumbles [https://perma.cc/4NCB-ALVA].

136 *Id.*

137 *See Roundup*, *supra* note 68.

138 *See id.*

139 Robinson, *supra* note 135.

tistics suggest that courts have held strong in the face of pervasive administrative law issues.

The Trump Administration faced setbacks from both Democratic-appointed judges and Republican-appointed judges. Indeed, Republican-appointed federal judges found against the Trump Administration at similar rates to Democratic-appointed federal judges.[140] The majority Republican-appointed bench of the Supreme Court ruled against the Administration on numerous occasions as well.[141]

Scholars suggest that these trends are not commentaries on the actual substantive polices that the Trump Administration has tried to promote.[142] Rather, the court decisions represent the Administration's "hasty efforts in trying to overturn Obama-era regulations and its failure to strictly adhere to the [APA] rules for doing so."[143]

Additionally, the trends represent national patterns. Although many of the Administration's defeats originated within the Ninth Circuit, other circuits have weighed in on the majority of the litigation, especially within the District of Columbia.[144] The notion that so many courts around the country are unwilling to defer to the federal government makes the Trump Administration's defeats "virtually unprecedented."[145] One Department of Justice attorney stated that, in his thirty years at the Department, he had never seen so many losses for a presidential administration in such a short amount of time.[146] The statistics show an administration that rushed to quickly implement policies "without regard for long-standing rules against arbitrary and capricious behavior."[147]

Despite numerous defeats in court, the Trump Administration still reached some victories in areas of administrative law. For instance, the Trump Administration successfully rolled back an Obama-

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140 *See id.*

141 *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916 (2020); Dep't of Com. v. New York, 139 S. Ct. 2551, 2576 (2019).

142 *See* Robinson, *supra* note 135.

143 *Id.*

144 *See* Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019, 11:05 AM), https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html [https://perma.cc/37RW-H64L].

145 *Id.*

146 *See id.*

147 *Id.*

era regulation restricting fracking on public lands and tribal lands,[148] a contested issue during the 2020 presidential election.[149] Furthermore, in the area of reproductive rights, the Trump Administration implemented rules restricting the types of information that taxpayer-funded family clinics can tell patients about abortion.[150]

Despite these limited successes, however, the Trump Administration's failure to follow the APA has significantly hindered its ability to pursue its substantive agenda.[151] In particular, the Trump Administration faced setbacks in courts when trying to roll back environmental regulations.[152] For instance, EarthJustice, an environmental rights group, won thirty-three of the forty cases it brought against the Trump Administration as of June 2020.[153] Repeatedly, courts overwhelmingly upheld regulatory requirements despite the limited substantive successes that the Trump Administration achieved.[154]

Overall, there has not been a substantial change in administrative law following the conclusion of Donald Trump's presidency. Due to pervasive administrative litigation and strong judicial response, courts have served as a check on agency "regulatory slop," preventing this behavior from influencing finalized agency actions. Furthermore, statistics show that the Administration has experienced relatively little judicial success as compared to other administrations.[155] Although the Trump Administration certainly made substantive changes to the law and altered the staffing and structure of many agencies,[156] at its core, administrative law's procedural norms and standards have remained intact, even when not initially adhered to, because courts have continuously affirmed these requirements.

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148 *See* California v. Bureau of Land Mgmt., No. 18-cv-00521, 2020 U.S. Dist. LEXIS 53958 (N.D. Cal. Mar. 27, 2020).

149 David Blackmon, *America Is About to Have Its First Fracking Election*, FORBES (Oct. 26, 2020, 8:40 AM), https://www.forbes.com/sites/davidblackmon/2020/10/26/america-is-about-to-have-its-first-fracking-election [https://perma.cc/PN6L-TRNW].

150 *See* California v. Azar, 950 F.3d 1067, 1079–82 (9th Cir. 2020).

151 *See* Barbash & Paul, *supra* note 144.

152 *See id.*

153 Lawrence Hurley, *Trump Administration's 'Sloppy' Work Has Led to Supreme Court Losses*, REUTERS (June 18, 2020, 5:10 PM), https://www.reuters.com/article/us-usa-court-immigration-trump-analysis/trump-administrations-sloppy-work-has-led-to-supreme-court-losses-idUSKBN23P3M2 [https://perma.cc/HWC5-G82G].

154 *See id.*

155 *See* Barbash & Paul, *supra* note 144.

156 *See* Max Boot, Opinion, *Trump Is Deconstructing the Government, One Agency at a Time*, WASH. POST (Dec. 2, 2019, 10:24 AM), https://www.washingtonpost.com/opinions/2019/12/02/trump-is-continuing-deconstruction-administrative-state/ [https://perma.cc/68DC-FJTM].

Conclusion

In 2019, Professors Glicksman and Hammond documented numerous examples of "regulatory slop" within the Trump Administration and analyzed how the Trump agencies had fared in court up to the publishing of their article.[157] While they sought to evaluate the effects of initial court battles over agency action involving the Trump Administration,[158] they recognized that a final conclusion would require examining case results from the remainder of the presidency.[159] The cases discussed in Part II and Part III of this Essay demonstrate that the Trump Administration continued to ignore important administrative law principles at an alarming rate. It is impossible to say what motivated the Trump Administration to continuously flout regulatory procedures. Courts, however, have found that the Trump Administration continued to act arbitrarily through the second half of the presidency, thus suggesting that the agencies did not correct their behavior. Independent of its motivation, the Administration's actions led to four years of "sloppy" rulemaking within the executive branch.

Despite the Administration's continued disregard for well-settled administrative law principles, there has not been a substantial change in this area of law because of frequent judicial invalidation and strong remedies. Had Donald Trump won a consecutive, second term in office, the conclusion of this Essay might have been different. Reelection is now almost a prerequisite for leaving a significant, durable regulatory legacy during a President's time in office because of the extended opportunity to suspend and roll back regulations in a proper manner.[160]

President Trump continued to implement his agenda while he served as a lame duck President during the transition to President Biden's Administration. During this time, Trump officials stated that the President remained focused on rolling back regulations and bringing accountability to agencies.[161] Reporters following the Trump Administration's "midnight regulations" found that the Administration acted on dozens of new regulations between election day and January

157 *See* Glicksman & Hammond, *supra* note 7, at 1656–61.

158 *See id.* at 1657.

159 *See id.*

160 *See* Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 Minn. L. Rev. 1, 73 (2019).

161 Michael D. Shear, *Trump Using Last Days to Lock in Policies and Make Biden's Task More Difficult*, N.Y. Times (Nov. 27, 2020), https://www.nytimes.com/2020/11/21/us/politics/trump-biden-transition.html [https://perma.cc/E83N-VJ5N].

20, 2021,[162] including regulations that affect the economy, the environment, public health, and state and local governments.[163] The Trump Administration did not finalize all of its proposed regulations; indeed, the Biden Administration has already stepped in to stop some rules that had yet to take effect.[164] Additionally, some of these final agency actions will likely face challenges in court. As such, it is possible that these midnight regulations could lead to new precedent concerning administrative law. Despite whatever substantive changes may result, long-standing administrative law principles and procedural requirements are likely to remain intact.

Looking ahead, it would be remiss to leave out from this discussion the effect that the Biden Administration will have on Trump's regulatory legacy. Some Trump Administration officials made clear that the Trump Administration's last-minute rulemaking was aimed at stifling Biden's policy options upon him taking office.[165] The Biden Administration will certainly try to continue to roll back Trump Administration regulations that are inconsistent with President Biden's policy agenda. Early actions from the Biden Administration show a determination to quickly undo the Trump Administration's guiding regulatory policies. First, at the very beginning of Joe Biden's presidency, Chief of Staff Ron Klain issued a memorandum directing the heads of executive departments and agencies to withdraw any regulations that were not yet published in the Federal Register and postpone the effective dates for any rules not yet published in the Register.[166] Second, President Biden released an executive order revoking the Trump Administration's policy of identifying two existing rules for repeal for every new rule promulgated.[167]

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162 Isaac Arnsdorf, Lydia DePillis, Dara Lind, Lisa Song, Moiz Syed & Zipporah Osei, *Tracking the Trump Administration's "Midnight Regulations*," PROPUBLICA (Feb. 8, 2021), https://projects.propublica.org/trump-midnight-regulations/ [https://perma.cc/JHL6-LUVP].

163 Suzy Khimm, *How the Trump Administration's 'Midnight Rule-Making' Could Leave a Big Mark on Government*, NBC NEWS (Nov. 15, 2020, 4:30 AM), https://www.nbcnews.com/politics/white-house/how-trump-administration-s-midnight-rule-making-could-leave-big-n1247773 [https://perma.cc/B9VP-E9JP].

164 Arnsdorf et al., *supra* note 162.

165 Shear, *supra* note 161.

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

167 *See* Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 20, 2021) (revoking Exec. Order No. 13,771, 3 C.F.R. 284 (2018)). For further information concerning the Biden Administration's early regulatory actions, see Bridget Dooling, *The Regulatory Savvy of Biden's Early Executive Actions*, BROOKINGS (Jan. 26, 2021), https://www.brookings.edu/research/the-regulatory-savvy-of-bidens-early-executive-actions [https://perma.cc/WT3M-YBKU].

Aside from executive orders, the ability of the Biden Administration to suspend or annul the Trump Administration's regulations will partly depend on Congress's willingness to repeal late-term rules through the Congressional Review Act.[168] Notwithstanding congressional action, the Biden Administration agencies will have to partake in full rulemaking processes to undo any effective, finalized rules. However, if the Trump Administration failed to follow the proper rule-making procedures when promulgating its midnight rules, just as it did over the past four years, any of its new rules could also face serious legal challenges. Ultimately, it may take a few more years to determine President Trump's lasting impact on the administrative state.

168 5 U.S.C. § 801. The Congressional Review Act allows Congress to review new federal regulations through an expedited legislative process and overrule any regulations through a joint resolution. *Id.* For a more detailed discussion of the Congressional Review Act and its rising popularity as a tool to reverse late-term regulations, see Noll & Revesz, *supra* note 160.