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## Power Transitions in a Troubled Democracy

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## Power Transitions in a Troubled Democracy

Peter L. Strauss and Gillian Metzger<sup>1</sup>

To honor Professor D'Alberty, this essay addresses the recent American experience of transition between Presidents Trump and Biden, in the context of political power transitions in the United States more generally. Unlike the power transitions with which readers in parliamentary democracies may be familiar, the terms of office resulting from American elections are fixed and, as between members of Congress and the President, asynchronous. The American President serves a fixed four-year term that can be renewed only once, so that presidential transitions are both predictable and never more than eight years apart.<sup>2</sup> The 435 members of the House of Representatives serve renewable two-year terms, and the 100 members of the Senate serve renewable six-year terms; even if a President comes into office at the same time as both chambers of Congress are controlled by his political party (which in itself need not happen), that can change within two years, at the next congressional election. Presidential/congressional struggles, then, are an inherent element of American politics. The nuclear age, health, safety and environmental challenges of the last decades, and the frequency with which American elections have resulted in divided government all underlie increasing presidential claims of constitutional authority independently to control governmental outcomes, as increasing populism and ethnic tensions have heightened political divisions that in themselves have put the country's fundamental political structures under considerable stress.<sup>3</sup> The success of American democracy has often been dependent on members of Congress's willingness to act in a bipartisan manner, crossing party lines. The increasing party discipline that has characterized recent years<sup>4</sup> has major implications for that success.

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<sup>1</sup> Betts Professor of Law Emeritus, Columbia Law School and Harlan Fiske Stone Professor of Constitutional Law, respectively. We are both grateful to Samuel Weitzman '21 for research assistance, and to colleagues for comments at a workshop held in early March, 2021. In light of her subsequent appointment to a position with the Biden administration, Professor Metzger's work on this essay ended with the draft presented to our colleagues. Her contributions reflect her personal scholarship only; Professor Strauss, the sole editor of this manuscript from that point forward, is responsible for any errors it may contain.

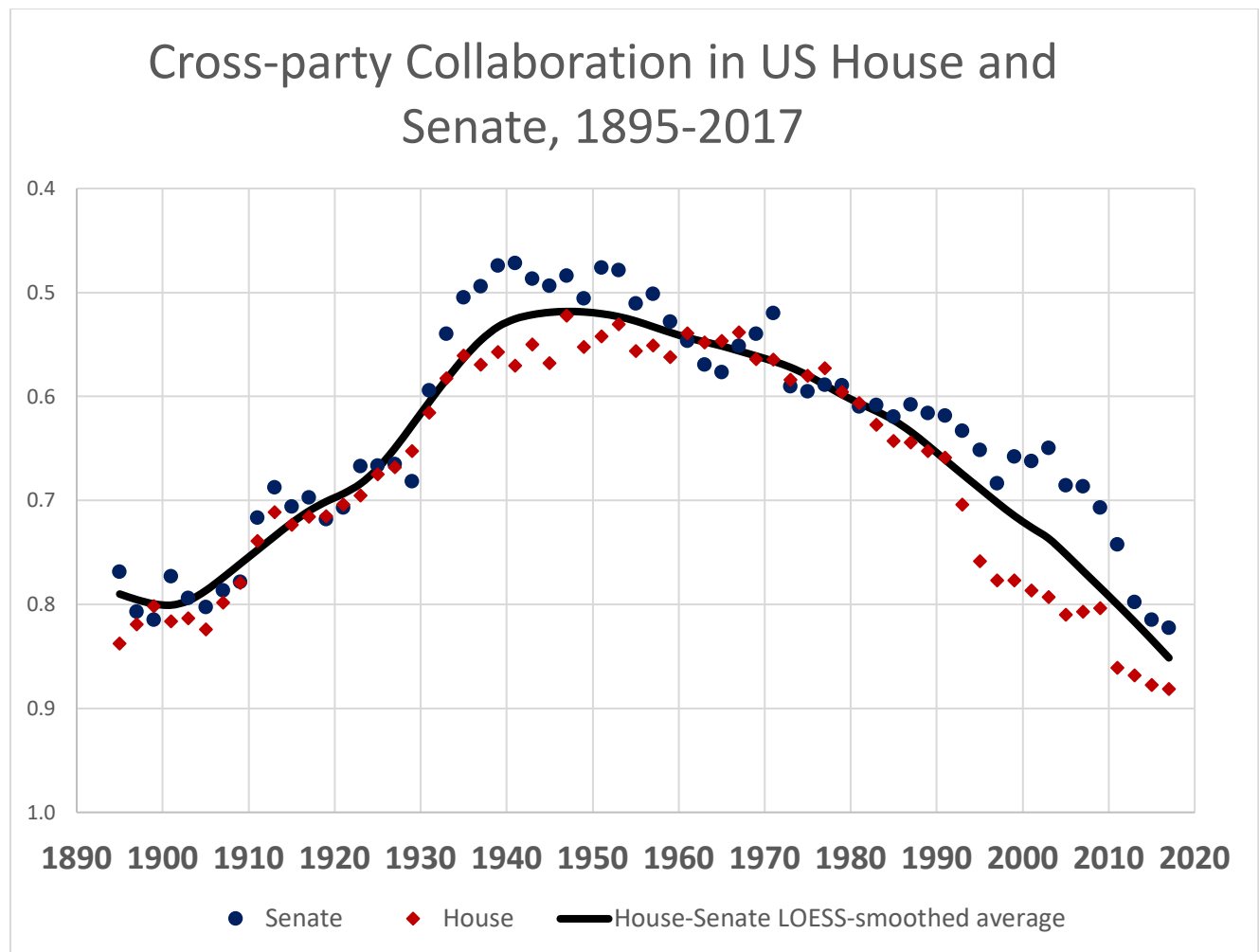
<sup>2</sup> A number of Presidents (due to death or resignation) have not served out their full terms, but there is not a full transition per se; instead, the Vice President steps in to finish out the four-year period.

<sup>3</sup> Peter L. Strauss, *How the Administrative State Got to This Challenging Place*, (forthcoming, *Daedalus*, Summer 2021); Gillian Metzger, "1930s Redux: The Administrative State Under Siege," 131 *Harv. L. Rev.* 1 (2017).

<sup>4</sup> Robert D. Putnam, *The Upswing: How America Came Together a Century Ago and How We Can Do It Again*, graphs cross-party collaboration in Congress, 1895-2017 in Figure 3.1:

The Trump-Biden transition was marked by extraordinary behaviors and events that provoked President Trump’s second impeachment. But even the transition’s mundane elements, our focus here, may seem distressingly familiar to Professor D’Alberti and to his Italian colleagues, who have coordinated this so well-deserved tribute. The recent national American elections removed from power an independently wealthy, conservative national leader whose actions in office and resistance to leaving it were deeply troubling, yet who still enjoys significant levels of committed public support—thereby revealing deep societal chasms and distrust. He may well remain an important political influence for years to come. We imagine that remembrances of Silvio Berlusconi have echoed in Italian minds as America’s events have unfolded. To be sure, Berlusconi’s final departure from the Italian premiership resulted not from an election but, as can occur in parliamentary democracies, from the Italian parliament’s loss of confidence in him. Nonetheless, we hope that an essay discussing the transition between Presidents Trump and Biden, and the resulting difficulties for American government going forward, will interest this audience.

America’s national political transitions vary considerably from the parliamentary model. Succession can happen quickly in an advanced parliamentary democracy once an election’s results are known. In Britain, a new government usually takes office the following day. In Canada, France,



India and Japan, it happens within a few weeks. Should a premier resign outside the prescribed election interval, as Berlusconi did in 2013, succession to that office may be virtually instantaneous. Although a lapse of time can result when national elections produce a new parliament, if a coalition must be formed to identify the prime minister, the political layer atop ministries is typically thin. The permanent civil service populates high as well as low elements of government; the layer of a new administration's political leadership directing its activities is generally quite thin. Thus, the bulk of important government officials continue in office through a regime change; pending successful coalition formation, caretaker governments, understanding that important policy changes should await the new cabinet, will operate under the oversight of the new parliament that has immediately been seated. Once the prime minister has been determined, the new cabinet will immediately take office with her as a whole—an event that can occur with little public celebration.

Any new political leadership will depend on the training and discipline of the permanent civil service to implement its policies, just as its predecessors did. Parliamentary transition is further eased because new leaders may take office already well-informed about the work of their ministries. If, as is often the case, the incoming ministers have been parliamentarians with a particular interest in the matters for which they are now responsible as ministers—perhaps even as shadow ministers for the opposition—they may already know a good deal about and have relationships with the civil service staffs they will be inheriting. And the continuity of staff and tradition of service across different governments also benefits newcomers, easing the learning curve they face upon taking office. They do not need the transition teams that new Presidents use to educate themselves about the government they are about to lead.

By statute, America's national elections occur on the first Tuesday in November, and the winner of a presidential election is generally known within a few days. These elections also determine the composition of the two elements of Congress, the Senate and the House of Representatives. Neither the President nor a new member of Congress, however, takes office immediately. Although the election may have considerably changed Congress' political complexion, the pre-election Congress remains in office for two more months, until January third of the coming year. And although the voters may have elected a Democrat to replace a Republican President, the Republican President and his political appointees in the executive branch—including all departmental and important agency heads—can remain in office at least seventeen days after the new Congress convenes.<sup>5</sup> A central constitutional norm is that there is only one President at a time, reflected in Article II's vesting of the executive power in "a" President and the Twentieth Amendment's provision that "[t]he terms of the President and the Vice President shall end at noon on the 20th day of January."<sup>6</sup> Only then are most of the former President's political appointees expected to resign. Thus, the norm of one President at a time, and the nearly two and a half months between the election and inauguration, give the outgoing President a window in which to further policies that the voters may just have rejected. Even outgoing Presidents who have been committed to a smooth

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<sup>5</sup> U.S. Constitution, Amendment 20. The relatively small number of important officials appointed to positions with a fixed term may continue in office until their terms expire, see text at note 25 below.

<sup>6</sup> U.S. Const. art II, §1, cl.1; amendment XX, §1, cl. 1.

transfer of power have proved unwilling to forgo last-minute actions that advance their own policies and potentially tie the incoming administration's hands.<sup>7</sup> President Trump's hostility to his successor, refusal to accept defeat, resistance to transition coordination, and commanding views of presidential authority were reflected in a stunning collection of actions. "There is something profoundly troubling," Sanford Levinson of the University of Texas wrote in anticipation of the election of 1996, "in allowing repudiated presidents to continue to exercise the prerogatives of what is usually called 'the most powerful political office in the world.'"<sup>8</sup>

Power transition in the United States is further complicated by the thickness of the political layer within governmental departments and agencies; by the absence of any practical need for presidential candidates to commit themselves before election to the more important appointments they will make if elected; by the way the Constitution's explicit separation of service in Congress and the Executive branch impacts the likelihood that new appointees will be familiar with the operation of the body to which they are appointed;<sup>9</sup> and by the necessity that the President's choices for the most important political positions in his administration be confirmed (approved for their office after a public hearing before the relevant committee) by the Senate then sitting. All of this can considerably slow, overall, the process of political change. Changing course has the speed and difficulty of navigating a large, heavy vessel, not a simple motorboat.

The Trump-Biden transition, between a first-term President seeking reelection and his opponent, is only one of the frames within which transitions can occur. The sitting President may feel confident about continuing in office and thus, at least to the point when defeat becomes the likely or actual outcome, experience less need to attempt to secure achievements in place. Presidents approaching the end of their second term know that a transition must occur – perhaps to a loyal supporter, to a party rival, or to the other party's candidate. The greater the anticipated

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<sup>7</sup> See text at note 56 below.

<sup>8</sup> Presidential Elections and Constitutional Stupidities, in Symposium, 12 Constitutional Commentary 183 (1995).

<sup>9</sup> "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time: and no person holding any office under the United States, shall be a member of either House during his continuance in office." U.S. Constitution, Art. I, Sec. 6, Para 2. Unlike the typical parliamentary situation, then, Senators and Representatives (and also judges) must resign their legislative (or judicial) seats if they are appointed to executive offices. This creates a political disincentive for the President considering such a nomination, as he usually will then be weakening the representation of his party in Congress pending the designation of a replacement by a process (appointment by a state's governor, or special election) that he cannot control. History offers a warning here. During the period 1913-2020, American Presidents had persuaded 42 incumbent elected Members of Congress to resign and serve in cabinet positions. Nearly 30 percent of their replacements were politicians from "the other party by the next regular election — either in midterm or presidential years." Jacob Smith et al., "*Here's the Problem Biden Faces If He Picks Current Lawmakers for His Cabinet.*," WASH. POST, <https://www.washingtonpost.com/politics/2020/12/02/heres-problem-biden-faces-if-he-picks-current-lawmakers-his-cabinet/>. For President Biden, this risk has been greatly heightened by the narrowness of his party's control in both chambers of Congress and by the likely impact of the most recent census, which is expected to result in redistricting of the House of Representatives tending to favor the election of Republican House Members. He has thus far chosen no Senators; the three Members of the House of Representatives he has chosen for important positions all represented election districts that have been solidly Democratic for years: Cedric Richmond (Director of the White House Office of Public Engagement), Marcia Fudge (Secretary of Housing and Urban Development), and Deb Haaland (Secretary of the Interior).

change, the more evident will be the need to prepare. The ways in which the Trump-Biden transition has illustrated the problems of transitions are discussed in the chronologically organized sections following. That discussion here is largely descriptive, highlighting many of the dynamics and challenges that have marked our most recent presidential transition.

The discussion also connects to broader debates and normative concerns about the contemporary American presidency. As Michael Herz and Kate Shaw have argued, a study of transitions reinforces the centrality of norms and conventions in constructing the presidency.<sup>10</sup> Although law constrains the transition period and the actions of both the outgoing and incoming Presidents in a variety of ways, both have substantial powers at their disposal. Often it is norms that determine whether a transition is successful, how much the outgoing president tries to embed policy and personnel, and how forceful the incoming President is in fighting back and pushing her agenda. Not surprisingly, then, transitions are evolving phenomena, the contours of which change with evolving norms and the particular Presidents involved.<sup>11</sup>

Transitions are also testaments to the contemporary centrality of presidential administration, underscoring the strengths and weaknesses of this mode of governance.<sup>12</sup> In particular, transitions showcase both the range of tools by which Presidents can advance their policy agendas, and the temporary and transitory nature of much such presidential action. In the context of immigration policy, for example, acting in an era of polarized politics and a gridlocked Congress, Presidents Obama and Trump each acted to achieve policy ends administratively where legislation might ordinarily have been expected. While some scholars argue that expansive views of presidential power enhance democratic political accountability, the opportunities that the weeks between election and inauguration give a defeated President to embed policies that voters have just rejected suggest the opposite. His democratically elected successor will have to staff the political layers of responsible agencies, find the embeddings, and deploy the appropriate procedures for reversing them – all considerably impeding, perhaps preventing, reversal of what his defeated opponent may have used the transition period to put in place.<sup>13</sup> In comparison to parliamentary

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<sup>10</sup> See, e.g., Michael Herz & Katherine Shaw, *The President in Transition* 3-13 [citation form (2021)]; see also Daphna Renan, *Presidential Norms and Article II*, 131 *Harv. L. Rev.* 2187, 2189 (2018) (emphasizing the role of norms in constructing the presidency generally).

<sup>11</sup> The literature is limited; notable contributions include Herz & Shaw, *supra* note 10; Joshua Zoffer, *The Law of Presidential Transitions*, 129 *Yale L.J.* 2500 (2020); Beth A Davis [Noll] and Richard L. Revesz, *Regulation in Transition*, 104 *Minn. L. Rev.* 1 (2019); Rivka Weill, *Constitutional Transitions: The Role of Lame Ducks and Caretakers*, 2011 *Utah L.Rev.* 1087 (2011); Nina Mendelson, *Quick Off the Mark: In Favor of Empowering the President-Elect*, 103 *Nw.L.R.Colloquy* 464 (2009); David Fontana, *The Permanent and Presidential Transition Models of Political Party Policy Leadership*, 103 *Nw. L. Rev. Colloquy* 393 (2009) and Jack M. Beerman and William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 *N.C.L. Rev.* 1253 (2006).

<sup>12</sup> For our prior views on presidential administration, see, e.g., Peter L. Strauss, *Overseer or “The Decider”*: The President in Administrative Law, *GW L. Rev. ; The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Columbia Law Review* 573 (1984); Gillian E. Metzger, *The Presidential Duty to Supervise*, 124 *Yale L. J.* 1856 (2015); see also Br. of Harold H. Bruff et al., *Seila Law LLC v. CFPB*, No. 19-7 (arguing for the constitutionality of limits on the President’s ability to remove the CFPB Director).

<sup>13</sup> E.g., Sarah Stillman, *“The Damage: Tracking Trump’s Assault on Immigration,”* *The New Yorker* p. 32 (Feb. 8, 2021), discussing the difficulties of uncovering and remedying the Trump administration’s hundreds of measures implementing his preferences for the regulation of immigration and treatment of unlawful immigrants.

systems, especially, the variety of ways in which a prior administration's policies and personnel have been embedded slow the rate at which direction can be changed. Does the net result of a prior administration's policy and personnel burrowing, together with its successor's policy and personnel reversals produce a government that as best as possible reflect the conflicted views of the American voting public? Or, in our already highly polarized political environment, "[b]ecause the President represents the median of his or her party, not of the nation, [are] the decisions of the President normally ... more extreme than what would emerge from Congress"?<sup>14</sup>

Consideration of American transitions also underscores the increasingly important role of courts and administrative law. To be sure, Presidents have long sought to embed their preferences through judicial appointments, and legal constraints on executive action are not new. But as the politicization of courts has expanded, litigation is playing a more central role in transitions; legal challenges may expand a new President's ability to set aside a predecessor's last-minute actions to embed policy, yet they may also be used to prevent policy changes. A particular question hanging over the Biden-Trump transition is the extent to which the many administrative law decisions of the Trump era will help or hamper the Biden administration.

Finally, studying transitions raises questions about transition reform.<sup>15</sup> There is no shortage of proposed reforms, from shortening the transition period, to reducing the number both of political appointees and of requirements for Senate confirmation, to making actions an outgoing presidential administration takes during the months between election and inauguration provisional. Many of these may have merit, but we do not take a position on any here. Our goal is instead to highlight the complexities and evolving aspects of the present transition, thereby underscoring the need for nuanced assessment of reform proposals as well as the ways that Presidents are always reforming the system in practice.

## **I. Pre-election anticipation of a possible shift of administration**

In the run-up to our November election, both the presidential incumbent, Donald Trump, and his challenger, Joseph Biden, could act in ways that could influence its outcome. Tactics to influence the election itself, such as declaring policy preferences or promoting or impeding voter registration, are evident possibilities. This essay, however, addresses actions that could ease or make difficult the transition from one presidency to another, beginning with President Trump before turning to candidate, now President, Biden.

### **A. President Trump**

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<sup>14</sup> John McGinnis, and Michael B. Rappaport, , Presidential Polarization (February 18, 2021). Northwestern Public Law Research Paper No. 21-05, Available at SSRN: <https://ssrn.com/abstract=3788215>; this question is important to the discussions in the works cited in nn 6 and 7 above.]

<sup>15</sup> Since both political parties can see themselves as potential beneficiaries of measures enhancing incoming administrations' ability to effect change, and despite its recent difficulties in enacting legislation, Congress has regularly amended the laws governing transitions to add to the incumbent administration's obligations of cooperation and to improve the position of candidates and of the President-elect.

To judge by the evidence offered in his recent impeachment hearing, Donald Trump began anticipating a possible shift of administration as early as late spring, when he began broadcasting his view that the only way he could lose the election would be if it were rigged. Behavior by outgoing Presidents to embed their own political preferences in ways successors would find it hard to disrupt is hardly new in American history. The Supreme Court Justice whom many place in the pantheon of great Justices, Chief Justice John Marshall, was among those Federalist Party stalwarts that President John Adams placed permanently in the federal judiciary on the eve of his departure from office. Marshall served for 34 years, well into Andrew Jackson's second presidential term. Putting aside the ways in which President Trump's personal conduct of office may have transformed the American presidency, one can identify three principal means that he, like his predecessors, used to project his political preferences into the next administration and beyond: (1) the appointment of federal judges who, like Chief Justice Marshall, might serve for decades after his term had ended; (2) embedding political sympathizers in the executive branch in positions from which a new President would find it difficult to remove them; and (3) encouraging executive agencies to take actions that can make changing policy difficult for a successor, such as the adoption of regulations (secondary legislation) whose rescission can require elaborate procedures, impeding the transition from one set of political preferences to another. As might surprise readers accustomed to parliamentary democracies, then, the many weeks between election and inauguration, after defeat has become certain, can be used to heighten this effect, undemocratically projecting the defeated candidate's influence well into the future.

### *1. Appointing Judges*

The United States does not have the special training, selection and advancement processes many nations use to people their judiciary. Rather, presidential nominations to the federal judiciary have been politicized from the beginning of the Republic, and their confirmation has now become the priority business of the Senate when it is controlled by the President's party. Since federal judges serve for life once appointed, these appointments permit Presidents to project their personal preferences long into the future. They have an incentive to fill judicial vacancies as rapidly as possible, and the opposing party has a counterincentive to slow the process or block nominations if it can.

Historically, there have been moderating influences somewhat mediating the politicality of the appointments process. Like all appointments requiring the Senate's approval, the confirmation process entails public committee hearings with the candidate, followed by debate on the Senate floor; this often created incentives for moderation, varying with the fact and intensity of Senate control. Political incentives have also been moderated by consultation with the American Bar to obtain the legal profession's assessment of a candidate's judicial qualities. For appointments to positions below the level of the Supreme Court, Senate norms elevated the preferences of Senators of the state where the nominee would be sitting. Appointment to the federal trial courts virtually required the agreement of these home state Senators; many Senators created informal committees



of local lawyers to assist them in making recommendations, highly conducive to merit-based appointments.<sup>16</sup> Until recently, moreover, Senate rules permitted a minority of Senators to use the filibuster to block a nominee's confirmation.

These moderating practices have badly frayed. For half a century, the distinctly conservative turn in American politics has made the nominee's judicial mien a major consideration—how, for example, she believes the Constitution or statutes are most appropriately to be interpreted; or how she could be expected to rule in cases involving a woman's constitutional right to an abortion. During President Obama's administration, the Senate's constraining practices and norms suffered serious further erosion. In 2013, after Republican party tactics strongly resisted the President's nominees at every level of government, the then Democrat Senate majority eliminated use of the filibuster for all presidential appointments (i.e., executive appointees as well as judges) save those to the Supreme Court. Obama's nominations, including judicial nominations, could then be confirmed. But when in 2014 the Republican party became the majority party in the Senate, it could and did significantly impede judicial nominations, in the hope of preserving vacancies for a Republican candidate who might win the 2016 presidential election.

The most striking example occurred when the conservative Supreme Court Justice Antonin Scalia died on February 13, 2016, eleven months before President Obama's second term would end. Obama promptly nominated Merrick Garland, an experienced judge widely admired for the skill and apoliticality of his judicial work.<sup>17</sup> These qualities and his age (63) strongly suggested that the nomination was a moderate choice of a candidate unlikely to serve for many decades – perhaps, an effort to appeal to Republican Senators understanding the importance of full membership to the Supreme Court's work.<sup>18</sup> The Republican Senate majority leader, Mitch McConnell, and the responsible committee chair, however, promptly decided that this nomination would not be considered. Despite the inconvenience this would occasion for the Court and the absence of any precedent for such a long delay, their argument was that filling this opening should be preserved for the President to be elected more than eight months later. This created the longest vacancy in the Court's history; only eight Justices heard more than a year's worth of cases, resulting in five decisions in which no majority could be formed.<sup>19</sup>

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<sup>16</sup> While each federal court of appeal serves several states, judicial seats on them tend to be associated with particular states, whose Senators would then be able to influence the choice of a successor when a seat informally associated with their state became vacant.

<sup>17</sup> Garland has since been confirmed as President Biden's Attorney General, with significant Republican as well as Democrat support for the nomination, after hearings suggesting no apolitical basis for opposition.

<sup>18</sup> Kristen Bialik and John Gramlich, "*Younger Supreme Court appointees stay on the bench longer, but there are plenty of exceptions*," available at <https://www.pewresearch.org/fact-tank/2017/02/08/younger-supreme-court-appointees-stay-on-the-bench-longer-but-there-are-plenty-of-exceptions/>

<sup>19</sup> Four cases were simply affirmed by an equally divided Court. *Hawkins v. Cmty. Bank of Raymore*, 136 S. Ct. 1072 (2016); *Friedrichs v. Cal. Tchrs. Ass'n*, 136 S. Ct. 1083 (2016); *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016); *United States v. Texas*, 136 S. Ct. 2271 (2016) – the last of these affirming a judgment invalidating the immigration authority's policy of withholding deportation for illegal immigrants who were the parents of American-born (and thus citizen) children, and had resided in the United States without otherwise violating the law for many years – a policy adopted at President Obama's strong urging. In a fifth case, *Franchise Tax Bd. of Cal. v.*

During his 2016 campaign, Donald Trump had announced a list of known conservatives as the persons he would consider for the Scalia vacancy. This unusual step sent a further signal of the deep politicization of the American judicial appointments process. When his election continued the Republican control of Congress, President Trump quickly nominated Neal Gorsuch, one of the names on his announced list. When Senate Democrats signaled a filibuster, in reaction to both Gorsuch's known conservatism and the Republican treatment of Garland's nomination, the Republicans responded by eliminating the possibility of filibustering even Supreme Court nominations, thereby undoing another potentially moderating constraint on nominations. Forty-nine years old when nominated, Gorsuch seems likely to serve on the Court much longer than Merrick Garland would have.

Once President Trump took office, Senator McConnell took his foot off the brake and put it on the accelerator. In a speech to one annual meeting of the Federalist Society—a distinctively conservative organization of which he had long been a member and which substantially influenced Trump's judicial nominations—Senator McConnell described his goal as:

“to do everything we can for as long as we can to transform the federal judiciary, because everything else we do is transitory. ... The closest thing we will ever have an opportunity to do to have the longest impact on the country is confirming these great men and women and transforming the judiciary for as long into the future as we can.”<sup>20</sup>

To this end, he disarmed the prior norms that had given “home state” Senators significant controls over appointments to the federal bench in their state; now, Senators from states represented by two Democrats could no longer prevent the appointment of a judge they opposed. And, in control of the Senate's calendar of business, he subordinated legislative business to judicial confirmations once they had the Judiciary Committee's endorsement after hearing.

Senator McConnell's judicial project was perhaps never more apparent than in his treatment of the nomination of Amy Coney Barrett (then also 49) to fill the seat that had been left vacant by the death of Justice Ruth Bader Ginsburg on September 18, 2020—six weeks, not eight months, prior to the presidential election. President Trump had nominated Barrett for a seat on the Seventh Circuit Court of Appeals three years earlier. He announced her nomination to the Court eight days after Justice Ginsburg's death; Senate hearings began October 12 and concluded October 22, less than a month after her nomination. She was confirmed by the Senate four days later, the first Justice since 1870 to be confirmed without a single vote from the Senate's minority party, and she heard her first argument on the Court November 2, the day before the presidential election that President Trump would lose. An election six weeks off was no reason not to fill a Supreme Court vacancy although four years earlier an election eight months off meant that a Supreme Court vacancy should be kept open, the only difference being the party of the President doing the nominating.

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Hyatt (*Hyatt I*), 136 S. Ct. 1277 (2016), the Court was equally divided on one question, that it was able to decide when the case later returned. *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt II)*, 139 S. Ct. 1485 (2019).

<sup>20</sup> David Montgomery, “*Conquerors of the Courts*,” THE WASHINGTON POST MAGAZINE, Jan. 2, 2019, available at <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/>.

Politics, then, have a major influence on judicial appointments, and the prospect of a presidential transition deepens that influence. It would be a mistake, however, to think of these judges as themselves simply political actors. Putting on judicial robes endows appointees with freedom from the constraints of discharge-enforceable loyalty, and Presidents have often been disappointed by particular decisions of judges they have appointed. To be sure, Trump's nominees have pushed the Court in a significantly more conservative direction, and often voted to uphold positions the Trump administration espoused. Yet on more than one occasion Justices Gorsuch and Kavanaugh (who have served long enough to permit this observation) have disagreed with each other, with their other conservative colleagues, and with outcomes President Trump would have preferred. Judges whom President Trump and other Republican Presidents had appointed were among those writing opinions highly critical of some of his administration's actions, and several of his judicial nominees, including those he appointed to the Supreme Court, firmly rejected his legal efforts to challenge the 2020 presidential election.<sup>21</sup>

## *2 Embedding political operatives*

As then-professor, now court of appeals judge, David Barron persuasively observed,<sup>22</sup> the steadily growing influence of American Presidents on domestic government actions in recent decades has come about not only from the creation of a larger, central White House bureaucracy that is generally opaque in its functioning, but also through the thickness of the political layers atop the civil service in the agencies that Congress has made responsible for decisions. David Fontana's concrete demonstration of the civil service's politicization is instructive:

The exact numbers vary based on what criteria are used to determine who constitutes a political appointee, but some estimates suggest that the American President makes almost 8,000 political appointments, while incoming national leaders in comparable democracies like Britain and France make just a few hundred political appointments. By any measure, this difference is staggering. In France, there are 5 million federal public servants, and just between 100 and 200 political appointments for the new President to make. In the United States, there are 1.8 million federal public servants, and the President makes almost 8,000 appointments. France has nearly three times as many federal public servants as the United States, but just about 1% or 2% of the number of presidential appointees".<sup>23</sup>

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<sup>21</sup> See, e.g., Rosalind S. Helderman & Elise Viebeck, "'The Last Wall': How Dozens of Judges Across the Political Spectrum Rejected Trump's Efforts to Overturn the Election," WASH. POST (Dec. 12, 2020, 2:12 PM), [https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8\\_story.html](https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html). When in November 2018 President Trump had complained bitterly about defeats suffered at the hands of "Obama Judges," Chief Justice Roberts (highly conservative and himself appointed by a Republican President, George Bush) delivered a sharp (and extremely unusual) public rebuke, saying that there were no "Obama judges," just federal judges upholding the rule of law. Jess Bravin, "Chief Justice Roberts Rebuts Trump's Attacks on Judges, and President Tweets Back," WALL ST. J. (Nov. 22, 2018, 11:10 PM), <https://www.wsj.com/articles/chief-justice-roberts-rebuts-trumps-attacks-on-judges-1542827385>. In the long run, it was subsequently noted, the judiciary – the weakest branch – inevitably loses such struggles. William Howell, Kenneth Shepsle, and Stephane Wolton,, *Executive Absolutism: A Model* (2020), available at <https://mpr.ub.uni-muenchen.de/98221/>.

<sup>22</sup> David Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Polarization*, 76 GEO. WASH. L. REV. 1095 (2008).

<sup>23</sup> David Fontana, n. 11 above, 103 *NWLRevColloquy* at 396-97.

Most high-level officials are expected to and do resign at the moment of a new President's inauguration. While some new appointments, like those to the federal bench, require Senate confirmation, a new President has no such need for the great bulk of these officials (some of whom are professionals who may expect to serve as civil servants typically do, continuously through transitions). The new administration is free to restaff the bulk of political, policy-responsible positions immediately. These include virtually all policy-making positions in the Executive Office of the President.<sup>24</sup> The challenges of filling both these positions and those requiring Senate confirmation, and of redressing the corrosive effect the Trump administration had throughout its four-year war with "the deep state," are treated in the separate section of this essay on Appointments. Here, we discuss situations in which an incumbent President is able to limit his successor's choice of policy-makers by embedding his own choices in positions enjoying statutory tenure protection.

These protections can take either of two forms. Some appointments are made for a fixed term of years—most often five, but as many as fourteen—and these are frequently accompanied by a limitation on removal from them to "cause," the nature of which may be specified to a greater or lesser degree. Officers so protected have no incentive to resign office upon administration change. Historically, statutes have established this limitation for the members of multi-member regulatory bodies like the Federal Trade Commission or the Federal Reserve, positions requiring political diversity in the body as a whole and Senate confirmation of appointments. But more recently Congress created a "for-cause" protected institution within the for-cause protected Securities and Exchange Commission, assigning both appointment and removal to the SEC itself, not the President, with no requirement of Senate confirmation; and recent Congresses have also created a few for-cause protected positions requiring presidential nomination and Senate confirmation for single administrators, such as the head of the Social Security Administration (six years). Recent Supreme Court opinions disapproving these innovative uses of "for cause" have cast some doubt on the constitutionality "for cause" limitations generally. It might be possible to limit their application to subordinate institutions embedded like Russian dolls in a for-cause agency, or to single agency heads enjoying substantial regulatory authority and operating relatively free of such other quasi-political constraints as the discipline of the presidential and congressional budget process.<sup>25</sup> Yet the repeated forceful statements in the opinions about the constitutional necessity of presidential "control," not just oversight, suggest that these opinions threaten the "for cause" protections of Senate-confirmed members of multi-member commissions designed for bipartisanship and policy

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<sup>24</sup> Senate confirmation is required for very few, including six leaders in the Office of Management and Budget, the EOP's principal statutory body overseeing presidential relations with domestic administrative agencies, and that has occasionally constrained presidential choices. Director of OMB, see 31 U.S.C. § 502(a); Deputy Director of OMB, see 31 U.S.C. § 502(b); Deputy Director for Management, see 31 U.S.C. § 502(c); Controller of the Office of Federal Financial Management, see 31 U.S.C. § 504(b); Administrator of the Office of Information and Regulatory Affairs, see 44 U.S.C. § 3503(b); and Administrator of the Office of Federal Procurement Policy, see 41 U.S.C. § 1102(b).

<sup>25</sup> *Selia Law LLC v. Consumer Financial Protection Board*, 140 S.Ct. 2183 (2020) invalidated a "for cause" limitation Congress had created for an agency headed by a single administrator, as *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), had done in the case of a multi-member board operating under the SEC's limited control. See Peter L. Strauss, *On the Difficulties of Generalization: PCAOB in the Footsteps of Myers, Humphreys Executor, Morrison and Freytag*, 32 *Cardozo L. Rev.* 940 (2011). The Court found both statutory limitations to be unconstitutional limitations of presidential oversight authority.

endurance across administrations. If they do, the impact of presidential transitions would be more profound.<sup>26</sup>

More important constraints exist for policy-responsible positions within the civil service that enjoy protections against removal enforceable by the Merit Systems Protection Board, an independent body of three members serving staggered six-year terms from which they too can be removed only “for cause”.<sup>27</sup> Until 1978, the ranks of the Civil Service, GS-1 through GS-15, included at their upper end (GS 13-15) numerous individuals with important policy-making and/or policy-implementing responsibilities. At the Nuclear Regulatory Commission, where author Strauss was General Counsel 1975-77, these included the heads of each of the Commission’s several bureaus, themselves responsible for developing published guidance about the Commission’s regulations, deciding whether safety issues identified by their staff warranted Commission attention, and many other important functions. As civil service employees, their appointments reflected meritocratic judgments not wholly in the Commission’s control, and they could not be freely removed from office or transferred to other responsibilities. With the Civil Service Reform Act of 1978,<sup>28</sup> all positions like these were transferred into a Senior Executive Service (SES) subject to considerably greater control by an agency’s responsible political officials. The stated purpose of this change was to promote greater efficiency by making it easier to reward excellent performance, and discipline poor performance, than civil service controls over GS tenure had to that point permitted. Nonetheless, the SES system was rather quickly turned to political uses. Although the statute limits “political” appointments to 10% of an agency’s SES positions, Presidents and their political appointees soon learned to use their disciplinary and transfer-of-responsibility authority over SES employees to “encourage” disfavored apolitical incumbents to resign.<sup>29</sup> Further, by then transferring the incumbents in their “political” SES positions into now-vacant positions defined as

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<sup>26</sup> Compare, e.g., Neomi Rao, Removal: Necessary and Sufficient for Presidential Control, 65 Ala. L. Rev. 1205, 1210 (2014) with Peter Strauss, “The Place of Agencies in Government: Separation of Powers and the Fourth Branch,” 84 Colum. L. Rev. 573 1984; see also Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (and Executive Agencies), 98 Corn. L. Rev. 769, 786 (2013) (cataloguing removal protections across 81 federal agencies).

<sup>27</sup> Disputes brought to the MSPB are initially heard and decided by individual administrative judges, subject to its review; the possibility that these administrative judges will themselves be found to have been unlawfully appointed under recent Supreme Court precedent, *Lucia v. SEC*, S.Ct. 2044 (2018), has further reduced the effective protection employees can obtain. Eric Katz, “New Trump Administration Strategy Leaves Fired Feds Seeking Recourse in Indefinite Purgatory,” available at <https://www.govexec.com/work-force/2020/09/new-trump-administration-strategy-leaves-fired-feds-seeking-recourse-indefinite-purgatory/168201/>.

The MSPB lacked a quorum for the entirety of the Trump administration, and currently has a backlog of over 3,000 cases. See text at note 118 below.

<sup>28</sup> Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111.

<sup>29</sup> The Secretary of Interior, for example, effectively removed important SES bureaucrats by reassigning them to positions for which they were not fit. Juliet Eilperin & Lisa Rein, “Zinke Moving Dozens of Senior Interior Department Officials in Shake-Up,” WASH. POST (June 16, 2017), [https://www.washingtonpost.com/politics/zinke-moving-dozens-of-senior-interior-officials-in-shake-up/2017/06/16/11801d3a-5295-11e7-b064-828ba60fbb98\\_story.html](https://www.washingtonpost.com/politics/zinke-moving-dozens-of-senior-interior-officials-in-shake-up/2017/06/16/11801d3a-5295-11e7-b064-828ba60fbb98_story.html). When he moved headquarters for the Bureau of Land Management from Washington, D.C., to a western city closer to the public lands it administers, but with just over 1% the population of the capital’s metropolitan area, seven-eighths of them resigned. Juliet Eilperin, “Trump Officials Moved Most Bureau of Land Management Positions Out of D.C. More Than 87 Percent Quit Instead,” WASH. POST (Jan. 28, 2021, 6:24 PM), <https://www.washingtonpost.com/climate-environment/2021/01/28/trump-blm-reorganization/>.

apolitical, they could embed employees sharing their policy preferences into career positions from which a subsequent administration might find it hard to disengage them. This has been an important element of the agency politicization process Professor Barron wrote about.<sup>30</sup>

### 3 “Midnight Regulations”

In parliamentary systems, a new government comes into power with parliamentary control, and with ministers immediately in command of their ministries. If desired, it can produce virtually instantaneous reversal of the prior administration’s accomplishments, whether they were the product of primary or secondary legislation. But here, too, the presidential system permits significant embedding. An American President may be able to institute policies or programs in ways a successor would find difficult to dislodge. One way of viewing this possibility is that it (like the effects of the transition period generally) moderates the extent to which regime change effectuates major shifts in social direction. As previously remarked, changing course has the speed and difficulty of navigating a large, heavy vessel, not a simple motorboat.

The survival of the health insurance plan President Obama persuaded the Congress to enact soon after his presidency began, known as the Affordable Care Act, is a good example. The Republican party and conservatives had strongly opposed its enactment, and made clear their purpose to eliminate the program as soon as they had the power to accomplish that. Yet although President Trump’s 2016 presidential campaign promised to replace the ACA with a better national medical insurance regime, and his election also brought the Republican Party control of both Houses of Congress, he was unable to achieve its repeal. Litigation seeking that end has to date failed; one challenge that the Trump administration supported still pending at our Supreme Court, but the Biden administration has informed the Court that the United States now supports the ACA.

The great bulk of America’s federal law embodied in binding texts is secondary, not primary, legislation that Congress has authorized agencies to adopt, generally after following public procedures set by the federal Administrative Procedures Act. The APA requires, *inter alia* a reasoned explanation for this rulemaking, that typically occupies many more pages of the Federal Register when it is published than the text of the rule itself.<sup>31</sup> An agency must follow these procedures, subject to what can be rather demanding judicial review, whether it is adopting, amending, or repealing a regulation. After a transition to new leadership, that agency must follow the same procedures to remove any now objectionable regulations the outgoing administration had adopted, explaining its reasons for the change of course. This process can be time-consuming and expensive within the agency, and is itself subject to judicial review. Judicial review defeated four out of five challenged rulemaking or other policymaking actions Trump administration agencies had undertaken, many of which addressed regulations that Obama administration agencies had adopted.<sup>32</sup>

A phenomenon called “midnight regulations,” is an arguable consequence of regulations’ stickiness. During the last months of their authority, outgoing administrations observably seek to

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<sup>30</sup> Note 22 above.

<sup>31</sup> 5 U.S.C. 553.

<sup>32</sup> NYU Institute for Policy Integrity, *Roundup: Trump-Era Agency Policy in the Courts*, (152/189 rules failed to survive a judicial challenge) available at <https://policyintegrity.org/trump-court-roundup> (last visited Feb. 26, 2021).

adopt a substantial body of secondary legislation embodying their preferences.<sup>33</sup> Many late-adopted regulations, of course, may be routine and relatively uncontroversial— anticipating the end of an administration can provoke a concerted effort to finish actions delayed for any reason. Others, however, are more significant, and can reflect an effort to put in place important policies a successor administration would be likely to reject. For several decades now the most important new regulations have been subject to White House oversight, and the executive order establishing this process<sup>34</sup> defines two categories of proposed regulation for the most exacting oversight, “major” and within that category “economically significant” rules. An analysis done by the George Washington University Regulatory Studies Center shows almost a doubling in “major” rules in the last year of the Clinton administration (52 in 1999→97 in 2000) and large increases also in the final years of the GW Bush (64 in 2007 →105 in 2008) and Obama (81 in 2015 →127 in 2016) administrations. The rate at which President Trump’s agencies adopted major rules in relation to the preceding year increased further still, in both number and disproportion (87 in 2019 →167 in 2020).<sup>35</sup>

In just the last five months it was in office (that is, concluding January 20, 2021) the Trump administration published 1490 new regulations,<sup>36</sup> While the majority were doubtless routine,<sup>37</sup> over 220 were “major” in the executive order’s terms and 130 of these were adopted *after* President Trump had lost the election – 27 in November, 47 in December and 56 more in its final three weeks in office. Twenty-five of these pre-election major rules and 49 post-election were designated “economically significant” rules – that is, these 74 rules had the importance for which the executive order requires the most intense White House engagement. And more than a few of these important, late-in-the-presidential-term actions represented efforts to embed policies the Biden administration would find objectionable. For example, on January 6, 2021 (the day of the Capitol riots) the Environmental Protection Administration published and made immediately effective a regulation assigning less weight to scientific studies of the harms that might result from personal exposure to dangerous substances if raw data they were built on, including medical histories and other confidential data from human subjects, had not been revealed.<sup>38</sup> Keeping that data confidential had been a standard practice, to encourage public participation and protect patient privacy. The

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<sup>33</sup> Jack M. Beerman, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN L. 285 (2013) reports a study of the phenomenon done for the Administrative Conference of the United States, available at <https://www.acus.gov/report/midnight-rules-final-report>.

<sup>34</sup> Executive Order 12866, in place with various amendments since the Clinton administration, requires some proposed regulations, those that along some dimensions are “major,” to follow an analytic process more demanding than the APA and subject to intensive oversight by the Office of Information and Regulatory (OIRA), an important element of the OMB, note 24 above.

<sup>35</sup> <https://regulatorystudies.columbian.gwu.edu/midnight-regulations>.

<sup>36</sup> The numbers in this paragraph were all taken from the Center’s Google Sheet downloadable at <https://gwu.app.box.com/v/2020-2021-FR-rules-CRA-window>.

<sup>37</sup> E.g., a January 15 rule of the Federal Aviation Administration concerning special flight authorizations for supersonic aircraft, 86 Fed. Reg. 3782, row 1453 in the Google Sheet of note 36.

<sup>38</sup> “Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information,” 86 Fed. Reg. 469-01 (Jan. 6, 2021). The Environmental Defense Fund, an NGO often litigating such issues, promptly challenged the “immediate effectiveness” of the rule, an element that if operative would have

new rule would substantially complicate evaluation of risks that EPA was responsible to regulate, thus restricting their regulation.

And the outgoing administration can embed its policy preferences in many other ways, some quite hard to detect. We treat embedment more fully in the fourth section of this essay, “Undoing/changing the prior administration’s acts.” For the moment, the point to observe is that the Trump administration has proved successful in embedding many of its policy preferences in an administration that would prefer to take a different direction, and that much of this activity occurred after the election results were known.

## B. Candidate Biden

Opposition candidates often speak before the election about the political courses they mean to take, identifying policies of the incumbent they find objectionable in ways they hope voters will share and promising their reversal; they will be developing lists of persons for the myriad political positions that election success would require them to fill. They are in not yet in any position, of course, to embed their views or actors favorable to them. Nor do they typically make public the identity of those they would expect to nominate to high position, judicial or executive, if elected. Candidate Trump’s publication of the list of names he would consider for Supreme Court appointment was in this respect highly unusual, an indicator of the extent to which such nominations have become politicized. So, too, was George W. Bush’s announcement that, if elected, he would nominate the much respected African-American General Colin Powell to be Secretary of State. Candidate Biden made no such announcements. For candidate Biden, his choice of Kamala Harris as his running mate, a progressive woman whose parents were of African and South Asian descent, made clear that one should expect liberal-left politics and a great deal of ethnic and gender diversity among his choices for office;<sup>39</sup> but he put forward no names.

In parliamentary democracies, not only is the number of political appointments having to be made orders of magnitude smaller,<sup>40</sup> but voters will often have a good idea who will be in the most important cabinet positions of the next Prime Minister. The politics of party control signal the future of government leadership in ways the American nomination process cannot match. If there has been a shadow government, its members are known – and have been educated over time about

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imposed on President Biden’s EPA the significant costs of repealing it; the EDF also raised significant doubts about the validity of the rule generally. This challenge to the regulation’s immediate effectiveness succeeded barely a week after President Biden’s inauguration, *Env’t Def. Fund v. U.S. Env’t Prot. Agency*, No. 4:21-cv-03-BMM, 2021 WL 270246, at \*8–11 (D. Mont. Jan. 27, 2021). Citing the doubts that had been raised about its validity, the new administration’s EPA promptly moved the court to vacate the underlying rule, effectively ending its legal force; the plaintiffs did not oppose the motion, and the court quickly granted it. *Env’t Def. Fund v. U.S. Env’t Prot. Agency*, No. 4:21-cv-00003-BMM, 2021 U.S. Dist. LEXIS 24202, at \*1 (D. Mont. Feb. 1, 2021).

<sup>39</sup> In their campaign debut together, he remarked:

"This morning, all across this nation, little girls woke up, especially little Black and brown girls who so often may feel overlooked and undervalued in our society – but today, maybe they’re seeing themselves for the first time in a new way."

<https://www.presidency.ucsb.edu/documents/remarks-vice-president-joe-biden-introducing-kamala-harris-his-vice-presidential-running>, visited May 6, 2021.

<sup>40</sup> Note 23 above.



the important issues before the ministries for which they might become responsible. A lengthy advance period is hardly required. Where a presidential candidate faces a sprint to fill thousands of positions with new faces if successful, the parliamentary process might be better characterized as a marathon participated in by relatively few, over extended periods.<sup>41</sup> Of course, there can be circumstances in which parliaments become, in effect, caretaker governments – for example, in the interval between a loss of confidence in the present administration and the following election, or should there be difficulties creating a coalition post-election known, with parliamentarians chosen but the government not yet formed. Yet in both cases parliament is sitting and responsible throughout; in any pre-election period, caretaker status carries with it an understanding that little should be done to tie the hands of the next government – whatever it will be – with the motivation of the impending campaign to enforce that; should forming a post-election coalition prove difficult, that very uncertainty will restrain the sitting parliament from controversial legislation, and the senior civil servants then acting for the ministries will if at all possible be responsibly awaiting the resolutions of any political leadership uncertainties before acting on controversies arising in the interregnum.<sup>42</sup>

Candidates do know, of course, that if elected they will have immediately to make concrete plans for their administration, both its policy objectives and the myriad personnel needed to administer it. As an amendment to existing legislation structuring the transition period itself,<sup>43</sup> the Pre-Election Transition Act of 2010 required the U.S. General Services Administration (GSA) to start providing all principal presidential candidates limited support for their possible transition, once officially selected by their party's convention in late summer.<sup>44</sup> The Act also obligated the current administration to supply information and support early on, and a 2015 measure went further, requiring the current administration to create a White House Transitions Council and a separate Agency Directors Council.<sup>45</sup> This support, of course, is to be used only for activities connected to assuming office and cannot be connected to campaign activities.<sup>46</sup> It permits getting a transition team ready for the hard work it will have to do should the candidate's campaign succeed, together with possible national security briefings and limited other support.

Presidential candidate Biden found little support from these measures, that ultimately depend on unenforceable norms of presidential cooperation with one's rival for which President Trump, like other norms of the presidency, had little patience. Rather, beginning well before the election itself and perhaps anticipating his defeat in the wake of what was, in general, his administration's

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<sup>41</sup> This theme is well developed in Fontana, note 11 above.

<sup>42</sup> Rivka Weill, *Constitutional Transitions: The Role of Lame Ducks and Caretakers*, 2011 *Utah L. Rev.* 1087 (2011).

<sup>43</sup> See text at note 49 below.

<sup>44</sup> Pre-Election Presidential Transition Act of 2010 §2(a), Pub. L. No. 111-283, 124 Stat. 3045, codified at 3 U.S.C. § 102 note (2018); see also Martha Joynt Kumar, *Before the Oath: How George W. Bush and Barack Obama Managed a Transfer of Power 37-56* (2015) (describing changes enacted over the years).

<sup>45</sup> John P. Burke, *The Contemporary Presidency, "It Went Off the Rails": Trump's Presidential Transition and the National Security System*, 48 *Pres. Stud. Q.* 832, 833-34 (2018).

<sup>46</sup> Pre-Election Transition Act § 2(a) (amending the Presidential transition Act to add new §§ 3(h)(2)(A)-(C)).

disastrous handling of the Covid19 pandemic,<sup>47</sup> he acted to plant the seed of “election fraud” and in many ways to embed both the personnel and the policies that might carry his preferences forward into the next administration, and frustrate its success.

## II. The transition period

The formal transition period starts after the election, once the winner of the election is known – generally by the following morning, although the elections of 2000 and 2020 took longer. For up to two-and-a-half months, the United States has both an outgoing and an incoming President—often of different parties, and sometimes recent electoral rivals. The transition period is a critical time for the peaceful and successful transfer of power, but many factors can create substantial bumps in the road to that goal. Its shape depends significantly on other factors, such as whether the incumbent President is a one or two term President and whether the transition represents a change in partisan control, as well as the attitude of the outgoing and incoming Presidents. Given the Twenty-Second Amendment’s limitation of a President to two terms, Presidents in their second terms know that a transition is coming and have more incentive to plan for it. A one-term President, by contrast, is likely to have given little attention to transition planning—and may not be disposed to be particularly helpful to a rival. Similarly, a transition to a new President of the same party is likely to be smoother and have more continuity (especially if the incoming President is the current Vice-President) than when the incoming President is of the opposing party.<sup>48</sup>

*1. Statutes, Norms, and Recent Transition Experience.* The constitutional and statutory framework governing the transition period is of relatively recent vintage. The Twentieth Amendment, which moved the start date for the new presidential term to January 20th from early March, was adopted in January 1933; only in 1963 was the first Presidential Transition Act enacted,<sup>49</sup> animated by a desire to “promote the orderly transfer of the executive power” and reduce the incoming administration’s dependence on private money to support transition planning. It authorizes the U.S. General Services Administration (GSA) to provide office space, services, and funding to “the apparent successful candidates for the office of President and Vice President, respectively, as ascertained by the Administrator following the general elections.” Subsequent amendments have added disclosure requirements, contribution limits on private support, and early security clearance processing for transition-team members and for those who will be nominated for positions in the new administration.<sup>50</sup> The most recent amendments require the incumbent President to create councils to help coordinate transition and negotiate a memorandum of understanding with each

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<sup>47</sup> The major exception was its successful commitment to the speedy development of effective vaccines – but their effectiveness and availability was established only after the election (by which time the country had experienced what were then the world’s highest infection and death rates from the disease) and after significant periods of resistance to public warnings and measures that might have limited Covid’s impact.

<sup>48</sup> Kumar, *supra* note 44, at 12-18, 36-37.

<sup>49</sup> Presidential Transitions Act of 1963 §3, codified at 3 U.S.C. § 102 note (2018); Joshua P. Zoffer, Note, The Law of Presidential Transitions, 129 Yale L. J. 2500, 2523-24 (2020).

<sup>50</sup> Zoffer, *supra* note 49, at 2524.

candidate's transition team contain an ethics plan and governing its access to government employees, facilities and documents.<sup>51</sup>

The quality of a transition, within this statutory framework, is a function of cooperation between the incumbent administration and its successors, as well as, individually, on “what the winning presidential candidate does to prepare for office and what the incumbent [P]resident chooses to do as he leaves office.”<sup>52</sup> The three most recent presidential transitions illustrate the possibilities. The transition from George W. Bush, a two-term President, to Barack Obama, exemplified facilitating the transfer of authority in a continuing presidency.<sup>53</sup> The Bush administration started planning for transition at the end of 2007, encouraged pre-election preparation, expedited security clearances for transition and incoming personnel, gathered information for the incoming administration, and provided frequent access to government personnel and documents. Candidate Obama also engaged with transition early, assigning trusted staff to start planning for it in late spring and summer of 2008, once his candidacy seemed likely.<sup>54</sup>

Despite his welcome commitment to assuring a smooth transfer of power, the nearly two and a half months between the election and inauguration gave President Bush a window in which both to advance his policy preferences and potentially to tie the incoming Obama administration's hands. The 2008 transition coincided with a major financial crisis, and public attention naturally gravitated to Obama's views on economic recovery measures. While preserving space for him to devise responses to the crisis, President Bush nonetheless made his own policy moves, ones that Obama opposed.<sup>55</sup> His administration issued a large number of controversial and economically-significant “midnight rules” during the transition period,<sup>56</sup> expanded gas and oil leases on national lands and signed a treaty that Obama opposed—just as President Clinton, Bush's predecessor, had signed the treaty establishing an International Criminal Court despite Bush's objections.<sup>57</sup>

By contrast, the Obama-Trump transition in 2016 was far more problematic. Like President Bush, President Obama was a two-term President facing the certainty of transition to someone,

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<sup>51</sup> Zoffer, *supra* note 49, at 2517, 2525-26.

<sup>52</sup> *Id.* at 8.

<sup>53</sup> Kumar, *supra* note 44, at 5; Jim Puzzanghera, A tale of two transitions amid crisis: Bush smoothed the path for Obama, while Trump creates chaos for Biden, *Boston Globe*, Dec. 22, 2020.

<sup>54</sup> Kumar, *supra* note 44, at 5-6, 44-51, 60-61, 249-51.

<sup>55</sup> Puzzanghera, *supra* note 13; Rivka Weil, Constitutional Transitions: The Role of Lame Ducks and Caretakers, 2011 *Utah L. Rev.* 1087, 1087-1088 (2011).

<sup>56</sup> See *supra* Part I.3; Anne Joseph O'Connell, Agency Rulemakings and Political Transitions, 105 *Nw. U. L. Rev.* 471, 472-73, 504 (2011). Curtis W. Copeland, Cong. Research Serv., R4077, “Midnight Rules” Issued Near the End of the Bush administration: A Status Report 1 (2009) (“Dozens of controversial rules” were issued in the final months of Bush administration). Although many of Bush's rules were controversial, it does appear that “President Bush's administration decreased the rate of economically significant rulemaking following the 2008 election.” GAO, GAO, GAO-18-183, Federal Rulemaking: OMB Should Work with Agencies to Improve Congressional Review Act Compliance during and at the End of Presidents' Terms (Mar. 2018) at 10.

<sup>57</sup> Weil, *supra* note 30, at 1087-88; Felicity Barringer, U.S. to Open Public Land Near Parks for Drilling, *N.Y. Times*, Nov. 7, 2008, <http://www.nytimes.com/2008/11/08/us/08lease.html>.

and his administration started preparing for transition in April 2016. Following the example that President Bush had set for an interparty handoff, President Obama interacted with Trump several times, meeting with him in the Oval Office shortly after the election.<sup>58</sup> He sought to pair his administration's officials with Trump representatives, and scheduled "two war-gaming exercises to prepare Mr. Trump and his staff for a potential national security crisis," just as Bush had done for Obama.<sup>59</sup> Trump's behavior, however, both as candidate and as President-elect, was quite unlike Obama's. He made last-minute changes in his transition's leadership, casting aside much of the preparatory work his initial transition team (headed by former New Jersey Governor Chris Christie) had done.<sup>60</sup> Deep distrust emerged between the Obama and Trump camps, with top Obama law enforcement officials concluding that Trump campaign personnel and nominees posed sufficient national security risks to require investigation.<sup>61</sup> And, like his predecessors, President Obama continued to advance his own regulatory and foreign policy preferences throughout the transition period, using advancing policies with which the newly elected, but not yet inaugurated President Trump strongly disagreed.<sup>62</sup>

Unlike Bush-Obama and Obama-Trump, the Trump-Biden transition occurred in the wake of a single-term presidency, when any incumbent might be relatively inattentive to transition planning before the election, and President Trump's confidence in a favorable outcome for himself, both before and after its occurrence, doubtless contributed to his indifference to it. As has already been noted, both during his campaign and after the election he made extensive use of his opportunities to embed judges, executive branch employees and policy commitments likely to impede President Biden's success. Beyond these embedding efforts, though, his personal refusal to concede the election, numerous lawsuits, and repeated false allegations of electoral fraud provoked an unruly mob's attempt, two weeks before inauguration, to block the ultimate determination of its

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<sup>58</sup> See, e.g., Russell Berman, *The Most Important Takeover of Any Organization in History*, ATLANTIC (Apr. 22, 2016), <https://www.theatlantic.com/politics/archive/2016/04/improving-the-presidential-transition-2016/477528/> ("For its part, the Obama administration says it has already begun preparing for the transition, trying to match if not exceed the early timeline set by Bush."); Julie Hirschfeld Davis, Trump and Obama Hold Cordial 90-Minute Meeting in Oval Office, N.Y. TIMES (Nov. 10, 2016), <https://www.nytimes.com/2016/11/11/us/politics/white-house-transition-obama-trump.html>.

<sup>59</sup> Davis, *supra* note 58; Julie Hirschfeld Davis, *Trump's Transition in a 'Long History' of Rocky Presidential Handovers*, N.Y. TIMES (Nov. 16, 2016), <https://www.nytimes.com/2016/11/17/us/politics/obama-white-house-transition.html>. Demetri Sevastopulo & Barney Jopson, *Trump Meets Obama in White House as Transition of Power Begins*, FIN. TIMES (Nov. 10, 2016), <https://www.ft.com/content/a6c7c0b8-a765-11e6-8b69-02899e8bd9d1>.

<sup>60</sup> Dan Balz, 'It went off the rails almost immediately': How Trump's Messy Transition Led to a Chaotic Presidency, WASH. POST. Apr. 4, 2017; Burke, *supra* note 45, at 836-40.

<sup>61</sup> Mattathias Schwartz, *The Last Handoff*, N.Y. Times Mag., Jan. 12, 2021.

<sup>62</sup> See *infra* Part II.2; Peter Nicholas & Carol E. Lee, *Transition from Barack Obama to Donald Trump Turns Tense*, WALL ST. J., Dec. 16, 2016; Michael D. Shear, *Obama's Last Days: Aiding Trump Transition, but Erecting Policy Roadblocks*, N.Y. TIMES (Dec. 31, 2016), <https://www.nytimes.com/2016/12/31/us/politics/obama-last-days-trump-transition.html>. The GAO Report, note 56 *supra*, at 9 reported that the Obama administration published 55 final economically significant rules in the period Sept 23, 2016-Jan. 20, 2017, substantially higher than the number of such rules (ranging from 14 to 33) it published in the same period in other years; Sofie E. Miller & Daniel R. Pérez, *Measuring the Obama administration's Historic Midnight Surge*, REG. REVIEW, Feb. 6, 2017, available at: <https://www.theregreview.org/2017/02/06/miller-perez-measuring-obama-administration-historic-midnight-surge/> (identifying 41 economically significant rules during Nov. 1, 2016 – Jan. 19, 2017).

outcome,<sup>63</sup> After thus poisoning the transition atmosphere, President Trump left the White House for his Florida mansion on the morning of inauguration, denying even the semblance of commitment to presidential continuity. And at the institutional level, things were little better. Although major networks called the election for Biden on November 7, four days after Election Day, there was a two-week delay before the GSA Administrator “ascertained” that Biden was the election winner,<sup>64</sup> giving him access to over \$6 million in government funding and other services, and his transition team access to agency employees and documents.<sup>65</sup> Once agency meetings did begin, President Trump’s political appointees insisted on attending Biden transition teams’ meetings with career agency staff – indeed, in some cases, agencies simply resisted such meetings; in others, they curtailed national security access the new administration would need to understand matters that would require their immediate attention.<sup>66</sup> Responsible career officials nonetheless were generally able to provide the Biden transition staff the access to information and agency personnel it needed.<sup>67</sup>

The Trump-Biden transition, then, demonstrates the limits of legal regulation and the critical role played by norms and the longstanding American commitment to peaceful transfer of power.<sup>68</sup> Despite the frequent congressional expansions of the governing legal framework to mandate greater and earlier support, an uncooperative outgoing President and administration can stymie a smooth transition. To be sure, new amendments might respond to some elements of the Trump-Biden experience: changing the threshold for the GSA’s ascertainment determination, for example, to being that a candidate is “substantially likely” to be the election victor; or increasing the role of senior career officials in transition.<sup>69</sup> Yet the process is fundamentally beholden to the incoming and outgoing Presidents’ commitments to ensuring a successful transfer of power.

2. *Actions During the Trump-Biden Transition.* Incoming Presidents have many pressing tasks on their plates during transition. Perhaps the most imperative is identifying political appointees for the new government – selecting cabinet and other high officials who will require Senate confirmation before they can take office and also White House staff and intermediate level appointees

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<sup>63</sup> Nicholas Fandos, Trump Acquitted of Inciting Insurrection, Even as Bipartisan Majority Votes ‘Guilty,’ N.Y. Times, Feb. 13, 2021.

<sup>64</sup> John Koblin, Michael M. Grynbaum & Tiffany Hsu, Tension, Then Some Tears, as TV News Narrates a Moment for History, N.Y. Times, Nov. 7, 2020; Letter from GSA Administrator Emily Murphy to Joe Biden, Nov. 23, 2020 (Murphy Letter) (stating that “because of recent developments involving legal challenges and certifications of election results” she was “transmitting this letter today to make [Presidential Transition Act] resources and services available” and insisting that she “was never directly or indirectly pressured by any Executive Branch official with regard to the substance or timing of [her] decision”).

<sup>65</sup> Murphy Letter, supra note 64, at 2; Matthew Choi, Gabby Orr, Meredith McGraw, & Nancy Cook, Trump relents as administration begins Biden transition, Politico, Nov. 23, 2020.

<sup>66</sup> Lisa Friedman, Trump Administration Is Planting Loyalists in Biden Transition Meetings, N.Y. Times, Dec. 8, 2020; Amy B Wang, Jenna Johnson & Dan Lamothe, Biden Accuses Trump Appointees of Obstructing Transition on National Security Issues, Wash. Post, Dec. 28, 2020.

<sup>67</sup> Michael Herz & Katherine Shaw, The President in Transition, draft at 48-49.

<sup>68</sup> Id. at 42-43; Kumar, supra note 44, at \_\_.

<sup>69</sup> Lawson Fite, The GSA Delayed Biden’s Transition. Future Presidents-Elect Could Sue to Speed Things Up, Lawfare, Nov. 30, 2020. Herz & Shaw, supra note 21, at 49-60.

who don't require Senate confirmation, important personnel who can assume office immediately.<sup>70</sup> At the same time, the transition needs to field a raft of agency review teams that meet with agency staff, examine agency documents, and identify issues for the incoming administration to address. The transition also must focus on developing the President-elect's policy agenda, crafting 100 day and 200 day plans, preparing executive actions to be announced in the administration's first days in office, putting together a budget, and responding to events.<sup>71</sup>

Although President Biden continued with transition activities throughout President Trump's determined efforts to overturn the presidential election results, naming his full cabinet by January 15, 2021<sup>72</sup> and preparing a substantial number of executive actions for his first weeks in office, Trump's attack on the election results had ongoing impact, contributing to Senate delays in confirming Biden's nominees.<sup>73</sup> As a result, despite having announced significantly more nominees by Inauguration Day than Presidents Bush, Obama, or Trump, President Biden started his administration with the fewest confirmed cabinet members. Only one member of Biden's Cabinet was confirmed on his first day in office with the next two cabinet members not confirmed until several days later, whereas other Presidents have had at least a couple in place from the start.<sup>74</sup> And Trump's resistance meant that Biden did not start to receive the President's Daily Brief until after the GSA's ascertainment; and after this, he alleged, Trump administration obstruction of transition access to national security information continued.<sup>75</sup>

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<sup>70</sup> Kumar, *supra* note 9, at 208-214, 239-41

<sup>71</sup> Partnership for Public Service, Center for Presidential Transition, *Presidential Transition Guide* 3-4, 12-14 (4th ed. Apr. 2020)

<sup>72</sup> Biden nominated Eric Lander as director of the Office of Science and Technology Policy and made the position a Cabinet level post on January 15, 2021; he nominated candidates for the final three cabinet department heads positions on January 7, 2021. Sarah Kaplan, Biden Will Elevate White House Science Office to Cabinet-Level, WASH. POST (Jan. 15, 2021, 3:56 PM), <https://www.washingtonpost.com/science/2021/01/15/biden-lander-ostp/>. He nominated his last two Cabinet department head positions on January 7, 2021. Alex Thompson & Theodor Meyer, *The Coming Biden Confirmation Blitz*, POLITICO (Jan. 7, 2021, 6:01 PM), <https://www.politico.com/newsletters/transition-playbook/2021/01/07/the-coming-biden-confirmation-blitz-792652>.

<sup>73</sup> Harry Stevens, Impeachment Trial Threatens Biden's Already-Delayed Cabinet Picks Amid Mounting Challenges, Wash. Post, Jan. 18, 2021. A recent White House Press Release states that President Biden has made up that ground:

The Biden-Harris administration put in place its Statutory Cabinet faster than any other administration since President Reagan. President Biden has also announced his intent to nominate 233 individuals to serve in Senate-confirmed leadership roles across the Executive Branch – more nominees than any past administration has announced by the 100-day mark.

and dramatically fulfilled his promises of ethnic and gender diversity in making his appointments. <https://www.whitehouse.gov/?s=100+Days+In%2C+Biden-Harris+Administration+Makes+History+with+Presidential+Appointees> (visited May 6, 2021).

<sup>74</sup> Ctr. For Presidential Transitions, *Pace of Nominations: How Does Biden Compare with Previous Presidents?* (noting Biden had 52 nominees as of January 19, whereas Trump had 29, Obama had 42, and Bush had 20); Lisa Mascaro, Senate Confirms Biden 1st Cabinet pick as Democrats Control, AP News, Jan. 21, 2021; Anne Joseph O'Connell, *Waiting for Confirmed Leaders: President Biden's Actings*, Brookings, Feb. 4, 2021;

<sup>75</sup> Herz & Shaw 47-48; Amy b. Wang, Jenna Johnson, & Dan Lamothe, Biden Accuses Trump Appointees of Obstructing Transition on National Security Issues, Wash. Post, Dec. 28, 2020.

The Trump administration added some new twists while also undertaking the more familiar last-minute transition actions. It issued more important regulations than had any other recent administration—rules that the Biden administration will find costly to dislodge,<sup>76</sup> adding the new twist of making many immediately effective, presumably to prevent Biden administration acting as predecessors had often done immediately on inauguration, putting on hold rules that had not yet become effective before they assumed office.<sup>77</sup> To foster the deregulation that had been President Trump’s mantra, it took many other deregulatory administrative actions likely to be at odds with the incoming administration’s view. In just one week, for example, the administration enacted a remarkable number of environmental rollbacks, including rules and single-shot adjudicatory decisions:

[T]he Interior Department overturned an Obama-era measure that increased royalties that oil, gas and coal companies pay the federal government; cut 3.4 million acres in critical habitat for the northern spotted owl, which faces extinction; expedited approvals to lease more than 550,000 acres of the Arctic National Wildlife Refuge for energy development; and approved a four-lane highway through Utah’s Red Cliffs National Conservation Area, which had been permanently protected as a wildlife reserve 25 years ago.<sup>78</sup>

In the month and a half after losing the election, President Trump made around three dozen appointments to federal boards and commissions,<sup>79</sup> his administration embedded a large number of political appointees in career positions protected by civil service rules.<sup>80</sup> It sought to use contracts with states and localities to lock in controversial policies, an unusual move – for example, when the Department of Homeland Security used them to commit itself to provide 180 days written notice before reducing or relaxing immigration enforcement.<sup>81</sup> Similarly, in an effort to prevent the repeal of its controversial actions permitting the imposition of work requirements as a condition of receiving Medicaid benefits, the Center for Medicare and Medicaid Services (CMS) signed

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<sup>76</sup> See text at note 33 above, and Part IV below.

<sup>77</sup> Jennifer E. Dlouhy, *Trump Rulemaking Blitz Cuts Waiting Period to Restrict Biden*, BloombergNews, Jan. 13, 2021; see also Memorandum from Ron Klain, Chief of Staff, to the Heads of Exec. Departments and Agencies, Jan. 20, 2021 (directing agency heads to “consider postponing the ... effective dates for 60 days” of “rules that have been published in the Federal Register, or rules that have been issued in any manner, but have not taken effect”).

<sup>78</sup> Juliet Elperin & Dino Grandoni, *In Trump’s Last Days, A Spree of Environmental Rollbacks*, Wash. Post, Jan. 15, 2021, available at: <https://www.washingtonpost.com/climate-environment/2021/01/15/trump-environmental-rollbacks/>.

<sup>79</sup> Jordan Fabian, *Trump Fills Government Boards with Loyalists as Term Nears End*, Bloomberg News, Dec. 18, 2020.

<sup>80</sup> Alice Miranda Ollstein & Megan Cassella, *The ‘Deep State’ of Loyalists Trump Is Leaving Behind for Biden*, Politico, Jan. 19, 2021; Lisa Rein & Anne Gearan, *Biden is Firing Some Top Trump holdovers, But in Some Cases, His Hands May Be Tied*, Wash. Post, Jan. 24, 2021 (reporting that Trump had already switched 26 political appointees to career status, with 9 pending, in Jan-Nov 2020).

<sup>81</sup> Agreement between the Department of Homeland Security and the Arizona Attorney General's Office and the Arizona Department of Law, available at <https://assets.documentcloud.org/documents/20466676/az-dhs-agreement.pdf>; Hamed Aleaziz, *The DHS Has Signed Unusual Agreements with States That Could Hamper Biden’s Future Immigration Policies*, BuzzFeed News, Jan. 15, 2021.

agreements with several jurisdictions requiring it to provide nine months' notice before their termination.<sup>82</sup> Although the Biden administration has treated these contractual restraints as ineffective, the contracts provide a basis on which jurisdictions can—and have—sued for their enforcement.<sup>83</sup> We turn now, then, to the new administration's efforts once in office to counter these moves.

### III. Creating the new government: Appointments

The thickness of the political layer at the top of the national government<sup>84</sup> keeps the task of peopling the new administration central alive well past the President's inauguration. Creating a responsive, functioning government requires a new President to nominate any officials requiring Senate confirmation quickly, naming acting officials who can be trusted to advance the new administration's agenda while waiting for nominees to be confirmed. It requires, as well, seeing to the rapid appointment of those subordinate officials ("inferior officers") Congress has provided may be politically appointed without Senate involvement. While many government employees working without civil service tenure protection—the economists of the Office of Management and Budget and government attorneys, for example—are apolitical appointees who expect to continue in their positions when administrations change, thousands in higher ranking positions are appointed politically and expected to resign upon the inauguration of a President of the opposing party. As the scholarship of Anne Joseph O'Connell has dramatically shown,<sup>85</sup> their replacement takes a great deal of time. The Trump administration's actions encouraging apolitical public servants to resign and its deviation from the longstanding norms of apoliticality characterizing some positions not formally protected by the civil service laws—for example, its firing of a number of Inspectors General whose decisions to investigate administration actions were taken as a sign of disloyalty, replacing them with loyalists<sup>86</sup>—has substantially increased the number of positions to be filled. Finding needed replacements, and appointing successors to Trump loyalists without in doing so seeming to endorse the political nature of the appointments, will in itself be a challenge.

These appointment tasks are inevitably complicated by the need for vetting to assure competence and to avoid conflicts of interest or other potential embarrassments. Their completion may be delayed to the extent Congress has placed their appointment in the hands of cabinet secretaries or others yet to be confirmed, if those candidates will control the choices made. The Constitution

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<sup>82</sup> CMS, Procedures for Withdrawing or Modifying a Section 1115 Demonstration; available at: <https://www.medicaidandthelaw.com/wp-content/uploads/sites/10/2021/01/Withdrawal-Terms-Letter-with-Enclosed-Agreement-FORMATTED-template-1.pdf>

<sup>83</sup> Sarah Kiff & Margot Sanger-Katz, Biden Administration Moves to End Work Requirements in Medicaid, *N.Y. Times*, Feb 12, 2021; Nick Miloff & Marla Sacchetti, Texas Sues Biden Administration over 100-Day Deportation 'Pause,' *Wash. Post*, Jan. 22, 2021.

<sup>84</sup> Text at note 23 above.

<sup>85</sup> See Anne Joseph O'Connell, Vacant Offices: Delays in Staffing Top Agency Positions, 82 *S. Cal. L. Rev.* 913 (2009).

<sup>86</sup> Ian Duncan & Michael Laris, Democrats Open Investigation into Trump's Replacement of Acting Transportation Department Inspector General, *Wash. Post*, May 19, 2020; Jen Kirby, Trump's Purge Of Inspectors General, Explained, *Vox*, May 28, 2020; Alan Rappeport, Trump's Inspector General Has Expressed Dim Views of Congressional Oversight, *N.Y. Times*, Apr. 7, 2020.



permits assigning to agency heads the great bulk of appointments to political positions, and one can find in this provision, as in the requirement for Senate confirmation of principal officers, an understanding consistent with its “checks and balances” design. It suggests loyalty to the law, overseen by both political branches, as the governing consideration, and not loyalty to a personal presidency at risk of becoming autocratic. In recent practice, however, Presidents have asserted control over all political appointments through the White House Presidential Personnel Office, whether statutes have assigned them to the President *or* to the heads of departments. The PPO is a small (and thus resource-constrained) part of the Executive Office of the President, that during the transition was headed by a 30-year old confidant who gave cabinet secretaries explicit orders whom among their subordinates they were to purge for disloyalty – in itself a profound *personal* loyalty test.<sup>87</sup> President Trump’s dominating concern for loyalty among government employees, and his administration’s strenuous efforts to reduce the size of government (particularly encouraging/forcing the departure of employees whose contributions were unwelcome to them) have both created many vacancies in those apolitical appointees who might have expected to continue in their positions when administrations changed, and to some extent filled the vacancies when created with political loyalists whose continuation in their offices is for that reason undesirable.

1. *Filling Out the Government.* The sheer number of political positions a new administration must fill on assuming office presents a daunting challenge. According to the “Plumbook,” in 2020 there were over 3,700 political positions that the President can fill: 1,118 presidentially nominated “PAS” positions (in addition to federal judgeships) requiring the Senate’s consent; another 354 presidentially-appointed positions that are not PAS; 724 Senior Executive Service positions not held by career officials; and 1566 Schedule C positions, which are positions excepted from the civil service “because of their confidential or policy-determining character.”<sup>88</sup>

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<sup>87</sup> Josh Dawsey, Juliet Eilperin, John Hudson and Lisa Rein, In Trump’s final days, a 30-year-old aide purges officials seen as insufficiently loyal, *The Washington Post*, November 13, 2020, visited May 7, 2021. A rare reported exception to presidential control was Secretary of Defense James Mattis insistence on naming as his chief deputy Michèle A. Flournoy, a hawkish Democrat who would most likely have been Hillary Clinton’s defense secretary. Helene Cooper, Eric Schmitt and Glenn Thrush, Mattis Shows How to Split With Trump Without Provoking Him, <https://www.nytimes.com/2017/09/20/us/politics/jim-mattis-trump-pentagon.html> (visited May 7, 2021). Ultimately she declined the job; and a contemporary profile of Mattis reported

Four months after Mattis took over the Pentagon, only two of the top civilian jobs—there are fifty-seven in all—have been filled. While Mattis was inclined to bring in people from across the political spectrum, the Trump White House was determined to appoint loyalists. In practice, that excluded nearly all the main-line Republican national-security experts, dozens of whom had signed letters during the campaign declaring that Trump was unqualified for office.

Dexter Filkins, James Mattis, A Warrior in Washington, <https://www.newyorker.com/magazine/2017/05/29/james-mattis-a-warrior-in-washington>. More recently, President Biden chose not to nominate Ms. Flournoy to be his Secretary of Defense. Jennifer Steinhauer, Michèle Flournoy Again Finds Her Shot at the Top Pentagon Job Elusive, <https://www.nytimes.com/2020/12/08/us/politics/michele-flournoy-defense-secretary.html> (visited May 7, 2021).

<sup>88</sup> S. Comm. on Homeland Sec. & Governmental Affairs, 110th Cong., Policy and Supporting Positions app. 1, at 212, 215 (Comm. Print 2020) (known as the “Plumbook,” this report issued every four years is the authoritative source for policy and supporting positions in the federal government); see also David E. Lewis, *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance* (2008) (describing these categories of positions).

Filling this deep layer of political appointees, many to positions requiring Senate confirmation, leads to extensive vacancies and delays. Although Presidents often have identified nominees to cabinet positions prior to their inauguration, and congressional hearings to consider their candidacy may even have begun, the situation is quite different for important subcabinet positions. “Of some 591 key positions requiring Senate confirmation, by early September Obama had 310 confirmed while Bush, had 294[, and] ... Trump [had] only 117.”<sup>89</sup> Moreover, these vacancies and delays continue throughout a President’s term in office. Anne Joseph O’Connell found that top jobs in cabinet departments and executive agencies were vacant or filled by acting officials 15% to 25% of the time in the period 1977-2005.<sup>90</sup> She also found that confirmation delays and difficulties are growing worse over time. For President Reagan, 17.5% failed and on average it took 59.4 days for confirmation, whereas President Obama experienced a 28% failure rate, and 127.2 days for confirmation.<sup>91</sup> Under President Trump, the number of these vacancies grew noticeably, perhaps reflecting in part distaste for the publicity and possibly conflicted loyalty that could result from the confirmation process, and the greater likelihood of political costs to their dismissal if called for. Having to obtain Senate approval may result in nominations of candidates whose views are not fully in line with the President’s or to the making of promises in committee hearings that can later impede simple political loyalty to the President. President Trump, more than any predecessor, relied on acting officials, “my actings,” and on sub-delegations of authority within agencies to less prominent actors.<sup>92</sup>

Presidents blame the Senate for confirmation delays, and a number of scholars have called for limiting when Senate confirmation is required. Currently, confirmation is required for a range of positions that do not rise to the level of principal officers for which presidential nomination and Senate confirmation are constitutionally required.<sup>93</sup> Yet limiting confirmation will only go so far. O’Connell’s data reveal that a more significant contributor is the time it takes Presidents to make nominations.<sup>94</sup> To the extent the PPO controls political appointments by whomever made, identi-

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<sup>89</sup> Burke, *supra* note 60, at 833.

<sup>90</sup> Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. Cal. L. Rev. 913, 965 (2009).

<sup>91</sup> Anne Joseph O’Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 Duke L.J. 1645, 1660-61, 1669 (2015). Note that the data for President Obama is as of 2014, so captures only his first six years in office rather than his full eight.

<sup>92</sup> Anne Joseph O’Connell, *Actings*, 120 Colum. L. Rev. 613, 617, 646-47 (2020) (internal quotations omitted) (reporting that, as a fraction of total days of an administration, acting secretaries served 9.9% of the days under President Trump compared to 2.7% of the days under President Obama and 1.6% of the days under President George W. Bush). See Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work around Senate Confirmation?*, 72 Admin. L. Rev. 533, 539 (2020) (“As of September 10, 2019 ... the ‘appointee tracker’ run jointly by the nonprofit Partnership for Public Service and The Washington Post reported that of 732 ‘key’ posts, 480 were occupied by Senate-confirmed individuals, leaving 252 vacant—a one-third vacancy rate.”).

<sup>93</sup> See Paul C. Light, *A Government Ill Executed: The Decline of the Federal Service and How to Reverse It* 91 (2008); O’Connell, *supra* note 91, at 1695-96 & n.148.

<sup>94</sup> O’Connell, *supra* note 90, at 966-67 (noting that “it took presidents an average of 173 days to nominate noncabinet agency heads, and it took the Senate an average of 63 days to confirm these nominations,” while for deputy noncabinet agency heads “it took presidents an average of 301 days to nominate and the Senate 82 days to confirm”).

fyng and vetting candidates for office, including weighing political considerations, is a time-consuming process for it, whether or not confirmation is required.<sup>95</sup> Presidents exerting control over agency hiring to install individuals who share their policy priorities, some argue, creates greater politicization in agencies where technological competence may be the dominant characteristic desirable.<sup>96</sup> Here, reliance on political appointees selected for loyalty or political connections rather than competence can undercut governmental performance. How much of a problem this is depends on the nature of the position at issue—though studies suggest that programs managed by political appointees perform less well on average, loyalty and closer political connections may matter more than policy or management expertise for some positions.<sup>97</sup>

For our purposes here, the central point is that the large number of political appointments to fill consumes a great deal of a new presidential administration’s attention and energy. Moreover, failures to adequately vet candidates can lead to costly missteps, if tax problems and other issues lead prominent candidates to withdraw. President Obama’s nominating process quickly went from being a success story to seeming disarray for such reasons; his first year ended with his then having “the lowest percentage of confirmed executive branch positions of the five most recent presidents”<sup>98</sup> When nominations and confirmations at the subcabinet or undersecretary and deputy level are delayed, the resulting lack of leadership can impede the President’s ability to implement key policy initiatives. Here again the Obama experience proves the point: “Despite the worst economic crisis in decades, Treasury Secretary Geithner worked without a main deputy for almost four months,” with Obama not even announcing until March “nominations for any of the nearly two dozen Senate-confirmed positions underneath Geithner,” “and those nominations covered only three positions.”<sup>99</sup>

For President Trump, committed to slowing government and “drain[ing] the swamp,” leaving positions unfilled and the agency less able to act had appeal.<sup>100</sup> But personnel and appointments have dominated the early days of the Biden administration and, as noted above,<sup>101</sup> President Biden has enjoyed greater success than his recent predecessors both in nominating and in securing confirmations. Nonetheless, the Senate’s 50-50 split underscores the implications of the confirmation process for the President’s range of choice in making nominations. Losing the support of a single

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<sup>95</sup> Light, *supra* note 93, at 85-88, 230-31,

<sup>96</sup> Barron, *supra* note 22, at 1121-1133.

<sup>97</sup> See Nick Gallo & David Lewis, *The Consequences of Presidential Patronage for Federal Agency Performance*, 22 *Pub. Admin. Res. Theory* 219 at 230, 238 (2012); Lewis, *supra* note 88, at \_\_\_; see also Mendelson, *supra* note 92, at 588-89 (emphasizing that the characteristics of acting officials who fill vacancies on an interim basis affect whether vacancies harm agency performance).

<sup>98</sup> Kumar, *supra* note , at 208-09, 212-13; as noted in text, President Trump’s record here was worse, although not for the same reasons.

<sup>99</sup> O’Connell, *supra* note 90, at 916-19

<sup>100</sup> Christina M. Kinane, *Control without Confirmation: The Politics of Vacancies in Presidential Appointments*, at 2 (“President Trump kept positions empty for months and refused to pursue nominations in many agencies where he has proposed slowdowns and dramatic cuts on regulation, workforce, and budget (e.g., Education and State).”).

<sup>101</sup> Note 73 above.

Democratic Senator can doom a nomination, and this dynamic resulted in the withdrawal of his candidate to lead the Office of Management and Budget, the most important bureaucratic element of the EOP.<sup>102</sup> More generally, “it has become more and more difficult to fill ... political positions because of interbranch fights over nominees and short tenures once appointees are in office.”<sup>103</sup> While 23 of President George W. Bush’s nominees won unanimous confirmation, as did 19 of President Obama, none of President Trump’s nominees did.

Anticipating the possibility of lengthy delays before its appointees were in place, the Biden administration devised strategies to ensure that these delays would not impede work on the administration’s agenda. It did not, as past incoming Presidents occasionally have, invite Senate-confirmed officials from the outgoing administration to remain in office pending until their successors’ confirmation. Instead, it quickly filled a number of first assistant positions requiring only presidential appointment with outside individuals, which then permitted naming these individuals to acting roles as the heads of divisions and bureaus within agencies. During the transition period it also drew on the knowledge of former Obama officials to identify senior career agency staff meeting the position requirements imposed by the Federal Vacancies Reform Act of 1998, who could be trusted to implement Biden’s policies<sup>104</sup> and appointed as “acting” leaders on inauguration.<sup>105</sup> It did not announce these names until President Biden had assumed office, apparently to ensure the Trump administration could not take actions against them.<sup>106</sup> A roster of policy experts, often former Obama officials having extensive knowledge of their agencies, have filled out other political slots.<sup>107</sup>

2. *The Personnel Fallout of the Trump Years.* In addition to the usual headaches of staffing the government with its own personnel, President Biden faces broader and deeper problems the Trump administration created that will be harder to address. The first is identifying and firing Trump loyalists embedded in positions whose incumbents, like the civil servants in parliamentary democracies are, are expected to implement the policies of the current administration, whatever they may be. Then, there is his undermining of longstanding staffing norms and, finally, the results of his attacks on the career civil service during his four years in office.

Before leaving office President Trump made a number of last-minute appointments of individuals to serve terms on various boards and commissions. Some of these appointees were close political allies—such as Kelly Anne Conway, a Trump advisor for almost all of his term, and Corey

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<sup>102</sup> Emily Cochrane & Jim Tankersley, Senate Committees Abruptly Postpone Votes on Neera Tanden, Signaling Pessimism on Biden’s Nominee, N.Y. Times, Feb. 24, 2021.

<sup>103</sup> David E. Lewis, Deconstructing the Administrative State, 81 J. Politics 767, 778 (2019).

<sup>104</sup> Natasha Korecki, Biden Looks to Obama Alums for Help Selecting Temporary Cabinet Secretaries, Politico, Jan. 13, 2021.

<sup>105</sup> Anne Joseph O’Connell, Waiting for Confirmed Leaders: President Biden’s Actings, Brookings, Feb. 4, 2021.

<sup>106</sup> Eileen Sullivan & Julian E. Barnes, Biden Team Delays Naming Some Interim Officials Until Trump Is Out, N.Y. Times, Jan. 19, 2021.

<sup>107</sup> O’Connell, *supra* note 105; GSA, Biden Administration Enlists GSA Team with a Mix of Obama Veterans and Public/Private Sector Expertise, Jan. 20, 2021; David E. Sanger, Biden Team Rushes to Take Over Government, and Oust Trump Loyalists, N.Y. Times, Feb. 23, 2021.

Lewandowski, his 2016 campaign manager.<sup>108</sup> And as noted above, the last year of the Trump administration saw a large number of political appointees “burrow” into the career ranks.<sup>109</sup> Although such burrowing is nothing new, the Trump administration appears to have undertaken it on a more extensive scale than other recent presidents.<sup>110</sup> Upon taking office, Biden officials moved quickly to stop and reverse these appointments, including firing a few Trump appointments to term positions that in the past had not immediately changed hands upon the inauguration of a new President.<sup>111</sup> President Trump had himself broken with past practice in this way, removing officials from positions generally viewed as apolitical during their terms in office. Most prominent was his removal of FBI Director James Comey, who was only four years into a ten-year term. The position of FBI Director is generally viewed as apolitical and Comey was only the second Director to be fired in the FBI’s history.<sup>112</sup> He was overseeing an investigation into Trump’s advisers when fired, and readers used to prosecutorial independence in parliamentary democracies should have little difficulty understanding the implications of this action.

Many termed positions – also, for example, the Commissioner of Internal Revenue – do not enjoy statutory for cause removal protection and instead, as with the FBI Director or Inspectors General, longstanding norms against politicizing the positions operated to constrain removal. Even where “for cause” protections have been enacted, they are shadowed by recent Supreme Court decisions striking down restrictions on the President’s removal power—a position strongly advocated by the Trump administration recently.<sup>113</sup> Indeed, its disapproval of statutory removal protections for the Director of the Consumer Finance Protection Bureau permitted President Biden immediately to remove the holdover CFPB Director and install an acting Director of his own choosing; at this writing, no nomination for the position has yet been made.<sup>114</sup> Removing former political officials who have transferred to career positions is more difficult, however.<sup>115</sup>

Far more problematic than dealing with holdover or burrowed Trump appointees is the corrosive effect that the Trump administration had on the government workforce generally during its four years in office. Some of this harm came from violations of longstanding personnel norms and protections. Executive orders overturned established practices with respect to union bargaining

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<sup>108</sup> Lara Seligman & Conor O’Brien, *Austin Ousts Pentagon Advisory Board Members as He Roots Out Trump Appointees*, Politico, Feb. 2, 2021.

<sup>109</sup> See *supra* text accompanying notes 79 - 80;

<sup>110</sup> See Ollstein & Cassella, *supra* note 80; Rein & Gearan, *supra* note 80.

<sup>111</sup> See Ian Kullgren & Josh Eidelson, *Biden Fires NLRB General Counsel After He Refuses to Resign*, BloombergLaw, Jan. 20, 2021; Seligman & O’Brien, *supra* note 108; Rein & Gearan, *supra* note 80.

<sup>112</sup> Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump*, N.Y. Times, May 9, 2017.

<sup>113</sup> See *Seila Law LLC v. CFPB*, 140 S.Ct. 2183 (2020); Matthew Choi, *Trump Appointee Sues Biden over Alleged Ouster from Advisory Board*, Politico, Feb. 3, 2021; Ian Kullgren & Josh Eidelson, *Biden Fires NLRB General Counsel After He Refuses to Resign*, BloombergLaw, Jan. 20, 2021. See also Letter from Rand Paul et al. to President Joe Biden, Feb. 19, 2020 (letter from four Republican senators arguing that the NLRB GC’s removal was unlawful).

<sup>114</sup> Michelle Price, *Biden Appoints U.S. Consumer Watchdog Veteran as Acting Director after Trump Appointee Resigns*, Reuters, Jan. 21, 2021.

<sup>115</sup> Rein & Gearan, *supra* note 80.

and representation, and made disciplining federal employees easier. government officials with policymaking responsibilities.<sup>116</sup> Agency political leadership sidelined or undertook retaliatory actions against career personnel viewed as resistant to the administration's priorities or who had supported Obama initiatives.<sup>117</sup> Meanwhile the Merit Systems Protection Board, the government agency charged with adjudicating claimed violations of civil service rules and protections, has lacked a quorum for the entirety of the Trump administration, and currently has a backlog of over 3,000 cases.<sup>118</sup> The lack of a functioning MSPB was in part the result of Trump's delay in nominating Board members. But in when late in his administration President Trump made the nominations needed to reconstitute the MSPB, a Democrat objector blocked their confirmation by withholding his consent to a process unanimity.<sup>119</sup>

President Trump's broader attack on career government employees, routinely castigated as an unaccountable "deep state," led to a significant loss of government morale, expertise and institutional capacity, especially in the State Department and national security agencies.<sup>120</sup> The administration's approach to the Covid19 pandemic made apparent the ways in which government scientists were routinely undercut. When the Department of Agriculture moved most of its Economic Research Service and its National Institute of Food and Agriculture to the Kansas City area, 1,000 miles away, with less than half the population of the Washington, D.C. metropolitan area, half the staff of these research offices resigned.<sup>121</sup> Eighty-seven percent of the staff of the Department of the Interior who were asked to move to Grand Junction, Colorado – twice as far away and with a population little more than 1% of the D.C. area's.<sup>122</sup> These and other moves caused a dramatic loss in expertise, productivity, and morale, requiring repair.<sup>123</sup>

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<sup>116</sup> Exec. Order No. 13,836, 83 Fed. Reg. 25,329 (June 1, 2018); Exec. Order No. 13,837, 83 Fed. Reg. 25,335 (June 1, 2018); Exec. Order No. 13,839, 83 Fed. Reg. 25,343 (June 1, 2018).

<sup>117</sup> Evan Osnos, *Trump v. The Deep State*, *The New Yorker*, May 21, 2018

<sup>118</sup> See *supra* text accompanying note 27; Nicole Ogrysko, *Historic Absences at MSPB Hit 4-year Mark, Creating Potentially Costly Backlog*, *Fed. News Network*, Jan. 13, 2021.

<sup>119</sup> Julie Grace Brufke, *Administration pushes for Senate to move on MSPB chair nomination*, available at <https://thehill.com/homenews/administration/505719-administrations-mspb-chair-pick-calls-for-senate-to-move-on-his> (7/2/20).

<sup>120</sup> See Democratic Staff Report, *Senate Committee on Foreign Relations, Senate Diplomacy in Crisis: The Trump Administration's Decimation of the State Department 26-42* (July 28, 2020) (detailing IG findings of actions against career employees and detailing morale problems); Franco Ordoñez, *Morale Disintegrates at State Department as Diplomats Wonder Who Will Quit Next to Escape Trump*, *McClatchy*, Jan. 16, 2018 (reporting that 60% of the State Department's top career diplomats had resigned by the start of Trump's second year in office).

<sup>121</sup> Dan Diamond, Lisa Rein, and Juliet Eilperin, *Trump Left Behind A Damaged Government. Here's What Biden Faces as He Rebuilds It*, *Wash. Post*, Feb. 6, 2021; Frank Morris, *USDA Research Agencies 'Decimated' By Forced Move. Undoing the Damage Won't Be Easy*, *NPR*, Feb. 2, 2021.

<sup>122</sup> Juliet Eilperin, *Trump Officials Moved Most Bureau of Land Management Positions Out of D.C. More Than 87 Percent Quit Instead*, *Wash. Post*, Jan. 28, 2021.

<sup>123</sup> Testimony of Anne Joseph O'Connell before the House Committee on Oversight and Reform, Subcommittee on Government Operations, Feb. 23, 2021; Lisa Rein, *"The federal government puts out a 'help-wanted' notice as Biden seeks to undo Trump cuts,"* *The Washington Post*, May 21, 2021, available at <https://www.washingtonpost.com/politics/2021/05/21/biden-trump-government-rebuilding/> (visited May 29, 2021)

Had President Trump been re-elected, an even more dramatic assault on the civil service was under way. On the eve of the recent election, he issued an executive order creating a new schedule of government employees, schedule F,<sup>124</sup> that would have removed from the competitive civil service *any* employee having policy-making or enforcement authority – not only, in this way, extending the SES further into the government bureaucracy but also suspending such civil service protections as SES employees enjoy. All those positions could then be filled outside the competitive, meritocratic regimes required for civil service positions, and would be classified as serving at-will. While Presidents have statutory authority to create elements of the Civil Service excepted from its requirements of competitive appointment and/or protected tenure—for example, government lawyers—Schedule F would have converted expert elements of what had been the apolitical government bureaucracy into political positions controlled by the White House and subject to change with a change of administration. Prior use of this presidential authority had already substantially reduced the proportion of government employees subject to the civil service regime. Schedule F would truly have transformed transitions, essentially ending permanent government service above the level of clerks and chauffeurs. The timeline for implementing this late executive order, however, effectively delayed its implementation until after President Biden’s inauguration.<sup>125</sup> It is perhaps not surprising that one of his first acts was to cancel this order, preserving in the Civil Service, with its constraints on appointment and its assurances of job security and apolitical discipline, the positions that might have been politicized by the schedule.<sup>126</sup>

President Biden has also sought to emphasize the importance of the career workforce and to counter the anti-bureaucracy rhetoric of the Trump years.<sup>127</sup> But in other contexts, figuring out how to respond to Trump’s actions is more complicated. For example, removing improperly installed, Trump-affiliated IGs could be seen as reaffirming the neutrality of IGs, but could also represent further erosion of the norm of IGs enjoying for-cause removal protection.<sup>128</sup> Even if new members to the MSPB are confirmed, addressing the Board’s extensive backlog will take time. The loss of expertise and institutional capacity as a result of departures of senior career officials may be particularly hard to remedy. It comes on top of longstanding concerns about an aging civil service and congressional as well as presidential actions that have hurt federal employees.<sup>129</sup> Reinvigorating the federal workforce will thus need to be a priority throughout Biden’s time in office.

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<sup>124</sup> Exec. Order No. 13,957, 85 Fed. Reg. 67,631 (Oct. 21, 2020).

<sup>125</sup> Lisa Rein, “*Trump’s 11th-Hour Assault on the Civil Service by Stripping Job Protections Runs Out of Time*,” WASH. POST (Jan. 18, 2021, 7:42 PM), [https://www.washingtonpost.com/politics/trump-civil-service-biden/2021/01/18/5daf34c4-59b3-11eb-b8bd-ee36b1cd18bf\\_story.html](https://www.washingtonpost.com/politics/trump-civil-service-biden/2021/01/18/5daf34c4-59b3-11eb-b8bd-ee36b1cd18bf_story.html)

<sup>126</sup> Executive Order on Protecting the Federal Workforce, Jan. 22, 2021, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/22/executive-order-protecting-the-federal-workforce/> (visited May 8, 2021)

<sup>127</sup> President Joe Biden, Executive Order on Protecting the Federal Workforce, §§1-4, Jan. 22, 2021 (“Career civil servants are the backbone of the Federal workforce, providing the expertise and experience necessary for the critical functioning of the Federal Government.”); Eric Katz, Biden: Foreign Service Officers and Career Civil Servants Are the ‘Center of All That I Intend to Do,’ Gov. Exec., Feb 4, 2021.

<sup>128</sup> Charlie Savage, Watchdogs Appointed by Trump Pose Dilemma for Biden, Feb. 1, 2021.

<sup>129</sup> Lewis, *supra* note 103, at 776, 782-83; O’Connell, *supra* 123, at 5, 9-10.

Finally, there are some Trump adaptations that Biden may opt to retain. One of these is Trump's extraordinary reliance on acting officials. Other Presidents have often relied on acting officials, particularly when having to provide leadership pending confirmations at the beginning of their terms. Yet, as Professor O'Connell has described, Trump's sustained use of acting officials throughout his administration distinguished his presidency.<sup>130</sup> President Biden's extensive use of acting officials so far, early in his term, falls within the traditional pattern. Yet, given the difficulties he may face in getting nominees through a closely-divided Senate, it is possible that he will be content to rely on them for a while.<sup>131</sup>

#### IV. Undoing/Changing the Prior Administration's Acts

Wholly apart from the challenges of transition, as such, America's presidential system, compounded at present by the very narrow (and likely temporary<sup>132</sup>) margins of President Biden's party's command of the Congress, creates political conditions capable of fostering a significant imbalance between the executive and the legislature. Here again, the comparisons with what might be expected in a parliamentary system are striking. A parliamentary government's political actors, legislative and executive, are generally unified, having control of both primary and secondary legislation permitting agile change on transition. Ours are not, and the tendency to confuse the whole of the executive branch with the presidency – the millions serving in administrative bodies and not just the thousands on the White House staff – combined with Congress's increasing difficulties in dealing with important issues,<sup>133</sup> has effectively converted the President into the principal apparent source of political action.

This is a development not lacking in challenges to democracy, as the Trump administration demonstrated in strengthening further a decades-long trend that has effectively transferred government decision-making from the agencies Congress has authorized to make decisions, using transparent public procedures for the most important of these choices, to the opaque and highly political processes of the White House. Bear in mind that the important political officials of agencies take office only with Senatorial approval, and act subject to continuous congressional oversight (and,

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<sup>130</sup> O'Connell, *supra* note 92, at 643-46, 653.

<sup>131</sup> Aaron Mehta, Lack of Pentagon Nominees Could Be Harbinger of Slow Process, *Defense News*, Feb. 23, 2021.

<sup>132</sup> Congressional elections occur every two years, and the almost universal American experience has been that support for the President's party erodes at the next election after a presidential election – here, in 2022. The likelihood of control change in 2022 is heightened by the combined results of the recent census (redistributing some House seats from states more likely to elect Democrats to ones more likely to elect Republicans) and the requirement state legislatures face, using its results, to reconstruct their election districts to reflect the current population distribution. These areas are politically created, and Republican state legislatures – which predominate – are expected to do so, using the detailed voting data now available, in ways that, at the margins, favor the election of Republican candidates.

<sup>133</sup> The foreseeable difficulties led President Biden to accept enactment of the American Recovery Act (ARA), the one major statute of his first 100 days in office, on a strictly partisan basis, despite his repeated promises to seek bipartisanship; the prospect of regaining congressional control in 2022 has led the Republican Senate majority leader, Mitch McConnell, to announce that, just as he acted in the final two years of the Obama administration, 100% of his effort will be devoted to blocking the Biden administration agenda. Who the first mover was here is not entirely clear. The prospect of unanimous Republican opposition to the ARA doubtless influenced Democrat Senate leader Chuck Schumer's decision to go it alone. That required invoking a procedure to prevent a filibuster that served as a reminder of its use early in the Obama administration to permit Senate passage of the Republican-hated Affordable Care Act.



often, rather detailed budgetary control through the appropriations process). Congress exercises far less control of the Executive Office of the Presidency. “Executive privilege” protects its advising functions from oversight, and budgetary controls are limited. And with few exceptions, a President can fill the EOP as he or she wishes, with no need for Senate engagement.

To be sure, the effect is to facilitate transition and a new administration’s repair of its predecessor’s acts that it finds objectionable. Where Trump administration resistance to the teachings of science had contributed to urgent national needs, the pandemic and climate change, the Biden administration quickly expanded its policy staff. In his first days in office, President Biden issued executive orders addressing COVID-19 and creating a number of White House positions, including COVID-19 Response Coordinator and Deputy Coordinator, COVID-19 Health Equity Task Force Chair, and Senior White House pandemic adviser, and filling these positions with prominent former government officials.<sup>134</sup> To the same ends, Biden created a White House office on climate change headed by Obama EPA Administrator Gina McCarthy and staffed with multiple Obama administration veterans and climate experts; and he named former Secretary of State John Kerry as international climate envoy, heading up a team of his own.<sup>135</sup> Yet note how this extensive policy presence connected to the White House can compromise the duties Congress has assigned to the agencies it is more capable of controlling. It echoes the Obama administration’s use of White House policy “czars” and suggests that Biden will seek to direct policy in these key areas.<sup>136</sup> And Trump had his fair share of such advisors as well, with Stephen Miller, a senior advisor who exerted extensive control over the Trump administration’s immigration policy, the most prominent example.<sup>137</sup> At a minimum, the fact that White House personnel do not require Senate confirmation means that they are able to get to work immediately on Biden’s policy agenda. And the longer it takes to confirm agency heads, the more policy initiatives will emanate from the White House. The world-wide trend toward autocracy is animated by such concentrations of authority in the executive.<sup>138</sup>

The executive branch has a number of techniques for creating policy change. Executive orders, memoranda and directives, instructions to responsible agencies and not to the public, can produce the creation of programs or influence agency priorities. President Trump used executive orders and OMB memoranda repeatedly to structure agency-White House interactions in ways that would constrain policy change or, as with Schedule F,<sup>139</sup> heighten the presidency’s control over government bureaucrats. Presidents since Clinton have used directives, sometimes confused by the press with actual achievement of the desired action, to instruct agency heads to take described actions.<sup>140</sup>

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<sup>134</sup> Karen Zraick, Meet the Key Members of Biden’s Covid-19 Response Team, N.Y. Times, Feb. 24, 2021;

<sup>135</sup> Lisa Friedman, A ‘Nerve Center’ for Climate in the Biden White House, N.Y. Times, Feb. 21, 2021

<sup>136</sup> Aaron J. Saiger, Obama’s “Czars” for Domestic Policy and the Law of the White House Staff, 79 Fordham L. Rev. 2577, 2582-95 (2011).

<sup>137</sup> Nick Miroff & Josh Dawsey, The Adviser Who Scripts Trump’s Immigration Policy, Wash. Post., Aug. 17, 2019.

<sup>138</sup> Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (2018).

<sup>139</sup> Text at note 124 above.

<sup>140</sup> Elena Kagan, Presidential Administration, 114 Harv.L.Rev. 2245(2001).

After some Republican legislators effectively blocked enactment of bipartisan immigration reform legislation, for example, President Obama instructed the Department of Homeland Security to establish programs offering temporary relief from the threat of deportation and work permits to certain illegal immigrants who had long been in the country and law-abiding.<sup>141</sup>

If statutorily authorized, as most are, government agencies using public procedures can adopt regulations (secondary legislation) that if valid have the same force as statutes. But the need for public engagement and prospect of intensive judicial review can slow that process considerably, and recent Supreme Court opinions have suggested some possibility that, after more than two centuries of judicial tolerance for statutorily authorized rulemaking, a conservative Supreme Court will sharply narrow if not wholly eliminate the circumstances in which rulemaking can constitutionally be authorized. Less formal are agency measures that do not directly impose requirements on the public, but nonetheless encourage desired behavioral changes – the use of public databases revealing information that can create public pressure for change, or the deployment of “soft law” guidance announcing agency instructions to staff, interpretations, or plans that serve to create desired expectations; or create new programs to meet a perceived public need. Here, too, litigation can frustrate these measures – an outcome that is not wholly unlikely with a politicized judiciary disposed either favorably or unfavorably to the executive acting.

Our focus in these pages is not on these general characteristics of the American order, but on the new administration’s ability to respond to its predecessor’s embeddings. Executive orders and the like are perhaps the easiest targets, because they are wholly internal documents, lacking external legal force, and readily available in the White House’s electronic archives. One well-established transition-team task is identifying them and identifying those, like Schedule F, that should promptly be withdrawn. This typically happens at an administration’s outset, on inauguration day or soon after. January 20, 2021 saw many revocations, and prompt withdrawals continued at least through January 22, when Schedule F was revoked.<sup>142</sup> A later executive order, issued February 24, revoked a number of others that may have prompted closer study, with dates ranging from February 3, 2017, very soon after President Trump took office, to January 18, 2021, two days before he left it.<sup>143</sup>

Earlier discussion<sup>144</sup> introduced the phenomenon of “midnight rules,” common in all transitions, although the Trump administration’s adoption of 1490 of them fitting that description, with

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<sup>141</sup> The Deferred Action for Childhood Arrivals policy (DACA) sought temporarily to protect law-abiding adults who had been illegally brought into the country as children from deportation, providing them with work authorizations; the subsequent Deferred Action for Parents of Americans (DAPA) policy extended similar benefits to law-abiding parents, illegal immigrants present in the United States for at least four years, whose children were citizens or lawful permanent residents.

<sup>142</sup> Note 126 above. Lists of these executive orders can be found at <https://www.whitehouse.gov/briefing-room/presidential-actions/page/12/>, /13 and /14. (Visited May 8, 2021).

<sup>143</sup> Executive Order on the Revocation of Certain Presidential Actions, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/executive-order-on-the-revocation-of-certain-presidential-actions/> (visited May 8, 2021).

<sup>144</sup> Text at note 33 above.

many of them quite important and sometimes made immediately effective<sup>145</sup> presented a major challenge for the Biden administration. Some of the very latest of these Trump administration regulations were immediately cast aside by the Biden administration. An Inauguration Day Memorandum from the Chief of Staff, long characteristic of transitions, instructed agencies to withdraw from publication or postpone the effective date of any Trump midnight rules that had not yet become effective, until the new agency leadership could review them.<sup>146</sup> Its success is not entirely assured, however; President Trump's administration's efforts summarily to rid itself of Obama rules by a wider range of actions, often undertaken without lawyerly care, met considerable judicial disapproval.<sup>147</sup>

A statutory remedy was available for the remainder of Trump's midnight rules well into May, 2021, although its use was been sharply constrained by other needs for legislative action and by the narrowness of the Biden administration's congressional majorities. During the Clinton administration, Congress had enacted and the President signed the Congressional Review Act [CRA].<sup>148</sup> This Act established an uncomplicated summary procedure for congressional adoption of a simple resolution of disapproval within a limited period of time after receiving required notice of a regulation's adoption, without having to follow the usual legislative processes of committee hearings, reports, and attendant public scrutiny, and protected from procedural obstacles (such as the Senate filibuster) by which a minority of legislators might be able to block its adoption. This process is of little use during the administration of a President whose agencies are responsible for challenged regulations; he can veto the bill disapproving his agency's work, and a successful vote to override that veto is unlikely. Contemplating the "midnight rules" phenomenon, however the CRA extends the time period for this review into the new administration, permitting Congress to disapprove rules adopted late in a President's last year in office during the first weeks of the next presidential term. Thus, when a national election both changes the political control of the White House, and also returns a Congress that the new President's party controls, they may be able summarily to rid themselves of the most objectionable "midnight rules."

Using the CRA, however, requires efforts that consume congressional resources at a time when the new President needs them for other purposes – for example, securing Senate consideration of and (hopefully) consent to his most important appointments. The new President's ability to invoke this remedy is also a function of the extent to which his party controls the Congress. The process of looking back at the prior administration's work, that is, imposes costs on the possibility of present and future achievements. Only one such disapproval occurred after the Clinton-Bush transition and none after Bush-Obama. While the Trump administration succeeded in invoking the CRA to disapprove Obama midnight rules fourteen times, a remarkable upswing, that affected less than a third of the 50 economically significant rules the Obama administration had adopted during its

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<sup>145</sup> Note 38 above.

<sup>146</sup> Regulatory Freeze Pending Review, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/> (visited May 8, 2021).

<sup>147</sup> Note 32 above.

<sup>148</sup> 5 U.S.C. §§ 801–08.

last four months in office, that were open to CRA overturning. By early May, facing the 223 important Trump-administration rules in the CRA's time window, President Biden and the Congress his party so narrowly controls had used the Act only once to disapprove a Trump regulation; reportedly, it was planning only one more such effort.<sup>149</sup>

Other possibilities for removing Trump embeddings remain available. If challenged in still-pending litigation, a potentially effective option for the Biden administration is changing the government's position from defense of the action to acquiescence,<sup>150</sup> or settling the dispute on terms embodying its views – although such “friendly” use of judicial processes is open to criticism. New rulemakings can be undertaken, but at significant costs in agency time and resources; and they would themselves be open to judicial challenge. Lower profile embeddings might be easier to correct, but difficult to find.<sup>151</sup> Thus, the Trump administration will have proved successful in embedding many of its policy preferences in an administration that would prefer to take a different direction.

Readers wishing a more extensive account of the CRA, and of other low-profile tools for accomplishing regulatory roll-back that President Trump had used in his aggressive efforts to defeat Obama initiatives, would do well to consult an extensive, remarkable essay published by Ricky Revesz, the former Dean of NYU's law school, and Bethany Noll that address both of these tools and the ways in which numerous developments in American politics conspire to increase the uncertainty attending any administrations adopting of regulatory change.<sup>152</sup> “Regulation in Transition,” they aptly remark, is the first article to identify and analyze tools for aggressive regulatory rollbacks “largely overlooked, not just by the public, but also by legal scholars.” Their impact, they argue, “will lead to a new conception of the president's regulatory power, in which two terms, rather than just one, are necessary to promulgate significant and lasting regulatory policy.”<sup>153</sup>

### Conclusion

The transition from Trump to Biden, then, is both troubled and troubling. As work on this essay was concluding, Republican senators used the filibuster to block creation of a bipartisan commission to investigate and report on the January 6 assault on Congress by legislation Republican negotiators had accepted as balanced – and in the national transition of such inquiries in response to major national events. The legislative situation, given both the narrowness of Democrat control and the stated priorities of Republican leadership to put all their efforts into blocking the new administration's success – using party discipline to preclude bipartisanship – will not just stymie legislation. The tools of executive power are now in President Biden's hands, and these roadblocks

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<sup>149</sup> Coral Davenport, “Senate Reinstates Obama-Era Controls on Climate-Warming Methane,” <https://www.nytimes.com/2021/04/28/climate/climate-change-methane.html>. The article reports that “Democrats plan to use the procedure just once more in the coming weeks, before their window to do so expires in late May, with a vote to repeal a labor rule that had made it easier for employers to deny worker claims of employment discrimination.”

<sup>150</sup> See note 38 above.

<sup>151</sup> See, e.g., note 13 above

<sup>152</sup> Bethany A. Noll and Richard L. Revesz, Regulation in Transition, 104 MINN. L. REV. 1 (2019.)

<sup>153</sup> Id. at 4.

may tempt him further down the paths his predecessors have taken, asserting increasing control over executive government's functioning, acting on his own where cooperation cannot be had. To repair the political damage President Trump inflicted on the government bureaucracy may prove impossible without President Biden appearing himself still further to thicken the political layers atop the civil service. Admiring his motivations, and troubled by the administration he succeeded, the difficulty is seeing a clear path back to a government constrained by the norms that had long kept our democracy safe.