

## Trump as Administrator in Chief

*di Jud Matherus*

**Abstract:** **Trump come amministratore in capo** – Like his predecessors, President Trump has sought to exert greater control over the apparatus of the administrative state by centralizing control and politicizing agency leadership. In some respects, Trump has pushed the centralization and politicization of administrative power in ways without precedent in the modern presidency. At the same time, many of the President's moves have been ineffectual. Although the Trump administration has been less effective at achieving the President's objectives than it might have been, the President's approach to administration has also caused damage to the institutions of American governance that will take time to repair.

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**Keywords:** presidentialism, public administration, administrative law, federal agencies, bureaucracy.

If there is anything Donald Trump's supporters and critics can agree on, it may be this: he did it his way.<sup>1</sup> In fact, the Trump Presidency has been such a blur of shattered norms and unprecedented behaviors that observers might well wonder whether the concepts and frameworks usually used to understand the American presidency even apply. Certainly with regard to the President's role as leader of the executive branch and the numerous administrative agencies it contains, Trump is no typical Administrator in Chief.<sup>2</sup> When it comes to the President and his relations with executive branch officials and operations, perhaps the best known episodes are Trump firing top officials via Twitter,<sup>3</sup> disputing agency findings on topics from the COVID-19 pandemic<sup>4</sup> to Russian election interference,<sup>5</sup> and decrying

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<sup>1</sup> See F. Sinatra, *My Way*, Reprise Records, 1969.

<sup>2</sup> The term "administrator in chief" has been used to describe the President's leadership of the administrative state at least as far back as the 1920s, see L.S. Short, *The Development of National Administrative Organization in the United States*, Baltimore, 1923, 450-458, but the term has been reintroduced into wide circulation more recently by an excellent article by Ming Hsu Chen. M.H. Chen, *The Administrator-in-Chief*, *Admin. L. Rev.*, Vol. 69, No. 2, 347-430, 2017. See also D.R. Brand, *The President as Chief Administrator: James Landis and the Brownlow Report*, *Pol. Sci. Q.*, Vol. 123, No. 1, 2008, 69-93.

<sup>3</sup> J. Jamerson, *Trump Cleans House; Who Could Be Next?*, *Wall Street Journal*, 14 March 2018; P. Baker & M. Haberman, *Reince Priebus Is Ousted Amid Stormy Days for White House*, *New York Times*, 28 July 2017.

<sup>4</sup> C. Kelly, *Trump Disagrees with Fauci on US Testing Capacity*, *CNN Politics*, 23 April 2020.

<sup>5</sup> L. King & M. Groppe, *Trump's Remarks Disputing Russian Meddling Reverberates Along Senate Campaign Trails Nationwide*, *USA Today*, 17 July 2018.

agency personnel as part of the “Deep State.”<sup>6</sup> Can what we have learned previously about presidential administration help us make sense of a term in office seemingly defined by its aberrance?

Yes. For decades, U.S. Presidents have sought to exert greater control over the apparatus of the administrative state,<sup>7</sup> through strategies of centralizing power and politicizing agency leadership. At the broadest level, many of the Trump administration’s moves have been in the service of one or the other of those strategies. To be sure, things have looked different in the Trump Era. In some respects, Trump has pushed the centralization and politicization of administrative power in ways without precedent in the modern presidency. At the same time, many of the President’s moves have been ineffectual. Trump’s approach to the personnel and policies of his administration has also spotlighted and aggravated a persistent—indeed, inherent—tension between the President as a person and the Presidency as an office. Trump’s predecessors all played the part of President in ways that minimized the tension, but Trump’s refusal to do so has created new challenges.

Every presidency is, in part, a reflection of the President’s personality. Shepherding an agenda through the administrative process requires patience, sustained focus, a willingness to work collaboratively with numerous stakeholders, attention to detail, and respect for procedures, none of which are hallmarks of Donald Trump. And the Trump administration has been less effective at achieving the President’s objectives than it might have been, in part because court challenges to Trump agency initiatives have succeeded at record rates.<sup>8</sup> But Trump’s approach to administration has also caused damage to the institutions of American governance that will take time to repair.

## 1. Presidential Administration

All modern Presidents face a common challenge. They have at most eight years to deliver on the promises they made to voters. Of course they may do so in part by shepherding a policy program through the legislative process, in the manner of Roosevelt’s New Deal or Johnson’s Great Society. But working through agencies is also important, and not only because the frequency of legislative gridlock in recent decades means major legislative

<sup>6</sup> See, e.g., Trump, Donald (realDonaldTrump), ‘The deep state, or whoever, over at the FDA is making it very difficult for drug companies to get people in order to test the vaccines and therapeutics. Obviously, they are hoping to delay the answer until after November 3rd. Must focus on speed, and saving lives! @SteveFDA’, 22 August 2020, Tweet.

<sup>7</sup> The classic account of the administrative law tools modern Presidents—and in particular, Bill Clinton—have used to steer policy is E. Kagan, *Presidential Administration*, *Harv. L. Rev.*, Vol. 114, No. 8, 2001, 2245–2385.

<sup>8</sup> According to data from New York University School of Law’s Institute for Policy Integrity, as of December 7, 2020, Trump Administration agencies had lost 134 out of 162 cases, or 82.7%. Agencies typically win roughly 70% of their cases.

wins are often out of reach.<sup>9</sup> Configuring existing administrative institutions to develop and operate new public policy programs is complicated, however. And because the President's desired outcomes may disrupt existing operations, implicate bureaucratic turf wars, and run afoul of agency personnel's policy preferences, there is no guarantee that everyone in the executive branch will be rowing in the same direction. In the push and pull between Presidents and agencies, time favors the agencies, which existed before the President entered office and will endure after he leaves.<sup>10</sup> President Harry Truman's predecessors and successors would surely share his complaint that the President "spends his time flattering, kissing and kicking people to get them to do what they are supposed to do anyway."<sup>11</sup>

Broadly speaking, Presidents have generally pursued two related strategies to mobilize the executive branch behind their agenda.<sup>12</sup> One is to centralize power, by developing and using resources for steering administrative activity "in house"—that is, in the White House or Executive Office of the President—rather than relying exclusively on the agencies themselves. The second is to politicize administration, by placing like-minded presidential appointees in key policymaking roles at agencies. Neither of these strategies is new: Daniel Galvin and Colleen Shogan argue that they pre-date the modern Presidency, emerging in the mid-nineteenth century.<sup>13</sup> But Presidents have refined them over the years. Perhaps the most important centralizing innovation, which dates back forty years, was the creation of a formalized process for presidential review of all significant regulations before they go public. Presidents have also pushed politicization further over time, reclassifying positions to send political appointees deeper into the organizational charts of agencies.<sup>14</sup>

## 2. Centralization

The basic template for presidential rulemaking review was set early in the Reagan Administration by Executive Order (EO) 12291.<sup>15</sup> Executive branch

<sup>9</sup> See David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-2002*, 2nd Edition, New Haven (CT), 2005; William G. Howell, *Power Without Persuasion: The Politics of Direct Presidential Action*, Princeton (NJ), 2003.

<sup>10</sup> See Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton*, 2nd Edition, Cambridge (MA), 1997, 19-32.

<sup>11</sup> Letter from Harry S. Truman, U.S. President, to Mary Jane Truman, sister, 14 November 1947.

<sup>12</sup> T. M. Moe, *The Politicized Presidency*, in J.E. Chubb & P.E. Peterson, (Eds.,) *The New Direction in American Politics*, The Brookings Institution, 1985, 235-71.

<sup>13</sup> D. Galvin & C. Shogan, *Presidential Politicization and Centralization Across the Modern-Traditional Divide*, *Polity*, Vol. 36, No. 3, 2004, 477-504.

<sup>14</sup> See D.E. Lewis, *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance*, Princeton (NJ), 2008.

<sup>15</sup> Signed 17 February 1981. Reagan's executive order build on foundations laid before, most notably President Carter's Executive Order 12044, signed 23 March 1978. EO 12044 required agencies to conduct regulatory analyses before promulgating major rules,

agencies were required to submit to the Office of Management and Budget (OMB) a regulatory impact analysis for all major regulations, as well as a semi-annual regulatory agenda describing regulations on the horizon. OMB, which is part of the Executive Office of the President, would permit agencies to proceed with a regulation only if persuaded that the benefits exceeded the costs. President Clinton subsequently relocated the review process to the Office of Information and Regulatory Affairs (OIRA), a subunit inside OMB. The presidential rulemaking review process is widely regarded as a key tool that Presidents use to shape their administrations' regulatory output.<sup>16</sup> And once institutionalized, OIRA review serves as a vehicle for Presidents to put their own stamp on the character of regulation, by tweaking the formula for review.<sup>17</sup>

OIRA review is at the center of the Trump administration's most systematic efforts to affect agency output. Executive Order 13771, issued at the start of the Trump presidency, requires agencies to identify two regulations for repeal each time they propose a new regulation, unless prohibited by law.<sup>18</sup> In addition to its "two-for-one" requirement, the Executive Order further requires that the costs of the new regulation be offset by cost reductions from the regulations to be repealed, to the extent permitted by law. In a related vein, Executive Order 13777, issued the following month, requires each agency to designate a Regulatory Reform Officer to oversee the implementation of EO 13771 and establish a Regulatory Reform Task Force to identify regulations as candidates for repeal, replacement, or change.<sup>19</sup>

Executive Order 13771 represents a form of regulatory budgeting: setting a limit to the costs that regulations impose, independent of the benefits that they confer. By requiring that the costs of new regulations be fully "paid for" by cost savings from repeals, the Executive Order effectively sets a regulatory budget of \$0. The idea of a regulatory budget has been around—and has been controversial—for a long time.<sup>20</sup> Critics charge that regulatory budgeting is a crude deregulatory tool that defeats the purpose of cost-benefit analysis by ignoring the benefits side of the ledger.<sup>21</sup> Proponents counter that regulatory budgeting is a necessary corrective to

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although it did not require cost benefit analysis.

<sup>16</sup> See, e.g., S. Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, *U. Chi. L. Rev.*, Vol. 70, No. 3, 2003, 821-885.

<sup>17</sup> For instance, President Obama specified that agencies should take account of the distributive impacts and equity implications of their proposed regulations, and that they should consider alternatives to command-and-control regulation, including providing economic incentives for desired behaviors. EO 13563, signed 18 January 2011.

<sup>18</sup> Signed on 30 January 2017.

<sup>19</sup> Signed on 24 February 2017.

<sup>20</sup> See, e.g., R. W. Crandall, *Federal Government Initiatives to Reduce the Price Level*, *Brookings Papers on Economic Activity*, No. 2, 1978, 401-452.

<sup>21</sup> See, e.g., C. R. Sunstein, *On Neglecting Regulatory Benefits*, *Admin. L. Rev.*, Vol. 72, No. 3, 2020, 445-459.

regulators' tendencies to overestimate the value of regulations and give short shrift to the burdens that the accumulation of requirements over time imposes on regulated parties.<sup>22</sup>

The two-for-one order sounds dramatic, but its impact has been limited. Because many areas of regulatory activity are excluded from its scope by OMB/OIRA guidance, the Trump administration has issued relatively few rules subject to the two-for-one requirement.<sup>23</sup> More generally, the two-for-one policy has had limited bite because Trump administration agencies have shown themselves notably disinclined to propose new regulations in the first place. Most agencies have issued substantially fewer new regulations in the past four years than in recent presidential administrations,<sup>24</sup> and by the administration's reckoning, most of the actions taken by agencies have been de-regulatory in nature.<sup>25</sup> The President received an early de-regulatory assist from the Republican Congress, which used the Congressional Review Act (CRA) to set aside sixteen rules adopted late in the Obama administration.<sup>26</sup>

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The Trump White House has made other moves to shape systematically how agencies operate. Executive Order 13891 does so with respect to agencies' use of guidance documents.<sup>27</sup> Agency guidance is subregulatory in nature: it advises the public on existing requirements rather than imposing new ones. EO 13891 requires agencies to formalize their use of guidance, by developing processes for adopting, amending, and repealing it, and to make all guidance in use available to the public. The White House also instructed the Council on Environmental Quality (CEQ), an office within Executive Office of the President, to revise the regulations implementing the National Environmental Policy Act (NEPA), which requires agencies to conduct environmental impact analyses, in order to streamline the process.<sup>28</sup> The CEQ's final rule, issued months before the 2020 presidential election, substantially changes in one fell swoop how all agencies will conduct environmental impact analyses going forward.<sup>29</sup>

<sup>22</sup> See, e.g., C. Winston, *Government Failure versus Market Failure: Microeconomics Policy Research and Government Performance*, Washington, AEI-Brookings Joint Center for Regulatory Studies, 2006.

<sup>23</sup> K. B. Belton & J. D. Graham, *Trump's Deregulation Record: Is It Working?* *Admin. L. Rev.*, Vol. 71, No. 4, 2019, 803-878, 832-33.

<sup>24</sup> *Id.* at 830-31.

<sup>25</sup> *Id.* at 830.

<sup>26</sup> The CRA permits Congress to undertake expedited review of new federal regulations and to disapprove them by joint resolution. 5 U.S.C. § 801 *et. seq.* Trump's election represented the first time since the CRA was enacted, in 1996, when the Presidency passed into the hands of the party firmly controlling both houses of Congress, setting the stage for a widespread use of the statute's disapproval procedure. (When George W. Bush assumed the Presidency in 2001, Republicans enjoyed a one-vote majority in the Senate for four months, until Senator Jim Jeffords changed his party affiliation to Independent.)

<sup>27</sup> Signed 9 October 2019.

<sup>28</sup> EO 13807, signed 15 August 2017.

<sup>29</sup> Council on Environmental Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, *Fed. Reg.*, Vol. 85, No.

A key Trump innovation has been to use the Department of Justice to imprint White House priorities on agency behavior whenever agencies are in court (which is constantly). Very few agencies have independent litigating authority; rather, they are generally represented in court by the Department of Justice (and, in the Supreme Court, by the Office of Solicitor General). Litigation often extends from one presidential term into another, and administrations typically defend most legacy policies in court. The Trump Justice Department seems to have taken a more strategic approach to legal challenges against Obama-era regulations, often using them as avenues for achieving administration objectives without going through the laborious administrative process. On numerous occasions, the Department of Justice has reversed positions taken by the Obama administration in court,<sup>30</sup> failed to claim the full measure of available deference for agency interpretations of law,<sup>31</sup> and sought abeyances of challenged regulations.<sup>32</sup>

Presidents have long worked to gather the reins of power close, by bringing the locus of decision making into the White House. As institutions that helped previous Presidents coordinate policy become less responsive with the passage of time, Presidents have innovated around them, as Kennedy and Johnson did with the numerous “task forces” they stood up to drive action on priority issues.<sup>33</sup> Trump has sought to locate policy initiative on key areas squarely in his inner circle by assigning leading roles to trusted insiders. Most famously, the President made son-in-law Jared Kushner point person on a large number of high-profile issues, including peace in the Middle East, the border wall with Mexico, and criminal justice reform.

Bringing policy development in-house can be an effective tool for centralizing control, but only when the White House builds effective interfaces between presidential staff and the relevant agency personnel. It is the agencies that ultimately hold the laboring oar when it comes to implementing programs, and it is the agencies that contain the kind of detailed knowledge needed to make a program run smoothly. The insular and anti-institutional character of the Trump administration’s approach to policy has, at times, hampered its effectiveness.

Trump’s signature immigration policy provides a vivid example. The President announced a “travel ban” from seven Muslim-majority countries early in 2017.<sup>34</sup> The order was largely drafted by Steven Miller, a presidential staffer, without the involvement of relevant agency personnel at the State Department and Department of Homeland Security, who were

137, 16 July 2020, 43304-43376.

<sup>30</sup> See, e.g., *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018).

<sup>31</sup> See *Waiving Chevron Deference*, Note, *Harv. L. Rev.*, Vol. 132, No. 5, 2019, 1520-1541.

<sup>32</sup> See B. A. D. Noll & R. L. Revesz, *Regulation in Transition*, *Minnesota L. Rev.*, Vol. 104, No. 1, 2019, 1-100. An abeyance suspends litigation over regulation. Depending on the stage of litigation, the effect can be to keep the regulation from taking effect, or to forestall a likely agency win that would make the regulation more difficult to repeal later. *Id.* at 25-28.

<sup>33</sup> See Moe, *supra* note 12, at 252-53.

<sup>34</sup> Executive Order 13769, signed 27 January 2017.



blindsided by its appearance.<sup>35</sup> A court order blocked major portion of the policy from taking effect in the face of potent constitutional challenges,<sup>36</sup> and the Administration only succeeded in crafting a policy that withstood judicial review on its third try.<sup>37</sup>

### 3. Politicization

It is nothing new for Presidents to place like-minded appointees in leadership positions in agencies, to shape the formation and implementation of policy. The Constitution requires Senate confirmation of presidential nominees to the most significant positions (so-called principal officers) and provides some more flexibility for the appointment of lower-level positions. The bulk of agency personnel are civil servants who serve from administration to administration and enjoy protection against removal. For decades, Presidents have pushed to extend the number of political appointees in agencies, in order to better shape the work of agencies at the source.<sup>38</sup>

To be sure, President Trump has placed staunch loyalists in key positions throughout the administrative state. And there are some notable commonalities to the techniques Trump-appointed agency leaders have used in quite different agencies to advance a deregulatory agenda. Trump appointees have made unprecedented use of suspensions, waivers, exemptions, and related devices to blunt the effect of disfavored regulatory programs.<sup>39</sup> Some observers believe these approaches will continue to find employment future Presidents with a deregulatory bent.<sup>40</sup>

But even though the Trump administration has made political appointments at record levels in some areas,<sup>41</sup> on the whole, the White House was slow to fill positions in many agencies. The Administration's sluggishness in putting forward nominees was in part the product of a chaotic presidential transition. Finding candidates was also a challenge, as the President's team deemed any past criticism of Donald Trump disqualifying, and criticism of Trump among establishment Republicans was common during the presidential primaries. A year into the administration, a

<sup>35</sup> P. Nicholas, D. Paletta, & D. Barrett, *Trump Team Kept Plan for Travel Ban Quiet*, *Wall Street Journal*, 29 January 2017.

<sup>36</sup> *State v. Trump*, No. C17-0141JLR, West. Dist. Wash., 3 February 2017, temporary restraining order.

<sup>37</sup> *Trump v. Hawaii*, 138 Sup. Ct. 2392, 26 June 2018.

<sup>38</sup> See Lewis, *supra* note 14.

<sup>39</sup> See C. Coglianese, G. Scheffler, & D. Walters, *Unrules*, *Stanford L. Rev.*, Vol. 73 (forthcoming 2021); Noll & Revesz, *supra* note 32.

<sup>40</sup> See Noll & Revesz, *supra* note 32, at 100.

<sup>41</sup> See L. Rein, T. Hamburger, J. Eilperin, & A. Freedman, *How Trump Waged War on His Own Government*, *Washington Post*, 29 October 2020 ("For the first time in more than a century, all assistant-secretary slots are filled by acting heads or political appointees."). See also P. C. Light, *The Six Government Reforms We Need in 2021*, Brookings Institution, 14 October 2020 (noting the "Trump administration's use of every available slot [available for political appointments] to enforce party discipline deep into the federal hierarchy").

study by three political scientists could pronounce that the Trump administration had not effectively pursued a politicization strategy.<sup>42</sup> In the years since, the Administration has filled more positions, but vacancies remain at historically high levels. In part, Trump has relied on “acting” officials, who can bypass Senate confirmation, but acting officials can only serve for a limited tenure, under statute.<sup>43</sup>

Having fewer presidential appointees in positions of authority does make it more difficult to deliver on some administration policy priorities. In part, though, the failure to staff up agencies seems to have been deliberate. For an administration seeking to “deconstruct the administrative state,” in the words of presidential advisor Steve Bannon, leaving agencies understaffed can represent a strategic choice.<sup>44</sup> In some instances, the personnel shortages are quite extreme. The Merit Systems Protection Board, responsible for reviewing personnel actions involving civil servants, has had *no* members since early 2019, leaving it unable to adjudicate claims.

The failure to appoint officials complements a strategy of eliminating positions in some disfavored agencies. Trump’s National Security Adviser John Bolton famously disbanded a National Security Council task force on pandemics prior to the outbreak of COVID-19,<sup>45</sup> and his successor Robert O’Brien announced plans to reduce the size of the National Security Council by approximately one-third.<sup>46</sup> In his budgets, Trump has signaled a desire to shut down substantial portions what some agencies do, proposing to slash the State Department’s funds by more than 30%,<sup>47</sup> for instance, and ending 50 programs at EPA.<sup>48</sup> (Congress, which holds the purse strings, has not enacted the President’s proposed cuts.)

While federal law offers civil servants some protection against removal, presidential appointees in some agencies have used other tools to pressure career employees to get with the President’s program. Civil servants who have argued that a course of action desired by agency leadership or the White House is unlawful or not supported by evidence have often found themselves reassigned to less important roles, relocated to less

<sup>42</sup> D. E. Lewis, P. Bernhard, & E. You, *President Trump as Manager: Reflections on the First Year*, *Presidential Stud. Q.*, Vol. 48, No. 3, 2018, 480-501.

<sup>43</sup> 5 U.S.C. § 3345 *et seq.* (Federal Vacancies Reform Act of 1998); see J. Eilperin, J. Dawsey, & S. M. Kim, ‘It’s Way Too Many’: As Vacancies Pile Up in Trump Administration, Senators Grow Concerned’, *Washington Post*, 4 February 2019.

<sup>44</sup> P. Rucker & R. Costa, *Bannon Vows a Daily Fight for “Deconstruction of the Administrative State”*, *Washington Post*, 23 February 2017.

<sup>45</sup> L. H. Sun, *Top White House Official in Charge of Pandemic Response Exits Abruptly*, *Washington Post*, 10 May 2018.

<sup>46</sup> R. C. O’Brien, *Here’s how I will streamline Trump’s National Security Council*, *Washington Post*, 16 October 2019.

<sup>47</sup> F. Schwartz, *Trump Administration Proposes 32% Cut to State Department Budget*, *Wall Street Journal*, 23 May 2017.

<sup>48</sup> R. Beitsch & R. Frazin, *Trump Budget Slashes EPA Funding, Environmental Programs*, *The Hill*, 10 February 2020.



desirable locations, or denied advancement.<sup>49</sup> A 2019 report issued by the State Department's Office of Inspector General documents how career employees were mistreated at that agency, leading to a number of resignations.<sup>50</sup> Comprehensive data are hard to come by, but media reports suggest that turnover among career employees has been high by historical standards in the Trump Era, especially in agencies perceived to be out of step with the President's agenda, just as turnover has been unusually high among top officials.<sup>51</sup>

In 2018, Trump took steps to assert a role in selecting officials previously walled off from presidential influence: Administrative Law Judges (ALJs). In the 2018 *Lucia v. Securities and Exchange Commission* decision, the U.S. Supreme Court concluded that at least those ALJs working for the Securities and Exchange Commission were officers of the United States.<sup>52</sup> Less than a month later, Trump issued an Executive Order exempting ALJs from the competitive, exam-based selection process previously used and providing instead that they could be selected by the heads of departments.<sup>53</sup> The bulk of ALJs adjudicate social security disability claims. But other ALJs rule on more policy-salient matters, and they frequently represent the agency's last word on a subject. Making ALJ appointments gives the President the power to push his agenda deep into the adjudicatory processes of the administrative state.<sup>54</sup>

That move prefigured a more dramatic one in the waning months of the Trump administration: the move to reclassify civil servant positions to a new "Schedule F" status, bypassing the civil service competitive appointment process as well as the protections against unwarranted removal. Trump announced the change by an Executive Order dated October 26, 2020.<sup>55</sup> Agency heads were to determine which positions could be classified under Schedule F; hundreds of thousands of positions could have been affected.<sup>56</sup> The creation of a professionalized civil service insulated against patronage politics, which dates to the 1883 Pendleton Act, was the defining "good government" achievement of the late nineteenth century. Had Trump been elected to a second term, his chief legacy might well have been to reverse this achievement, by de-professionalizing much of the

<sup>49</sup> See Rein et al., *supra* note 41.

<sup>50</sup> U.S. Department of State, Office of Inspector General, *Review of Allegations of Politicized and Other Improper Personnel Practices in the Bureau of International Organization Affairs*, August 2019.

<sup>51</sup> See, e.g., R. Gramer, D. De Luce, & C. Lynch, *How the Trump Administration Broke the State Department*, *Foreign Policy*, 31 July 2017.

<sup>52</sup> *Lucia*, *supra* note 30.

<sup>53</sup> Executive Order 13843: Excepting Administrative Law Judges from the Competitive Service, signed July 10, 2018.

<sup>54</sup> E. Wagner, *OPM Moves to Formally Shift Administrative Law Judges Out of Competitive Service*, *Government Executive*, 18 September 2020.

<sup>55</sup> Executive Order 13957: Creating Schedule F in the Excepted Service.

<sup>56</sup> T. Stretton, *Trump's New Executive Order Would Enable Government Corruption*, *Project on Government Oversight*, 30 October 2020.

administrative state. Joe Biden's victory, however, puts this out of the President's grasp.

#### 4. Embodying the Presidency

The last point that deserves mention is how this President inhabits the office of the Presidency.

More than sixty years ago, Ernst Kantorowicz explained how English constitutional thought grappled with the duality of King and Crown—a mortal who embodies a monarchy—in his famous book *The King's Two Bodies*. This summer, Daphna Renan explored a set of parallel puzzles for American public law in a law review article titled *The President's Two Bodies*.<sup>57</sup>

The presidency is an office, and the actions and utterances of the officeholder are vested with legal significance as a result. The modern presidency is thoroughly institutional, with structures, processes and norms built up over time. The President is also a person. And as Theodore Lowi cautioned more than thirty years ago, the Presidency has also become more personalized even as it has become more institutionalized.<sup>58</sup> Presidents and would-be Presidents compete for the public's trust not just on policy, but on the personal brand of leadership they bring to the position. The nature of relationship between the person of the President and the office of the presidency lies just beneath the surface of many constitutional controversies, Renan argues.

Normally, Presidents work hard to massage the tension between person and office, by playing the part of President according to a familiar script. Donald Trump has exposed and inflamed the tension, by instead playing the part of Donald Trump. Trump did not seem to perceive the presidency as an office, as a public trust, but merely a collection of powers and prerogatives for him to use as he pleases. Trump's transactional approach to the job not only made for breaches of decorum and tradition but also created legal issues. Asking someone to do you a favor is okay, but not necessarily if you are the President, he is the head of the FBI, and the favor is to drop a criminal investigation of your political ally. Or if you are the President, he is the President of another country, and the favor is to investigate a political rival, in exchange for military aid promised by Congress.

The President's unconstrained comments have also created challenges when he has sought to execute on his political agenda. As mentioned, the President's travel ban drew immediate legal challenges. The government lawyers defending the revised ban against claims it discriminated on the basis of religion had to answer for candidate Trump's promise of a "Muslim

<sup>57</sup> D. Renan, *The President's Two Bodies*, Colum. L. Rev., Vol. 120, No. 5, 2020, 1119-1214.

<sup>58</sup> T. Lowi, *The Personal President: Power Invested, Promise Unfulfilled*, Ithaca (NY), 1986.

ban,” as well as President Trump’s tweets criticizing the revised ban for not going far enough. As Renan notes, the case forced the Supreme Court to confront a gap between what Donald Trump said and the Trump administration represented, and to decide how much the President’s intent mattered to the constitutionality of his administration’s policy.<sup>59</sup> (Perhaps not surprisingly, the Justices did not agree.)

Trump’s criticism of the revised travel ban issued by his own Justice Department was not an isolated incident. Trump ran as a political outsider, and remarkably, he maintained the stance even as he moved to the very center of American government. And so he has heaped blame and scorn on the executive branch, and complained publicly about the behavior of the Cabinet officials he selected and could remove at will. For four years, we witnessed the person of the President at war with the institutions of American government.<sup>60</sup>

In the end, the President’s apparent contempt for the processes of administrative governance was one reason he failed to accomplish more of his agenda. Trump’s agencies lost in court more than any other President’s, by a substantial margin.<sup>61</sup> Administrative law doctrine requires agencies to follow procedures and to give reasoned explanations for their actions, and many of the Trump administration’s agency actions skipped important steps or defied rational explanation. While the Trump administration leaves some wreckage in its wake, the courts’ insistence on upholding administrative law principles kept the damage from being worse.

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<sup>59</sup> Renan, *supra* note 57, at 1198-1201.

<sup>60</sup> David Lewis captures a similar point with his observation that Trump positioned himself as President but not chief executive. D. E. Lewis, *Deconstructing the Administrative State*, *Journal of Politics*, Vol. 81, No. 3, 2019, 767-789.

<sup>61</sup> See *supra* note 8; see also F. Barbash & D. Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, *Washington Post*, 19 March 2019.