# Trump's Fight against the Regulatory State: Reloaded

*di Nausica Palazzo e Leonardo Parona*

**Abstract: La battaglia trumpiana contro il *Regulatory state*: Atto II –** The aim of the article is, first, to verify the ongoing relevance of the claim that Trump's Presidency is characterized by a departure from consolidated case law and conventional practices. A second, separate aspect regards whether this departure, if confirmed, is set to be temporary or yield long-lasting effects on the Constitution. The areas that are explored to confirm the ongoing validity of the claim are 4. Section 2 looks at the Congressional Review Act, to discern if Trump has persisted in its 'aggressive' recourse to the Act to overrule agencies' regulations. Section 3 addresses the issue of the Chevron waiver. Section 4 moves on to shed light on the implementation of the Regulatory Reform introduced by executive orders 13.771 and 13.777, seeking to curb agencies' regulatory bloating. Section 5 is devoted to understanding how Trump has battled the use of guidance documents by agencies to surreptitiously introduce new rules (without going through standard administrative procedures).



**Keywords:** deregulation, rulemaking, guidance, Trump, Chevron.

## 1. Introduction

This article builds on a previous research paper drafted at the time of the Bocconi University's conference on the first two years of Trump's Presidency. On that occasion, the research focused on the relationship between President Trump and federal agencies, and on whether his approach was in line with that of his predecessors or characterized by discontinuity. Based on the conducted analysis, an argument was made that Trump's era was marked by a deliberate departure from consolidated case law and conventional practices.

This bold claim was sustained in light of the unorthodox use by President Trump of a host of tools, which, despite being oftentimes 'legal', were somewhat situated on the edge of the law. In particular, the beginning of its Presidency seemed to be characterized by a penchant for 'twist[ing] existing legal rules, whether procedural, administrative or constitutional, and overlook[ing] consolidated practices'.[1] Aware that in 2018 only two

© The article is the result of shared reflections of the two Authors. Nausica Palazzo authored s. 2 and s. 3, while Leonardo Parona authored s. 4 and s. 5. Ss. 1 and 6 have been written jointly.

[1] N. Palazzo, *Tiptoeing on the Edge of the Law: How Trump is Fighting the Regulatory State*, in G.F. Ferrari, *The American Presidency Under Trump: The First Two Years*, The Hague, 2019.

years of the Presidency had elapsed, this article offers a precious opportunity for the two Authors to put to test such a claim and verify whether that bold attitude was continued in the remaining years of the President's term.

The aim of the article is hence to verify the ongoing relevance of the claim that Trump's Presidency is characterized by a departure from consolidated case law and conventional practices. A second, separate aspect which would be worth inspecting regards whether this departure, if confirmed, is set to be temporary or yield long-lasting effects on the Constitution. His efforts to put campaign promises and first statements as President into practice undoubtedly had an impact on federal agencies' regulatory activity. The consequences – both overt and covert – of this impact are, however, a matter of debate and only future developments (what we could call 'life after Trump') will shed light on their magnitude and impact on constitutional law.

In the previous work, the claim regarding Trump's observed departure from consolidated law and conventional practices was especially sustained on account of the following four grounds:

(i) an unprecedented recourse to the Congressional Review Act (CRA) to rescind previous regulations;
(ii) the freezing a of agencies' administrative action following the one-in-two-out rule;
(iii) statutory abnegation claims giving rise to major agencies' policy shifts;
(iv) a waiver of the *Chevron* deference by agencies themselves.



Evolving circumstances warrant a reflection on whether all such grounds are still relevant, including a reflection on whether new, additional aspects should be considered. Overall, it can be anticipated that all grounds seem to be of ongoing relevance, but for statutory abnegation claims. With respect to this ground there was no noteworthy evolution.

A new aspect seemed worth inspecting: Trump's attempts at curbing an unorthodox use of guidance by the agencies, and at imposing a stricter political control over them. Similar drivers and policy objectives seem to inspire the President's action in this area, namely, a desire to expand his reach over the regulatory process.

As to the roadmap this article follows, the next section (Section 2) is devoted to the Congressional Review Act, with an aim to discern whether a Red Congress has persisted in its 'aggressive' recourse to the Act to overrule agencies' regulations. Section 3 addresses the increasingly 'popular' issue of the *Chevron* waiver, while also providing a cursory overview of the notion of statutory abnegation claims and explain why the ground is no longer relevant to the analysis of the last two years of Trump's term. Section 4 then moves to shed light on the implementation of the controversial Regulatory Reform introduced by executive orders 13.771 and 13.777. It especially seeks to inquire whether the order has lived up to the expectation of drastically curbing agencies' regulatory bloating. Section 5 is devoted to understanding how Trump has battled the use of guidance documents on the part of agencies to surreptitiously introduce new rules (without going

through standard procedures set forth by the Administrative Procedure Act). Ultimately, the two Authors offer some concluding remarks regarding the ongoing relevance of the central claim stated above: Trump's penchant for circumventing established laws and practices to deliver on his pledge to reduce the excesses of the regulatory state.

## 2. Congressional Review Act

The applicability of the Congressional Review Act (CRA) is still of great relevance: It is both relevant to the assessment of the Trump's Presidency and, most crucially, to the prediction of some perspective scenarios to which the Presidency's bold attitude has laid ground for. Its bolder approach to reviewing regulations under CRA might indeed open the door to the possibility for a future Democratic president to do the same and overrule many unpopular regulations issued under Trump. Of course, recourse to CRA becomes especially appealing in times of transitions in government. A re-elected president has no interest in (directing Congress to) dismantling her own regulations, while a president with a different party affiliation might be lured by this possibility. Therefore, should Trump be re-elected the issue of shielding regulations from Congressional overturning will be less relevant. By contrast, should Biden win the elections – which at the time this contribution is written seems to be the case, despite weak legal challenges brought to state electoral results –, it will be interesting to see whether Biden will follow suit in adopting a more expansive and aggressive interpretation of the Act to undo previous rules.



More in detail, the CRA confers upon Congress a possibility to overturn final rules issued by a federal agency,[2] especially major rules.[3] Therefore, once a federal agency issues a new major rule, the Act will require any agency to notify each house of Congress and the Comptroller General of the Government Accountability Office (GAO), so as to allow congressional supervision. If Congress decides to 'halt' the new rule, it will issue a resolution of disapproval within 60 days (or more if Congress is adjourning) through a fast-track legislative procedure.[4] Once a resolution of disapproval is issued, the federal agency is prevented from issuing both the same rule and rules in 'substantially the same form' as the halted rule.[5] Therefore, the Act sets forth an effective veto power allowing Congress to block new rules and prevent any agency to issue similar rules in the future.

[2] Congressional Review Act, 5 U.S.C. §§ 801–802 (2012). On which *see* Maeve P. Carey et al., Cong. Research Serv., R43992, Congressional Review Act: Frequently Asked Questions 14 (2016).
[3] The definition of "major rules" is patterned after the definition set forth in the Administrative Procedure Act. Usually, they are rules with costs of $100 million or more.
[4] The expedited procedure under the Act, while complying with two requirements under Chadha of bicameralism and presentment, still allows for bypassing a filibuster and passing the resolution by a simple majority. See 5 U.S.C. § 802(d)(1). As to the presentment and bicameralism requirements, applying to legislative vetoes, *see Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).
[5] 5 U.S.C. § 801(b)(2).

It is worth recalling that Trump has made an unprecedented use of the Act in the first two years of his term, by directing Congress to halt a number of disagreeable rules issued by Obama. While from 1996, i.e. the year of its enactment, only once had the Act been used to block an agency rule,[6] Trump availed itself of this power to block fourteen agency regulations[7] in fields as varied as the protection of streams from mining debris,[8] background checks for purchasing firearms,[9] a host of rules of the Department of Education.[10] After the article had been submitted, Congress used this tool two more times through 2018.[11]

As reported by the Congressional Research Service, as of January 2020, no other regulation has been overturned through the CRA.[12] This is understandable. Mentioned rules were more or less issued at the tail end of Obama administration. Hence, the initial 'impetus' was somewhat necessitated by the logic underpinning Trump's recourse to the Act: successfully blocking mid-night rules.



While this is true, it is also true that the most aggressive approach was the consequence of a broad and unorthodox interpretation of the Act which virtually makes all rules that have not been sent to Congress vulnerable to congressional review.[13] Usually sub-regulatory guidance or mere policy statements were not considered rules for purposes of CRA and were thus not submitted by agencies. This is why it was possible for him to overturn a 2013 guidance by the Consumer Financial Protection Bureau on racial discrimination in auto lending.[14] A similar non-textual interpretation entails that for non-submitted rules there is basically no deadline for congressional reaction and that Congress could block all of a sudden, *any* rule which has

[6] Ergonomics Program, 65 Fed. Reg. 68,262 (Nov. 14, 2000), disapproved by Pub. L. 107-5, 115 Stat. 7 (2001.)

[7] For a list of these regulation, *see*: E. Lipton & J.e C. Lee, *Which Obama-Era Rules Are Being Reversed in the Trump Era*, N.Y. Times, 18 May 2017, www.nytimes.com/interactive/2017/05/01/us/politics/trump-obama-regulations-reversed.html [accessed: 20 Dec., 2020].

[8] Pub.L. 115–5, H.J.Res. 38 (February 16, 2017).

[9] Pub.L. 115–8, H.J.Res. 40 (February 28, 2017) ("Providing for congressional disapproval ... of the rule submitted by the Social Security Administration relating to Implementation of the NICS Improvement Amendments Act of 2007").

[10] Pub.L. 115–13, H.J.Res. 57 (March 27, 2017) ("Providing for congressional disapproval ... of the rule submitted by the Department of Education relating to accountability and State plans under the Elementary and Secondary Education Act of 1965"); Pub.L. 115–14, H.J.Res. 58 (March 27, 2017) ("Providing for congressional disapproval ... of the rule submitted by the Department of Education relating to teacher preparation issues.").

[11] B. Dooling, GAO's role in the regulatory state, Brooking, March 17, 2020, www.brookings.edu/research/gaos-role-in-the-regulatory-state/ [accessed: Dec. 21, 2020].

[12] Congressional Research Service, The Congressional Review Act (CRA): Frequently Asked Questions, R43992, January 14, 2020, at 30 fas.org/sgp/crs/misc/R43992.pdf [accessed: Nov. 21, 2020].

[13] The Act allows for overturning rules within 60 days from their submission for congressional oversight. However, Trump has taken it to mean that non-submitted rules must be submitted, and this is when the 60-day period starts ticking.

[14] GAO, B-330736, Bureau of Consumer Financial Protection: Disclosure of Loan-Level HMDA Data, www.gao.gov/assets/700/697072.pdf [accessed: Feb. 21, 2019].

not been sent to it for review. This explains why in the last two years of the term, the attention of Trump's administration shifted instead onto immunizing its own rules from scrutiny rather than tracking down previous non-submitted rules to reverse them. With this aim in mind, his administration has worked diligently to predict when the cut-off date to immunize rules from future scrutiny would be. It then submitted as many rules as it could before such date to prevent a Democratic-led Congress from blocking them. Predicting the cut-off date was not easy since it hinged on predicting how many session days are left in the Senate and how many 'legislative days' in the House. The number of sessions has been more uncertain than ever due to the pandemic. As of August 28, 2020, the lookback period was starting on June 1, 2020 (based on the number of days the two Houses had been in session and on their calendar until December 31).[15] But again, the exact cut-off date might still change based on when Congress will hold its sessions until the end of the year.

The flip side of the coin is, of course, that non-submitted rules are vulnerable to future review by Congress, regardless of when they were entered into. Trump's adventurous interpretation of the Act exposes in fact hundreds of Trump-era rules which have not been submitted to Congress to post-electoral review by a Democratic-led Congress. For instance, many deregulatory actions he took could be overturned by democrats. Agencies like the Environmental Protection Agency (EPA) and the Interior, Occupational Safety and Health Administration (OSHA) made an extensive recourse to guidance. Guidance, as well as policy statements or dear colleague letters, do not qualify as rule under the Act as it is a sub-regulatory action (despite Section 5 illustrating how incisive the use of guidance can be done to introduce new legislative rules, rather than mere interpretative rules). Therefore, it is not sent to Congress for review. It will be interesting to see whether Biden will insist on this unorthodox interpretation to overturn many non-submitted deregulatory actions undertaken by Trump. In our view, the practice should be discontinued as based on a non-textual, strongly questionable interpretation of the term "rule" under the Act.



### 3. *Chevron* Waiver and statutory abnegation claims

Looking at the 2016-2018 period, one is induced to think that the President showed a bolder attitude at the outset of his term. Yet, this was dictated by a necessity to discontinue the course of Obama's Presidency and its broad delegations of authority to federal agencies to cover a host of policy areas, such as health care, discrimination, education. In the courtroom, an obstruction of litigation strategies of the previous administration was achieved on one occasion through a fairly novel tool: the *Chevron* waiver.

[15] J.M. Auslander, M. Boyer, D.M. Friedland, A.L. Stern, J.B. Zietman, *Recent and Forthcoming Environmental Rules and Guidance Could Be Reversed Under Congressional Review Act: Three Steps for Stakeholders to Consider*, *The Nat'l L. Rev.*, October 1, 2020, Vol. X, No. 275.

*Chevron* deference or *Chevron* doctrine[16] is the standard of review for agencies' rules "carrying the force of law."[17] The logic behind is granting an agency a certain leeway in interpreting the governing statute a rule is intended to implement. The standard is deferential[18] and usually allows courts to only set aside interpretations which are clearly wrong.[19] In this sense, a *Chevron* waiver on the part of an agency is tantamount to relinquishing its right to defend the rule in the courtroom. When the agency fails to invoke *Chevron* deference it seeks to reverse course during litigation. However, this is a problem from the perspective of modern administrative law. Agencies cannot merely change their mind at will. APA sets forth lengthy and detailed formal procedures whereby agencies can 'change their minds' and rescind previous rules. Relinquishing the prerogative to defend previously enacted rules in court is tantamount to eschewing APA and can thus amount to irrational, arbitrary rulemaking, as defined in case law. This is why recent legal scholarship interrogating this novel and pressing issue tends to condemn the practice.[20] The seriousness of the conduct is such that courts should be entitled to react, they argue. Hence, a failure to argue for deference when the rule plainly occasions its application should not prevent the reviewing court from granting it.[21]



In the past mid-term, this unorthodox (non)use of *Chevron* deference occurred in *Global Tel*Link v Federal Communications Commission*,[22] a case filed prior to Trump's election and decided in the aftermath of his election. It concerned a previous administration's order[23] seeking to reduce the price

[16] *Chevron, U.S.A., Inc v Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984). The Chevron question arises where an agency issues: (1) a rule interpreting a statutory term or rule as a matter of "genuine interpretation": e.g. what the statutory term "take" means, (2) a legislative rule filling a vacuum or an unclear passage of the statute, under the assumption that Congress wanted the agency to fill it.

[17] United States v Mead Corp, 533 US 218 (2001).

[18] *See* C.R. Sunstein, *Chevron Step Zero*, *Va. L. Rev.*, Vol. 92, 2006, 187, 188-89. In light of the breadth of the margin of discretion Chevron recognizes, the success rate of agencies is high. *See* K. Barnett & C.J. Walker, *Chevron in the Circuit Courts*, *Mich. L. Rev.*, Vol. 116, 2017, 3031.

[19] Usually, under *Chevron* step one, the court will ask: "Has Congress directly spoken to the precise question at issue?" At this stage the issue is whether an agency's interpretation is clearly precluded. See *MCI Telecommunications Corporation v. American Telephone & Telegraph Company*, 512 U.S. 218 (1994). Then, under step two, the court will ask: "If the statute is silent or ambiguous, did the agency's answer is based on a permissible construction of the statute?" Only patently unsustainable interpretations are crossed out at this stage. See *Food and Drug Administration v. Brown & Williamson*, 529 U.S. 120 (2000).

[20] J. Durling & E.G. West, *May Chevron Be Waived?*, *Stan. L. Rev. Online*, Vol. 71, 2019, 183; and J.D. Rozansky, *Waiving Chevron*, U. *Chi. L. Rev.*, Vol. 85, 2018, 1927. See also Note, *Waiving Chevron Deference*, *Harv. L. Rev.*, Vol. 132, 2019, 1520.

[21] A.L. Nielson, *D.C. Circuit Review – Reviewed: Chevron Waiver*, *Yale J. on Reg.: Notice & Comment*, April 12, 2019, www.yalejreg.com/nc/d-c-circuit-review-reviewed-chevron-waiver/ [accessed: Dec. 21, 2020].

[22] 866 F.3d 397 (D.C. Cir. 2017).

[23] Rates for Interstate Inmate Calling Services, 80 Fed. Reg. 79136, 79137 (2015). The Court eventually stayed the order with respect to 47 C.F.R. § 64.6030 (imposing interim rate caps). See the Court order available on the FCC website: www.fcc.gov/document/court-order-granting-partial-stay-global-tellink-v-fcc-dc-cir [accessed: Dec. 20, 2020].

of interstate inmate calling services (ICS) calls, which had become exorbitant and prohibitive for inmates. After Trump's electoral victory, new heads of the Federal Communications Commission were appointed. These new officers, however, did not share the purpose of the rule seeking to mitigate costs for inmate calling services, and deliberately and intelligently failed to invoke *Chevron* in the court.

We do observe a further failure to invoke *Chevron* in the courtroom in *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives.*[24] This failure is even most notable compared to the previous one since Trump's administration is now de facto dissociating itself from its own rule rather than a rule issued under Obama's Presidency. The facts of the case are worth discussing. In October 2017, a massive shooting occurred at a concert in Las Vegas where a lone gunman with bump-stock-enhanced semiautomatic weapons killed 58 people and wounded hundreds from a hotel window. After that shocking episode Trump promptly reacted by directing the Bureau of Alcohol, Tobacco, Firearms and Explosives to promulgate a rule classifying bump stocks as prohibited machine guns under the law.[25] The rule was then appealed by pro-guns advocates before D.C. District Court, and then before the D.C. Circuit Court.[26]



The decision of the Circuit Court is of special interest to the extent it addresses head on the issue of the waiver. Interestingly, the government seemed to have disclaimed any authority to invoke *Chevron* before the District Court, contending that the new rule did not attract *Chevron* deference.[27] The Court decided to set limitations on this questionable practice. It did so by equating forfeiture (unvoluntary failure to invoke *Chevron*) and waiver (deliberate and intelligent refusal to invoke it) and thus imposing the same limitations of forfeiture on waiver.[28] The Court went on to argue that

Allowing an agency to freely waive *Chevron* treatment in litigation also would stand considerably in tension with basic precepts of administrative law. [...] A waiver regime, moreover, would allow an agency to vary the binding nature of a legislative rule merely by asserting in litigation that the rule does not carry the force of law, even though the rule speaks to the public with all the indicia of a legislative rule. Agency litigants then could effectively amend or withdraw the legal force of a rule without undergoing a new notice-and-comment rulemaking. That result would enable agencies to circumvent the Administrative Procedure Act's requirement "that agencies use the same procedures when they amend or repeal a rule as they

[24] *Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 920 F.3d 1 (D.C. Cir. 2019)
[25] National Firearms Act, 26 U.S.C. §§ 5801 – 5872. See Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) ("Bump-Stock Rule").
[26] *Guedes*, supra n. 24.
[27] Id, par. 21.
[28] *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 54 (D.C. Cir. 2018) (the doctrine is forfeited only if the agency fails to "manifests its engagement in the kind of interpretive exercise to which review under Chevron generally applies—i.e., interpreting a statute it is charged with administering in a manner (and through a process) evincing an exercise of its lawmaking authority)".

*DPCE online*
ISSN: 2037-6677

used to issue the rule in the first instance."[29]

To this firm rejection, however, did not correspond a firm rejection by the Supreme Court. On April 23, 2020 the Supreme Court decided the *County of Maui v. Hawaii Wildlife Fund* case. The decision prompted a flurry of comments on whether the Court had repudiated any limits on forfeiture and waiver of the *Chevron* doctrine (and thus on whether *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives* had been overturned). It seems, however, that the Court has not explicitly taken up the issue of the waiver, which only surfaces in a line of Breyer's opinion regarding a question that would not have attracted *Chevron* deference in any case.[30] Thus, it still remains unsettled and it will be interesting to see what the new term of the next Presidency will hold. To conclude, *Guedes* continues to be a controlling precedent and thus it seems that so far there is a legal basis to reject any further attempt on the part of an administration to relinquish its defense rights so as to circumvent the lengthy (and politically costly in the case of the Vegas shooting!) procedures to repeal previous rules. There is, however, a possibility that the Supreme Court might want to take up and address this issue head on in the future. It will be interesting to see what a now clearly conservative Supreme Court will have to say about it.



A second technique to rescind previous rules that the previous paper discussed was the adoption of the so-called statutory abnegation claims. Such claims consist in a cursory allegation that the agency lacks power to regulate a matter, despite such power having previously been asserted. This kind of claim was commonplace in policy reversals occurred in the years 2017 and 2018.[31] While it is commonplace for an agency to rethink previous rules and base their repeal, inter alia, on a lack of authority, what seemed to be striking two years ago was the lack of thorough analysis of the policy context, costs, objectives which always needs to inform rulemaking (including a rescission of previous rules, which is equated to rulemaking for purposes of APA). A similar analysis was completely lacking, thereby amounting to arbitrary rulemaking. There were no remarkable changes on this front. This seems understandable in light of the fact that reaction to the 'most hated' rules had been prompt and had already occurred in the first two years.

## 4. Hidden motives and consequences of the Regulatory Reform: deregulating at what cost?

The recent Final Accounting Report for Fiscal Year 2019[32], together with

[29] *Guedes*, supra n. 24, parr. 22-23.
[30] K.E. Hickman, *County of Maui & Chevron Waiver — Let's Not Get Carried Away*, *Yale J. on Reg.: Notice & Comment*, April 27, 2020, www.yalejreg.com/nc/county-of-maui-chevron-waiver-lets-not-get-carried-away/.
[31] See e.g. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,037 (proposed Oct. 16, 2017). The new interpretation concerned Section 111(d) of the Clean Air Act, which set forth the agency power to regulate the matter.
[32] Released every December by the Office of Information and Regulatory Affairs (OIRA) and available

the Spring 2020 Unified Agenda of Federal Regulatory and Deregulatory Actions[33] provide updated and valuable data to discuss the implementation of the Regulatory Reform and to weigh its consequences. As anticipated in our "Introduction", the considerations that will be offered in the present paragraph build on previous and more detailed analysis of the reform introduced by executive orders 13771 and 13777[34]. For our purposes it will therefore suffice to briefly recall its main features, starting with the fundamental – and declared – goal of reducing the costs and burdens generated by federal regulations[35]. The reform's deregulatory thrust, as it is well known, is represented on the one hand by the zero-net-cost policy, which deals with the maximum amount of regulatory costs agencies are allowed to introduce every year, and, on the other hand, by the one-in-two-out policy, which requires agencies to repeal at least two previous regulations for every new one they propose to issue. From the point of view of the organizational asset of the federal bureaucracy, moreover, the reform envisages a more active control of the Office of Management and Budget (OMB), whose Director has been charged, among other things, with approving the regulatory budget and fixing for each agency an annual total incremental cost allowance. Federal agencies (except for independent regulatory commissions) have as well experienced significant changes in their organizational structure, with the creation of Regulatory Reform Task Forces which, besides ensuring compliance with the new policies, carry out regulatory planning, regulatory review, and retrospective review activities.



The picture resulting from the Regulatory Reform shall be completed in light of further interventions that moved in two directions: on the one hand, the President addressed the issue of reducing presumed inefficiencies also intervening on aspects of the federal machinery other than costs and burdens posed by the regulatory process; on the other hand, he further

at:www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2019.pdf [accessed: Dec. 21, 2020].

[33] The Agenda, published twice a year by the OIRA, is useful to understand the priorities and the direction of the implementation of regulatory policies. It consists of an extensive and comprehensive report that, according to sec. 4(b) of E.O. 12866, all federal agencies must prepare, listing each regulatory action they expect to work on in the following twelve months. The latest version (Spring 2020) published on June 30, 2020 is available at: www.reginfo.gov/public/do/eAgendaMain [accessed: Dec. 21, 2020].

[34] Executive order 13771 of January 30, 2017 "Reducing Regulation and Controlling Regulatory Costs", and 13777 of February 24, 2017 "Enforcing the Regulatory Reform Agenda. For a first analysis see: L. Parona, *Riforme recenti e prospettive future del rulemaking statunitense*, *Riv. Trim. Dir. Pubbl.*, 2018, Vol. 4, 1145 ff.; N. Palazzo, *Tiptoeing on the Edge of the Law*, cit.

[35] It must be reminded that the reform only applies to executive agencies, to other agencies (administration, bureaus, offices) within the federal departments, and to two independent executive agencies (*i.e.* the Environmental Protection Agency and the National Aeronautics and Space Administration). Independent agencies and regulatory commissions are instead exempted, although they are invited to comply with the reform's requirements, as specified by OMB Memorandum of April 28, 2017 (M-17-23) "Guidance on Regulatory Reform Accountability under Executive Order 13777". On the various forms and institutional arrangements of administrative agencies see B. Marchetti, *Pubblica amministrazione e corti negli Stati Uniti. Il judicial review sulle administrative agencies*, Padua, 2005, esp. 23 ff.

DPCE online
ISSN: 2037-6677

articulated the deregulatory initiative with reference to specific – and allegedly strategic – sectors.

As far as the first aspect is concerned (*i.e.* the efficiency motif), at the beginning of 2017 the President instructed the Director of the OMB to "reorganize governmental functions and eliminate unnecessary agencies … components of agencies, and agencies programs"[36]. He then required agencies to prioritize actions that "cut costs" when pursuing environmental and energy sustainability goals[37]. The following year, executive departments and agencies were requested to develop an efficient, effective and cost-reducing approach to federal sector collective bargaining[38]. Furthermore, E.O. 13875 of 2019 established agencies' duty to terminate at least one-third of their advisory committees, in case: i) their objectives have been accomplished; ii) their subject matter has become obsolete; iii) their primary functions have been assumed by another entity; iv) the cost of their operation is excessive in relation to the benefits[39]. Finally, the Regulatory Reform has been reinforced by last year's E.O. 13893, which directed agencies to "consider the costs of their administrative actions, take steps to offset those costs, and curtail costly administrative actions"[40].



With reference to the second aspect (*i.e.* the sectoral implementation of the deregulatory initiative), besides actions individually undertaken by federal agencies under the supervision of the various Regulatory Reform Task Forces and in conformity with OMB prescriptions, the President intervened directly to reinvigorate the deregulatory trend in a considerable number of specific sectors, such as: health[41], finance[42], commerce[43],

[36] §1, Executive Order 13781 of March 13, 2017 "Comprehensive Plan for Reorganizing the Executive Branch".
[37] §1, Executive Order 13834 of May 17, 2018 "Efficient Federal Operations".
[38] Executive Orders 13836, 13837, 13839 of May 25, 2018, further clarified by the presidential memorandum of October 11, 2019.
[39] §1(b)(i)-(iv), Executive Order 13875 of June 14, 2019 "Evaluating and Improving the Utility of Federal Advisory Committees". Sec. §2 of the E.O., moreover, sets a Government-wide maximum number (350) of eligible committees that, when met, cannot be exceeded by any agency, unless the creation of a new committee obtains a waiver by the Director of the OMB.
[40] §2, Executive Order 13893 of October 10, 2019 "Increasing Government Accountability for Administrative Actions by Reinvigorating Administrative PAYGO". More precisely, according to §5(b) if a proposed discretionary action would increase mandatory spending, the agency shall undertake a comparative analysis of proposals that would have a lower cost, whereas "submissions to increase mandatory spending that do not include a proposal to offset such increased spending shall be returned to the agency for reconsideration".
[41] §§1-2, Executive Order 13765 of January 20, 2017 "Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal", ordering agency heads to "exercise all authority and discretion available" to "minimize the unwarranted economic and regulatory burdens of the Act".
[42] Executive Order 13772 of February 3, 2017 "Core Principles for Regulating the United States Financial System", ordering the Secretary of the Treasury to identify and repeal financial regulations which inhibit economic growth.
[43] §1(a), Executive Order 18921 of May 7, 2020 "Promoting American Seafood Competitiveness and Economic Growth", establishes the federal policy to "identify and remove unnecessary regulatory barriers restricting American fishermen and aquaculture producers" which, according to sec. §4(a)(i), shall take place through "a prioritized list of recommended action to reduce burdens".

labor[44], environmental protection[45], and housing[46]. Quite foreseeably, also the President's response to the COVID-19 adverse economic impact focused on "rescinding, modifying, waiving, or providing exemptions from regulations"[47].

Having put the reform in a broader perspective, it is now possible to consider its structural consequences on the regulatory process and the administrative state, as well as to discuss tensions with consolidated administrative and constitutional law principles.

Looking beyond the net amount of regulatory cost savings[48], which for fiscal year 2019 amounted to 13.5 billion dollars and which, since the inception of the Regulatory Reform, raised a total of almost 51 billion dollars[49], it neatly emerges that the implementation of the deregulatory imperatives had the effect of "freezing agencies"[50]. While in the first two years this tendency mainly led to withdrawals, suspensions or repeals, agencies currently seem to have come to a halt, ceasing to propose and issue new regulations. As reported, in fact, only a small minority of agencies commenced new regulatory actions in 2019[51], while the majority issued no regulations at all. Such a circumstance is quite astonishing if compared to the common debate concerning agencies' regulatory hypertrophy[52].



[44] Memorandum for the Secretary of Labor of February 3, 2017, ordering the Secretary of Labor to consider rescinding certain financial regulations.
[45] Executive Order 13783 of March 28, 2017 "Promoting Energy Independence and Economic Growth", revoking environmental protection actions taken by the previous Administration and ordering agency heads to identify and repeal rules that burden domestic energy production.
[46] Executive Order 13878 of June 25, 2019 "Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing". Sections §§2 and 3 show however that, lacking direct presidential competence in the subject matter, the executive order is mainly a political manifesto to "reduce and remove the multitude of overly burdensome regulatory barriers that artificially raise the cost of housing development". The only action it establishes, in fact, is the creation of a White House Council, *i.e.* a consultative body whose function is to evaluate regulations and propose reforms (according to §4).
[47] §1, Executive Order 13924 of May 19, 2020 "Regulatory Relief to Support Economic Recovery". According to sec. §4 agency heads shall identify 'regulatory standards that may inhibit economic recovery and consider taking appropriate action', among which temporarily or permanently rescinding, modifying, waiving or exempting regulated parties from those requirements.
[48] Exclusive attention for regulatory costs is *per se* a critical aspect of the reform. For some considerations on this issue see L. Parona, '*Quantitative over Qualitative Regulatory Reform: Assessing Trump Regulatory Reform Agenda's Implementation. An Update*, in *Osservatorio AIR*, available at www.osservatorioair.it/quantitative-over-qualitative-regulatory-reform-assessing-trump-regulatory-reform-agendas-implementation-an-update/ [accessed: Dec. 21, 2020], and S. Mirate, *Politics v. Administration: la progressiva estensione dei poteri di controllo del Presidente sulle independent agencies negli Stati Uniti*, *Costituzionalismo.it*, Vol. 1, 2020, 200, 261.
[49] Data from the Final Accounting Report for Fiscal Year 2019, available online at: www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2019.pdf [accessed: Dec. 21, 2020].
[50] N. Palazzo, *Tiptoeing on the Edge of the Law*, cit., 37.
[51] Only 9 of the 25 major federal agencies undertook regulatory actions in 2019, with four of them carrying out just a single regulatory action in the whole year.
[52] On this topic see M. Sohoni, *The Idea of "Too Much Law"*, *Fordham. L. Rev.*, Vol. 80, 2012, 1585 ff.

This might exactly be the result that the President had in mind when enacting executive orders 13771 and 13777, and one might question whether this is *per se* a desirable result, especially in light of agencies' fulfillment of their multifarious and crucial tasks. These considerations, however, concern regulatory activities taken as a whole, and refer to aggregate data on the implementation of the reform. Noticeable differences emerge, instead, from a closer look at *significative regulatory actions*, on the one hand, and from certain specific regulatory sectors, on the other.

As for the first aspect, latest data show that for the first time since 2017 the one-in-two-out requirement has not been met in fiscal year 2019 with reference to *significant rules* (*i.e.* those with a higher economic impact), with the ratio stopping at 1,7[53]. While proponents of the reform may insist that executive orders 13771 and 13777 have already served their mission and that a decline in the deregulatory ratio might somehow be physiological, other observers may argue that the reform is showing its unfeasibility in the long run. Critics, moreover, have legitimately underlined that deregulatory efforts, as perpetrated up to now, run counter to traditional principles of administrative law governing the repeal of previous regulations, which might be opposing resistance to the implementation of the reform[54]. If that was the case, the slowing pace of the deregulatory reform with regard to significant rules might appear a promising signal of the re-affirmation of traditional administrative law values. This, however, is merely a hypothesis, requiring further empirical data and a longer timeframe to prove valid.



As far as the second aspect is concerned – that of narrowing down our perspective on single regulatory sectors – the Regulatory Budget for Fiscal Year 2020[55] – *i.e.* still a projection – shows that while the OMB has required the majority of agencies either to achieve significant cost savings[56], or to maintain the current level of regulatory costs and expenditure, it simultaneously allowed a specific group of agencies to introduce significant costs exceeding the total allowance of the previous year. The Department of Homeland Security and the Social Security Administration, for instance, have been allowed to introduce respectively 35.230 million dollars and 3.741 million dollars in regulatory costs. The issue is clearly complex and, although it cannot be further analyzed in greater detail here, it reveals a

[53] See the Final Accounting Report for Fiscal Year 2019.
[54] Deregulation, for instance, may be slowed down by the fact that, following *Motor Vehicle Manufacturers Association v. State Farm*, 463 U.S. 29 (1983), agencies have to provide reasons for repealing a previous regulation and must follow a procedure akin to that employed when approving the regulation (*i.e.* in most cases notice and comment). There is therefore no unfettered discretion – substantial and procedural – in removing previous regulation. This aspect is emphasized, in light of the broader *Deconstruction of the Administrative State*, by S. Mirate, *Politics v. Administration*, cit., 259 ff.
[55] The Budget, which establishes projected cost allowances and savings, is set yearly by the OMB. It is available at: www.reginfo.gov/public/ pdf/eo13771/EO 13771 Regulatory Budget for Fiscal Year 2020.pdf.
[56] The greatest savings are demanded from the Environmental Protection Agency (40.000 million dollars), from the Department of Transportation (40.000 million dollars), and from the Department of Labor (5.700 million dollars).

heterogeneous treatment of the various regulatory sectors, which can in turn be explained, at least in part, in terms of policy preferences. In other words, these disparities show that the deregulatory effort has greater grip on – or is deliberately directed at – certain regulatory areas rather than others.

Even looking at governmental interventions peripheral to the regulatory process, it emerges that the President has not always been consistent with the deregulatory motif and with the idea of a 'small government'. Several executive orders, such as those establishing promotional measures in the field of public procurement[57] and governmental controls in strategic economic sectors like energy[58] and telecommunication services[59], in fact, seem incoherent with the policy according to which "the private sector and private markets are the best engine for economic growth"[60], resembling, rather, a nationalistic and centralizing approach towards economic regulation.

If one considers the aforementioned elements under a common perspective, they do not show a well-coordinated and systematic project. They nonetheless reveal, in our view, that the driving objective in the issuance and implementation of the Regulatory Reform, as well as of other governmental interventions we referred to, was not exclusively – nor even mainly – a deregulatory one.



The professed deregulatory imperative, rather, offered a captivating veil to hide centralization and politicization of federal regulatory activities, which, in turn, allowed for greater presidential control over the latter[61].

## 5. Reining in Guidance: Enlarging the Scope of the President's Supervision

A rationale analogous to the one inspiring the Regulatory Reform discussed in the previous paragraph has animated the enactment of two executive orders in October 2019[62] relating to the so-called regulation by

[57] See Executive Order 13788 of April 18, 2017 "Buy American and Hire American"; Executive Order 13858 of January 31, 2019, "Strengthening Buy-American Preferences for Infrastructure Projects"; and Executive Order 13881 of July 15, 2019, "Maximizing Use of American-Made Goods, Products and Materials".
[58] Executive Order 13920 of May 1, 2020 "Securing the United States Bulk-Power System".
[59] Executive Order 13913 of April 4, 2020 "Establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector".
[60] Executive Order 12866 of September 30, 1993 on regulatory planning and review, on which Trumps' E.O. 13771 and 13777 build upon.
[61] As a result, most functions assigned to administrative agencies, endowed with technical expertise, have become ever more subject to presidential – and therefore – political influence. The issue will be discussed further in the conclusive paragraph.
[62] Executive Order 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents" and Executive Order 13892 "Promoting the Rule of Law through Transparency and Fairness in Civil Administrative Enforcement and Adjudication", both of October 9, 2019. These E.Os. build on previous memoranda of the Attorney General of November 16, 2017 concerning the "Prohibition on Improper Guidance Documents" and of January 25, 2018 "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases". According to the memoranda, guidance documents shall identify themselves as non-binding, shall state that they are not final agency actions, shall not be used for the purpose of coercing, and shall therefore not use mandatory language.

guidance[63]. Such choice seems *per se* consistent with an all-encompassing approach towards regulation, *i.e.* with a view according to which there is a *continuum* between regulations and guidance documents as far as their potential effects – and varying binding force – over regulated parties[64].

The issuance of acts belonging to this heterogeneous category, such as for example circulars, memoranda, advisories, opinion letters, interpretive letters, enforcement manuals and bulletins, indeed raises several theoretical and practical problems[65]. In fact, notwithstanding their formally non-binding nature and the fact that they are not enacted through notice and comment procedures[66], these acts compel regulated parties in a variety of ways[67] and are often rigidly followed and implemented by agencies themselves[68].



This controversial issue is not new, nor unfamiliar, to practitioners[69],

[63] See R.A. Shipley, *Regulation by Guidance*, *Environmental Quality Management*, Vol. 10, 2001, 109 ff.; and S. Mirate, *Politics v. Administration*, cit., 264 ff. who aptly observes that these interventions should be read, together with the regulatory reform commenced with E.Os. 13771 and 13777, as a sign of the extension of the President's control over the regulatory process taken as a whole.

[64] P.L. Strauss, *The Rulemaking Continuum*, *Duke L.J.*, Vol. 41, 1992, 1463 ff. In *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987) at 1045 the Court of Appeals for the D.C. Circuit referred to the relationship between legislative and nonlegislative rules (on which see the following footnote) in terms of a "hazy continuum".

[65] These acts might contain nonlegislative rules, *i.e.* rules that, differently from legislative or substantive rules enacted through regulations, do not formally have the force of law. Nonlegislative rules might be employed either to explain the meaning of existing provisions of law and regulations (interpretive rules), or to explain how an agency intends to use a discretionary power (policy statements). See P.L. Strauss, *The Rulemaking Continuum*, cit., esp. 1478-1479.

[66] On this aspect see R.M. Levin, *Rulemaking, and the Guidance Exemption*, *Admin. L. Rev.*, Vol. 70, 2018, 263 ff.

[67] It is the so-called "practical binding effect", on which see R.A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, *Duke L.J.*, Vol. 41, 1992, 1312 ff., esp. 1328-1332. Several heterogeneous factors prompt regulated parties to follow guidance: pre-approval requirements announced by an agency as ensuring affirmative assent for the future release of benefits, permits or licenses; regulated parties' desire to maintain good relationships with the agency, considered the fact that violations leading to enforcement actions may be vaguely pre-determined and discretionally enforced; intrafirm constituencies for total compliance, *i.e.* even with regard to requirements that do not carry the force of law. See on these aspects N. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, *Yale J. on Reg.*, Vol. 36, 2019, 165, esp. 184 ff., and R.M. Levin, *Rulemaking, and the Guidance Exemption*, cit., 290 ff.

[68] Agencies tend to rigidly follow and implement policies and other prescriptions contained in guidance documents as a consequence of a variety of reasons, such as: legitimate pressure for stability coming from industry preferences; demands for regulatory consistency by NGOs, the Media, and Congress; fear that inconsistency (*i.e.* being more flexible towards regulated parties' needs) will open the floodgates to future requests of dispensations and enforcement exemptions from regulated parties. See N. Parrillo, *Federal Agency Guidance and the Power to Bind*, cit., 232 ff.

[69] The issue has been dealt with by the Administrative Conference of the United States (ACUS) in several recommendations: *Agency Guidance Through Interpretive Rules* (84 Fed. Reg. 38,927, August 8, 2019); *Agency Guidance Through Policy Statements* (82 Fed. Reg. 61,734, December 29, 2017); *Agency Policy Statements* (57 Fed. Reg. 30,103, July 8, 1992); *Interpretive Rules of General Applicability and Statements of General Policy* (41 Fed. Reg. 56,769, December 30, 1976).

scholars[70], courts[71], the OMB[72], and Congress[73].

It is not regulation by guidance in itself, however, that matters in the perspective of our analysis. More relevant, rather, are the President's interventions aimed at addressing it, and the consequences they generated.

Considering the fact that regulation by guidance allows agencies to escape traditional procedures established by law[74], as well as the requirements of the Regulatory Reform, it is not surprising that the President felt an urgency to intervene. By resorting to formally nonbinding guidance acts, in fact, agencies could easily render the Regulatory Reform substantially ineffective. The risk appears even sharper – if one embraces this type of reasoning – in light of the fact that guidance documents "greatly



[70] See *ex multis*: R.A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, *Admin. L.J. Am. U.*, Vol. 8, 1994, 1 ff.; M. Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, *Mich. L. Rev.*, Vol. 75, 1977, 520 ff.; W. Funk, *When is a Rule a Regulation? Making a Clear Line Between Nonlegislative Rules and Legislative Rules*, *Admin. L. Rev.*, Vol. 54, 2002, 659 ff.; W.F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, *Pub. Admin. Rev.*, Vol. 64, 2004, 66 ff. In critical terms see G. McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, *Admin. L. Rev.*, Vol. 60, 2008, 371 ff., esp. 377, Who argues that guidance documents "have become process-free vehicles for agency declarations of explicit standards and principles that have a real, direct, and potentially devastating impact".

[71] The Supreme Court focused on how to distinguish legislative rules from nonlegislative ones (*Barnhart v. Walton*, 535 U.S. 212 (2002), *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988)), as well as on the reviewability of the latter, and on the standard of review applicable to them (*Christensen v. Harris County*, 529 U.S. 576 (2000)). These issues have been long debated by federal courts: *National Mining Association v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014); *Natural Resources Defense Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011); *G.E. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002); *Paralyzed Veterans of America v. Secretary of Veteran Affairs*, 308 F.3d 1262 (Fed. Cir. 2002); *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000); *American Hospital Association v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987).

[72] With the Final Bulletin for Agency Good Guidance Practices of January 25, 2007 (72 Fed. Reg. 3432) the Office of Management and Budget requested executive agencies (*i.e.* not every *administrative* agency) to conduct notice and comment procedures before adopting "economically significant" guidance documents (*i.e.* those that, according to sec. §I(5), "may reasonably be anticipated to lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy or a sector of the economy"). As reported by N. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study*, *Admin. L. Rev.*, Vol. 71, 2019, 57 ff., esp. 105, allegedly "economically significant" guidance documents from January 2011 to July 2018 only amounted to two. See in similar terms S.M. Johnson, *In Defense of the Short Cut*, *Kansas L. Rev.*, Vol. 60, 2012, 495 ff., esp. 544.

[73] See hearings before the Subcommittee on Regulatory Affairs and Federal Management of the Senate Commission on Homeland Security and Governmental Affairs: *Examining the Use of Agency Regulatory Guidance* (114th Cong. (2016) and 114th Cong. (2015)). See also the bills: Regulatory Accountability Act, H.R. 5, S. 951, 115th Cong. (2017); Truth in Regulations Act, S. 580, 115th Cong. (2017); Regulatory Predictability for Business Growth Act, H.R. 288, 115th Cong. (2017).

[74] Some Authors argue that agencies deliberately resort to guidance to avoid formal procedures, which are more transparent and open to participation. See: M.E. Magill, *Agency Choice of Policymaking Form*, *U. Chi. L. Rev.*, Vol. 71, 2004, 1383 ff., esp. 1411; T.D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, *Admin. L. Rev.*, Vol. 52, 2000, 159 ff., esp. 168. Not all Authors however agree on agencies' bad faith: C.N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, *Yale L. J.*, Vol. 119, 2010, 782 ff. The point will be further discussed *infra*.

*DPCE online*
ISSN: 2037-6677

outnumber legislative rules"[75] and are issued in "a volume dwarfing the regulations"[76]. Accurate and updated empirical data is however unavailable with reference to guidance, its use and abuse [77].

It is therefore not a surprise that, with E.O. 13891, the President required agencies to "treat guidance documents as non-binding both in law and in practice"[78] as well as to "take public input into account when appropriate in formulating guidance documents, and make guidance documents readily available to the public"[79].



More precisely, in order to ensure transparency, agencies have first of all been required to establish on their website a single searchable database that contains all guidance documents in effect[80].

Secondly, guidance documents – in the same way as regulations – must comply with the deregulatory policy; according to §3(b), in fact, agencies shall review guidance documents and rescind those that appear no longer appropriate[81]. The OMB has even affirmed the – indeed controversial – thesis that guidance documents, when referred to major regulatory actions, are subject to the Congressional Review Act and can therefore be reversed by Congress[82].

Thirdly, a more rigid procedure for issuing guidance documents has

[75] C.N. Raso, *Strategic or Sincere?*, cit., 785.
[76] P.L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, *Admin. L. Rev.*, Vol. 53, 2001, 803 ff., esp. 805.
[77] Data related to regulatory activities are instead more precise, as reported in the previous paragraph. The lack of sufficient data with reference to guidance documents is *per se* a problem, which, as we will see, Trump's E.Os. only partially address.
[78] This aspect is further explored by Executive Order 13892 of October 9, 2019 "Promoting the Rule of Law through Transparency and Fairness in Civil Administrative Enforcement and Adjudication", sec. §2(e), according to which the issuance of guidance shall not determine an "*unfair surprise*" for regulated parties, *i.e.* "a lack of reasonable certainty or fair warning of what a legal standard administered by an agency requires" (on which see *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012)). According to sec. §3, moreover, agencies "may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations".
[79] §1, Executive Order 13891 of October 9, 2019 "Promoting the Rule of Law Through Improved Agency Guidance Documents". When defining the concept of "guidance document", however, sec. §2(b) only refers to a specific type of guidance, *i.e.* "agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation". The concept excludes internal guidance and internal legal advice and opinions "not intended to have substantial future effect on the behavior of regulated parties" (§2(b)(v)). The notion of "substantial effect", moreover, is quite broad, and closely resembles that of "legal consequence" as referred to in *Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1813-16 (2016), on which see W. Funk, *Final Agency Action after Hawkes*, *N.Y.U. J.L. & Liberty*, Vol. 11, 2017, 285 ff. The notion refers to an action that directly or indirectly affects substantive legal rights or obligations, even in the sense of the potential subjection to liability (*Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1030 (D.C. Cir. 2016)).
[80] §3(a).
[81] The central role of the White House, and in particular of the Director of the OMB is confirmed with reference to the implementation of this policy. Under sec. §3(c), in fact, the Director can waive compliance with the E.O. for particular guidance documents or categories.
[82] OMB Memorandum of April 11, 2019, "Guidance on Compliance with the Congressional Review Act" (M-19-14). See esp. 3. On this aspect see *supra*, par. 2.

been established to curb agencies' tendency to resort excessively to this type of acts. The latter are in fact requested to comply with most of the requirements established for the adoption of regulations[83]. Moreover, specific and stricter procedures are established in case of "significant guidance documents"[84], whose adoption shall include a period of public notice and comment of at least thirty days and ensure a public response to major concerns raised in comments. A non-delegable approval by the agency head, or by another component appointed by the President, is also required, in order to ensure a political control over the issuance of guidance[85]. In addition, significant guidance documents shall be subject to review by OIRA as far as E.O. 12866 requirements on cost-benefit analysis is concerned.

Although it is undeniable that regulation by guidance, as already mentioned, poses several controversial issues, the President's interventions do not seem to address many of them, posing instead, at the same time, new ones.



Establishing more onerous procedures, for instance, will foreseeably have the effect of drastically reducing the number of guidance documents and of discouraging agencies to use flexible acts, even when the latter might otherwise be appropriate, if not necessary.

The President's interventions on guidance, moreover, seem built upon the biased premise that agencies act maliciously when resorting to guidance. However, one thing is to recognize that agencies have abused in issuing guidance as a consequence of the ossification of the rulemaking process, another is to accuse them of bad faith. While the former thesis is quite accepted among legal scholars[86], the latter lacks supporting data and has been convincingly contested[87].

---

[83] See especially sec. §5 of E.O. 13891, which imposes compliance with E.Os. 12866, 13563, and 13609.

[84] According to sec. §2(c) a guidance document is significant when it may: i) lead to "an annual effect on the economy of $100 million or more or adversely affect in a material way the economy"; ii) "create a serious inconsistency or otherwise interfere with an action taken or planned by another agency"; iii) "materially alter the budgetary impact" of other agency actions; iv) "raise novel regal or policy issues". These hypotheses occur quite seldom as observed by N. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance?*, cit., 65 and 105.

[85] This runs counter to the tradition observed by P.L. Strauss, *Domesticating Guidance*, *Envt'l Law*, Vol. 49, 2019, 765 ff. at 768 that guidance "need not be issued or approved by the agency head". As observed by S. Mirate, *Politics v. Administration*, cit., 267, this requirement significantly reinforces indirect Presidential controls.

[86] See *ex multis*: R.J. Pierce, *Seven Ways to Deossify Agency Rulemaking*, *Admin. L. Rev.*, Vol. 47, 1995, 59 ff.; P.R. Verkuil, *Rulemaking Ossification – A Modest Proposal*, *Admin. L. Rev.*, Vol. 47, 1995, 453 ff.; T.O. McGarity, *Some Thoughts on "Deossifying" The Rulemaking Process*, *Duke L. J.*, Vol. 41, 1992, 1385 ff.

[87] As observed by N. Parrillo, *Federal Agency Guidance and the Power to Bind*, cit., 271, "debate on the subject would be more realistic and productive if it occurred at a lower temperature, less charged with insinuations of bad faith and more oriented toward institutional reform" considered the fact that "it is possible to acknowledge and explain most of the problems with coercive guidance without resorting to accusations that officials are deliberately trying to circumvent the guarantees of the Administrative Procedure Act". On this point see also, C.N. Raso, *Strategic or Sincere?*, cit., and C.R. Sunstein, A. Vermeule, *'The Unbearable Rightness of Auer'*, *U. Chi. L. Rev.*, Vol. 84, 2017, 297 ff. at 308 who affirm that "we are

Building on this debatable premise, E.Os. 13891 and 13892 seem rather to aim at ensuring a direct (via the OMB and OIRA) and indirect (via President-designated agency heads) presidential control over the issuance of guidance documents. Such a centralization and politicization of the control over the whole spectrum of regulatory activities[88], however, runs counter to the theory, consolidated in administrative law, that Congress may insulate the exercise of certain administrative tasks, including rulemaking, from the President[89].

## 6. Concluding remarks

The four years of Trump's Presidency are, and will likely continue to be, an interesting object of study for researchers in disparate fields. Trump's attention towards the regulatory state has been morbid and has resulted in a host of deregulatory actions as well as unorthodox interpretations of laws and case law. The actual impact of these actions is the stiffening of the relationship between the President, on the one side, and agencies, on the other, whose rules become structurally precarious. A freezing of agencies' action is the result of a synergetic and cross-cutting strategy working on many fronts, including fronts that had never been harnessed (to achieve similar objectives).



CRA constitutes a relevant example for this: regarding CRA, Trump has insisted on his 'unorthodox' interpretation of the term regulation, with the paradox of rendering vulnerable to reversal his own most controversial (deregulatory) rules during a Blue Government. This interpretation runs counter canons of statutory interpretation and thus situates itself on the edges of law. The practice is also a stress test for the separation of powers to the extent that never has a partisan Congress made such an aggressive use of the Act to rescind government regulations. Especially zealous and

unaware of, and no one has pointed to, any regulation in American history that, because of Auer, was designed vaguely" in order to allow agencies to issue interpretive rules outside the procedures established by the APA. To briefly clarify this point, it shall be recalled that in *Auer v. Robbins* (519 U.S. 452 (1997)) the Supreme Court ruled that an agency's interpretation of its own regulations shall be reversed in the course of judicial review only in case the interpretation is "plainly erroneous or inconsistent with the regulation" (establishing therefore a deferential standard). However, in light of more recent case law (*Kisor v. Wilkie*, 139 S. Ct. 657 (2018)), the applicable standard has been refined, and appears more similar to the so-called "*Skidmore deference*", which allows for a 'less deferential' review, based on the reasonableness of the agency's interpretation of its own regulations contained in guidance documents (*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

[88] *i.e.* comprehensive of both regulations and guidance.

[89] See *ex multis*: P.L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, *Colum. L. Rev.*, Vol. 84, 1984, 573 ff.; T.O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, *Am. U. L. Rev.*, Vol. 36, 1987, 443 ff., esp. 465 ff.; L. Lessig, C.R. Sunstein, *The President and the Administration*, *Colum. L. Rev.*, Vol. 94, 1994, 1 ff., esp. 55 ff.; C. Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, *U. Pa. J. Const. L.*, Vol. 12, 2009, 637 ff. Already J.M. Landis, *The Administrative Process*, New Haven, 1938, 46 observed that an independent "administrative power" should counterbalance a powerful Executive. For an opposite point of view see G. Lawson, *The Rise and The Rise of the Administrative State*, *Harv. L. Rev.*, Vol. 107, 1994, 1231 ff., esp. 1242-1243, insisting on the idea of a "unitary executive".

unprecedented is the systematic use of the Act, especially in the first two years, as a tool to reverse Obama-era rules, including rules that were not suitable for review as falling outside the purview of the notion of 'rule' under the Act.

Likewise, the concern regarding the potential for the one-in-two-out rule to circumvent all administrative procedures and laws equating rescission of previous rules with the introduction of new rules remains intact. A less radical conclusion applies to guidance documents: in the end, introducing a formal procedure for the issuance of guidance is 'brave', perhaps ineffective as it further stifles agency action, but lawful (as something that the President can do through order).

Therefore, another aspect seems instead to constitute the *fil rouge* of Trump's offensive against agencies: a desire to politicize and centralize the whole regulatory process. This objective itself creates a tension with consolidated principles of constitutional and administrative law in many respects. As argued, this stands in sharp contrast with the well-established theory that Congress may insulate the exercise of certain administrative tasks, including rulemaking, from the President.

As far as the implementation of the Regulatory Reform is concerned, although the latter allegedly aimed at alleviating the burdens of excessive regulation, it simply determined the 'freezing' of agencies' activities, with only a small number of administrative agencies commencing regulatory actions in the last year. Our analysis, moreover, revealed that, at a closer look, the Regulatory Reform is showing some cracks, and is being implemented in a non-consistent way. A clue for this is, on the one hand, the inability to meet the one-in-two-out requirement for significant rules, and, on the other hand, the growingly permissive stance of the OMB in terms of regulatory cost allowances.



Likewise, the attitude towards guidance documents, though tackling a (nearly) universally recognized problem[90], seems to be inspired by the same attitude towards the whole regulatory spectrum. The underlying rationale is in fact that of both cutting the number of guidance documents and ensuring stricter Presidential – and therefore political – control. All those trends thus put a black mark on Trump's Presidency for they seem to put under pressure the longstanding tradition of checks and balances informing U.S.-style separation of powers, which could hardly tolerate the trends illustrated above.

Again, establishing whether the underlined tension and its impact on constitutional and administrative law principles will determine an irreversible fracture, or will soon be counterbalanced, is an issue that cannot be solved straightforwardly at present. Only future developments will shed light on the magnitude of these 'stretches'. Inquiring what such

[90] *i.e.* the unorthodox and abusive issuance of guidance documents, which led to the so-called regulation by guidance.

*DPCE online*
ISSN: 2037-6677

implications might be seems like a fruitful project to undertake in the upcoming years.

*Nausica Palazzo*
Dipartimento di studi giuridici
Università comm.le "L. Bocconi"
nausica.palazzo@unibocconi.it

Dipartimento di studi giuridici
Università comm.le "L. Bocconi"
leonardo.parona@unibocconi.it