Agency rulemaking under the Biden Administration

by Vincenzo De Falco

Abstract: L'attività regolatoria delle agenzie sotto l'amministrazione Biden. – The author highlights the Biden's reform on the incidence of presidential policy in the rulemaking process. The essay describes the situation existing before Trump, the Trump's innovation, and Biden's approach, that is based on a different way of understanding the relationships between the policy of Presidential Offices and the discretionary power of executive agencies.

Keywords: Rulemaking process; Control of Presidential Offices; Biden Administration; Costs-benefits analysis; Discretionary power of executive agencies.

1. Rulemaking process and Presidential powers in Biden era.

Upon assuming office Biden revoked[1] six executive orders issued by President Trump in 2017 and 2019 related to the rulemaking process. Trump's reform was clearly inspired by the idea of politicizing and centralizing the regulatory process and had created tensions in the American constitutionalism.[2]

In 2017 President Trump directed agencies to review regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources. In the same year, with the executive order n. 13771 he issued the 2-for-1 rule, requiring agencies to repeal two regulations for every one new regulation. This order also established a budgeting process that required agencies to limit the incremental cost of new regulations under supervision of the OMB director. With executive order n. 13777/2017 Trump required each agency to designate a regulatory reform officer and a task force to oversee initiatives and recommend regulations to be repealed. The order further required

[1] Executive order n.13992/2021.

[2] A.V. Sunstein, *Presidential review: The President's statutory authority over independent agencies*, 109 *The Georgetown law journal* 3, 637 (2021); D. Schultz, *Public Administration in the Age of Trump*, 23 *Journal of Public Affairs Education* 1, 557 (2017); similar reflections have also been made by foreigners scholars. P. L. Strauss, *The Trump Administration and the Rule of Law*, 170 *Revue Française d'administration publique*, 433 (2019); C. Sartoretti, *The Trump Administration and its strategy to seize control over independent agencies*, in *DPCE online*, 1, 2021, 1047 ss.; N. Palazzo-L. Parona, *Trump's Fight against the Regulatory State: Reloaded*, in *DPCE online*, 1, 2021, 1085.

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agencies to measure and report their progress in implementing these reforms. With executive order n. 13875/2019 he required each executive department and agency, with the exception of the independent regulatory agencies, to review, reduce, and limit the number of federal advisory committees, terminating at least one-third of these committees by September 30, 2019. The order also capped the government-wide total number of advisory committees at 350. With executive order 13891/2019 Trump imposed agencies to treat guidance documents as non-binding both in law and in practice, maintain an online database of all guidance documents, rescind outdated guidance documents, and establish procedures for issuing new guidance documents, including a clear statement of their non-binding effect, opportunities for the public to petition for withdrawal or modification of guidance documents, and a 30-day period of notice and comment for certain significant guidance documents. With executive order 13892/2019 Trump limited agencies' ability to enforce standards of conduct that were not publicly stated or issued in formal rulemakings. The order also provided that agencies issuing notices of noncompliance provide an affected party the opportunity to be heard and at the same time, imposed requirements governing administrative inspections and certain statutory obligations. Finally, with executive order 13893/2019 he required agencies to submit proposed discretionary actions and proposals for compliance with PAYGO to the OMB director for review, to ensure that agencies propose ways to reduce mandatory spending whenever they undertake a discretionary action that would increase it.

This approach created tension with the principle of separation of powers.[3] According to American scholars Presidential supervision of agency rulemaking is more readily justified when it does not purport wholly to displace, but only to guide and limit discretion which Congress had allocated to agencies.[4] President's authority to issue the order is based on his constitutional power to take care that laws be faithfully executed. Instead, Trump's innovations carried the risk that the discretionary power of agencies would be transformed into obsequious compliance, which in turn would have reduced the role of judicial review.[5]

Biden's election offered the opportunity to remedy this situation, without producing excessive problems, as only a small number of administrative agencies have begun to implement the Trump's orders in the past year.

2. The tensions of Trump's reform and Biden's approach

[3] J. L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 *Duke Law Journal*, 1811 (2012); R. Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking Via Pre-Notice Transparency*, in 47 *Wake Forest Law Review*, 681-704 (2012); M.C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts*, in 119 *Har. Law Review* 4, 103 (2006).

[4] Supreme Court, *National Labor Relations Board v. Noel Canning*, 134 S. Ct. 2550, 2014.

[5] R. Toniatti, *Non-Deferential Judicial Checks and Balances and Presidential Policies*, in *DPCE online*, 1, 2021, 1010; M.E. De Franciscis, *The independence of the Judiciary in the Trump Era*, in *DPCE online*, 1,2021, 945 ss.

When Trump became president, the relationships between the Presidential Offices and agencies were already governed by executive orders adopted by previous Presidents, in line with the principle of separation of powers and the high specialization of executive agencies.

The rulemaking process in the United States has been entrusted to administrative agencies for their specialization, and independent authorities have been given special autonomy with respect to policymaking. Congress has delegated to the American authorities the power to issue regulations, without specific constraints. However, since agencies were established in United States, a check system by the President, head of the executive, was lacking, resulting in a paradoxical situation of democratic deficit in which both the elected representative bodies, President and Congress could not effectively direct the politics of a great part of American administrations. The former did not have juridical tools, and the second had progressively delegated its normative power. Participation in rulemaking, provided for by the Administrative Procedure Act, was viewed as a surrogate form of the democratic deficit, with the possibility, granted to any group, to participate in decision making process, and to defend its interests in a judicial action.

Observing the evolution of the executive orders issued by precedent Presidents it emerges a different way of understanding the relationships between agencies and central offices, depending on President was democratic or republican. In fact, democratic Presidents have shown less tendency to centralize the rulemaking process than republican.[6] Trump has activated a system of centralization of executive powers to a level that had not occurred before his election.

Biden's idea is different. President Trump's approach—both the "two-for-one" requirement and the regulatory budget—breaks from the historical emphasis on maximizing net benefits and instead offers a blunt institutional reform to rein in regulatory costs without attention to benefits. This is presented by Trump as necessary to counter the political impulses that may produce excessive or inefficient regulation, or regulation that could be better designed. Although Trump said these reforms were necessary to boost both jobs and the U.S. economy, reality the logic of a regulatory budget was therefore political rather than economic. It is analogous to the fiscal budget for direct expenditures that limit the authority of agency spending. The most fundamental question for any regulatory budget is how to measure costs, and orders issued by Trump appear to be aimed at increasing control of Presidential Offices rather than improving the US economy. Trump's orders excessively reduced the discretionary power of the executive agencies; if an agency was not in full compliance with the requirements of executive order n. 13771 at the end of a fiscal year, the director of the OMB would not have approved the plan.

The two for one rule was also considered ineffective in simplifying administrative action. The Supreme Court argued that the notice and

[6] This circumstance entails the risk, especially in cases where the President is not re-elected, that Congress may exercise the veto powers envisaged by the Congressional Review Act and the new President revoke the orders issued by the outgoing President. In this way, the ineffectiveness and dysfunction of the regulatory function of the agencies is determined, which in turn are required to change the implementing regulations as result of the modification of the presidential orders.

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comment procedure provided for Administrative Procedure Act must be adopted even if agency intends to repeal an existing regulation[7]. Similarly, the agency will have to demonstrate the need to proceed with the repeal. The approach provided by the Supreme Court means that the agency will have to activate three notice and comment procedures: two for the regulations it intends to repeal and one for the new regulation. The rulemaking process also becomes more complex if a judicial review is requested against the repeal procedure.

Executive orders no. 13891 and 13892, which apparently seem to have the purpose of countering deregulation with which agencies have been trying for years to avoid the notice and comment procedure,[8] introduce the power of control of Presidential Offices also on guidance documents. In relation to this type of documents there is a problem of uncertainty both in procedural and substantive elements. The Administrative Procedure Act contains exemptions relating to interpretive provisions, general policy statements and agency organization rules. As result of these exceptions, the guidelines are adopted by the American administrations without the impact and cost-benefit analyses. The reform project of the Administrative Procedure Act provides for a formal placement of these provisions within the system of legal sources, the obligation to publish the provisions to be approved and to specify that these rules cannot be considered binding. The co-participation of the Presidential Offices is also envisaged.[9]

The underlying motivation was both to reduce the number of guidance documents, and above all to ensure more rigorous presidential - and therefore political - control.

In addition to order n. 13992/2021, Biden issued a memorandum freezing rulemakings pending review. Agencies are not to propose or issue any rule until a department or agency head appointed or designated by President Biden approves the rule, unless the rule falls into an exception for emergency situations or other urgent circumstances relating to health, safety, environmental, financial, or national security matters, as permitted by the director of the Office of Management and Budget. For rules that have been published in the *Federal Register* but have not yet taken effect, agencies should consider postponing the rules effective dates for 60 days and opening a new 30-day comment period to evaluate the rules further. After the 60-day delay, if a rule raises substantial questions of fact, law, or policy, agencies should take further appropriate action in consultation with the director of OMB.

This memorandum applies broadly to all substantive action by an agency that is anticipated to lead to a final rule or regulation. It does not appear to include independent agencies, though there is some ambiguity; while the memorandum is addressed to executive departments and agencies, its definition of rule is expansive enough that it could be read to cover actions

[7] *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). S. A. Shapiro, *Rulemaking inaction and the failure of administrative law*, 68 *Duke Law Journal*, 1814 (2019).

[8] N. Palazzo-L. Parona, *Trump's Fight against the Regulatory State: Reloaded*, in *DPCE online*, 1, 2021, 1083.

[9] C.J. Walker, *Modernizing the Administrative Procedure act*, 69 *Adm. Law Rev.*, 646 (2017).

by independent agencies. This memorandum will likely cause reconsideration of a wide variety of rules proposed or issued in the final days of the Trump Administration. Trump left agencies with no choice but to postpone by 60 days the effective date of any regulations published in the *Federal Register* that had not yet taken effect. By contrast Biden freeze instructs agencies to consider this 60-day delay for such rules, which gives them more flexibility.

The Biden Administration issued another memorandum which instructs the director of OMB to make recommendations for improving and modernizing review of regulations. Such recommendations should provide concrete suggestions on how to promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations in the regulatory process. These recommendations should ensure that policies reflect new developments in scientific and economic understanding, account for regulatory benefits that are difficult or impossible to quantify, and do not cause detrimental deregulatory effects. OMB is also instructed to evaluate ways that the Office of Information and Regulatory Affairs can partner with agencies to support regulatory initiatives that are likely to yield significant benefits and to identify reforms that further the efficiency and transparency of the interagency review process.

3. The continuity of a balanced constitutional model

Biden has not introduced relevant innovations but has so far limited himself to restoring and improved the situation existing before Trump.

In line with the principles of separation of powers, the first presidential orders were adopted to guide and coordinate the regulatory function; orders required the agencies to circulate among themselves the projects for the adoption of the regulatory programs with the greatest impact on the economy of American society, to prepare preventive studies to verify the effect that the new provisions would have on inflation, when they exceeded 100 million dollars.[10] Nixon, in 1971, established that agencies were obliged to submit to the Office of Management and Budget (OMB) a summary of their proposals, a description of the alternatives that had been considered and a cost comparison, in relation to rules pertaining to environmental quality, consumer protection, and occupational health and safety.[11] In 1974, President Ford issued an order requiring executive branch agencies to prepare an inflation impact statement for each major federal rules, prior to publication of the notice. On this same trend line, in 1978 President Carter ordered the agencies to publish semi-annual agendas, describing and giving the legal bases for any significant regulations, establish procedures to identify significant rules, to evaluate their need, acceptable alternatives and prepare a regulatory analysis that examined the cost-effectiveness of alternative regulatory approaches for major rules.[12] President Carter also

[10] Executive order n. 118121/1974.
[11] R.B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. Law Rev.* 8, 1699 (1975).
[12] Executive order n. 12044/1978.

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established a Group to review the regulatory analyses for a limited number of major rules and to submit observations during the public comment period. He created the Regulatory Council, which was charged to avoid duplication of effort, or conflicting policy in regulation of any area.

President Reagan instead began to increase presidential control over executive branch rulemaking and imposed the regulatory impact analysis, with which the Presidential Offices could have verified the impact on the American economy of new rules producing effects exceeding 100 million dollars, through the mechanism of cost-benefit analysis.[13] For the first time there was a transition from the direction and coordination function to the more incisive one in the regulatory activity. The agencies were also required to illustrate the advantages and disadvantages that would arise as result of the implementation of alternative policies. The term was indicated in 60 days before publication of the notice. The agencies also had to certify that the benefits to the regulated sector outweighed the costs.

The analysis by Presidential Offices no longer concerned the cost-benefit ratio in relation to budgetary policies, but the content of the political choices made by the agencies in relation to the benefits on the social sector. It was necessary to indicate the recipients of the expected benefits, the actual costs and the categories involved. However, these provisions made rulemaking extremely complex. In fact, such review often came late in the regulatory process, after huge investments of agency time and resources, and often after agency staff commitments had made extremely difficult to consider any acceptable regulatory alternative previously ignored. So, President Regan established a regulatory planning process with the purpose of ensuring that each major step in rulemaking was consistent with Administration policy, to avoid this problem.[14] The head of each agency was required to determine at the beginning whether a proposed regulatory venture was consistent with the goals of the Administration, allowing the Presidential Office to review the annual plans of federal bodies. So, OMB was given a relevant role in ensuring coordination of regulatory policy.[15]

America was changing the way of understanding the rulemaking process through the ever more incisive control of the Presidential Offices.[16] It would have been difficult to imagine that this upheaval would not have had consequences on the activity of the independent authorities as well. A new model of rulemaking was establishing itself, which disregarded both the idea of high specialization on which the competence of federal agencies was based, and the neutrality which instead characterized independent agencies. In fact, although they were not formally bound, even the neutral administrations spontaneously adapted to the new type of relationship with the Presidential Offices.

The use of the delegation progressively reduced the spaces of competence of the Congress on the control of regulatory function, with the effect that most of the problems relating to the connections with

[13] Executive order n. 12291/1981.
[14] Executive order n. 12498/1985.
[15] P. Cane, *Controlling Administrative Power. An Historical Comparison*, Cambridge, 2016, 304.
[16] P. Strauss, *The President and the Constitution*, 65 *Case Western Law Review*, 1151 (2015).

representative democracy have been shifted to the President, both in relation to the entity and the ways in which he could affect the discretion granted to the American administrations.[17] This effect was particularly felt in relation to the federal authorities, for which there are no limitations on the directive function of the President, that exist instead in the relationship with independent agencies.[18] But the presidential power to issue orders would have compromised the role of neutrality with which the independent authorities had been conceived and organized in American constitutionalism. Since Congress had mostly delegated its power, the expansion of presidential power also in relation to neutral administrations could have configured an excessive interference in the regulatory function not exercised by the legislative body. The President, through the Presidential Offices, could have reduced the effectiveness of participation of private groups in rulemaking, thus also affecting the functioning of this type of democracy which had been conceived in 1946 as a tool for overcoming the democratic deficit.

The phenomenon immediately led to a conflict between powers. The Presidential Offices were trying to impose burdens on the agencies that were not envisaged in the delegation acts, so much so that Congress had to adopt the 1976 Act with the aim of curbing the phenomenon, and to order that the powers of the Office of Management and Budget could not reach the point of vetoing the programs carried out by agencies. At the same time, Congress established the Congressional Budget Office, competing with the Presidential Office, and passed the Budget and Impoundment Act in 1974 to reduce the President's power to constrain agency budgets, while, with order no. 12044 President Carter required agencies to publish, at least half-yearly, an agenda of significant regulations under development or review.

So, Congress sought to limit the interference of Presidential Offices on the agency's discretionary power, which risked altering the constitutional balance between powers. With the Paperwork Reduction Act of 1980 Congress statutorily established Office of Information and Regulatory Affairs (OIRA) to review and approve or disapprove agency information collection requests and reduce the government's overall paperwork burden.[19] The Regulatory Flexibility Act (RFA) of 1980 required agencies to conduct regulatory flexibility analyses for proposed and final rules that will have had a significant economic impact on a substantial number of small entities.[20] The Unfunded Mandates Reform Act of 1995 added requirements for agencies to analyze costs resulting from regulations imposing federal

[17] G. Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 *Iowa L. Rev.*, 849 (2012).
[18] P.M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 *Ark. L. Rev.*, 161, 176–78 (1995).
[19] D. Cohen, P.I. Strauss, *Congressional Review of Agency Regulations*, 49 *Adm. Law Rev.*, 95, 103 (1997).
[20] For proposed rules, such an analysis is referred to as an initial regulatory flexibility analysis. This analysis includes elements such as a description and estimate of the number of small entities to which a rule would apply and a description of the steps the agency has taken to minimize the significant economic impact on small entities.

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mandates upon state, local, tribal governments, and the private sector.[21] In 1996, the Congressional Review Act gave the legislative body the ability to review and veto administrative rules, as a further tool to balance the advance of presidential powers.

4. Restoring the separation of powers

Biden restored the principal analytical requirement for most agencies' regulations established in executive order n. 12866 issued by President Clinton in 1993. It encouraged, as it still does today, agencies to design their regulations in the most cost-effective manner to achieve the regulatory objective and to ensure that the benefits of a regulation justify the costs. The order requires agencies to assess the potential costs and benefits of significant rules and to submit this assessment along with each rule to OMB's Office of Information and Regulatory Affairs (OIRA) for review.[22]

The Clinton executive order was generally well received by American juridical thinking, but President Bush made several significant changes to the executive order 12866. In 2002, with executive order 13258 he basically removed the Vice President from the process. In January 2007, with executive order 13422, he ordered that significant steering documents also be reviewed by the OIRA. He also required that agencies had to identify in writing specific market failures that necessitated a rulemaking, that agency regulatory policy officers be presidential appointees, that these officers were obliged to approve the regulatory plan, that aggregate costs and benefits for all rules had to be included, and that agencies considered whether to use formal rulemaking for complex determinations. During the Bush Administration, OIRA also announced several new initiatives in its review process. It made extensive use of its website to publish its guidelines and other information pertaining to its review process and specific rule reviews. It began the practice of issuing public return letters to agencies for reconsideration of a particular rule review, and prompt letters, which sent on OMB's initiative and contained suggestions for new or stronger regulations. Some scholars thought that these innovations exceeded the limits imposed on the role of the President in U.S. constitutionalism.[23]

However, President Obama,[24] upon assuming office, revoked Bush orders and reinstated the original Clinton approach. Agencies were urged to consider values that are difficult or impossible to quantify, including

[21] This analytical requirement is triggered when a rule may result in the expenditure of over $100 million in any one year. Agency are obliged to conduct assessment of quantitative and qualitative costs and benefits and other economic effects.
[22] In September 2003, OMB finalized *Circular A-4* that was designed to assist analysts in the regulatory agencies by defining good regulatory analysis and standardizing the way benefits and costs of Federal regulatory actions are measured and reported. The circular recommends that an analysis include elements such as a statement of the need for the proposed action, including any statutory or judicial directive, an examination of alternative approaches, and an evaluation of qualitative and quantitative benefits and costs of the proposed action and the main alternatives.
[23] P.L. Strauss, *Overseer or the "Decider"? The President in Administrative Law*, 75 *Geo. Wash. Law Review*, 696 (2007).
[24] With executive order n. 13563/2011.

equity, human dignity, fairness, and distributive impacts, afford the public a meaningful opportunity to comment through the internet on any proposed regulation, with a comment period that should generally be at least 60 days; to provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded; to provide, for proposed rules, an opportunity for public comment on all pertinent parts of the rulemaking docket, to seek public input from affected persons before issuing a notice of proposed rulemaking, to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice, to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.[25] Agencies had to develop and submit to OIRA a preliminary plan for periodically reviewing its existing significant regulations, to determine whether any such regulations should be modified, streamlined, expanded, or repealed, so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives. This order was extended to independent regulatory agencies.[26]

By later memorandum, the requirement that significant guidance documents be reviewed by OIRA was reinstated. President Barack Obama encouraged agencies to choose regulatory alternatives that maximize net benefits and to tailor their regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account the costs of cumulative regulations.

After Clinton and Obama Administrations agencies do not make decisions solely on the outcome of their cost-benefit analyses, and other factors will likely be part of an agency's regulatory decision, such as statutory mandates and considerations, as well as the political and policy priorities of the current Administration.[27] Regulatory impact analysis, including cost-benefit analysis, is one of the key inputs into federal agencies' rulemaking. This basic approach remained fundamentally unchanged since Trump Administration.

5. Biden and new tendencies in administrative law

Biden's approach is more respectful of Constitutional law and the bill under discussion in Senate than Trump's reforms. As result of the executive orders and Congressional initiatives, rulemaking is today enriched with elements that reinforce the proportionality, illustrate the economic and technological feasibility, the costs and the benefits to the regulated sector. Furthermore, agencies generally are obliged to demonstrate that they have adopted the most convenient rule, compared to the other possible solutions, identify each

[25] H.G. Boutrous, *Regulatory Review in the Obama Administration: Cost-Benefit Analysis for Everyone*, 62 *Admin L. Rev.*, 262 (2010).
[26] With executive order n. 13579/2011.
[27] R.J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, *Mich. St. L. Rev.*, 67 (2009).

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additional advantage and costs, illustrate the benefits obtained, when they adopt a provision that involves higher financial charges than to the other hypotheses evaluated. These innovations should lead agencies to identify regulatory solutions in line with presidential policy, but the limits of the power of the central offices remain rather uncertain.[28]

The bill would require, if passed, that any determination, analysis or regulation produced by the agency or the Bureau of Information and Regulatory made pursuant to an order must form part of the agency's register, also in relation to judicial review. In other words, it is expected that the inclusion of the recommendations of the Presidential Offices in the register could exercise a significant influence on the agency, since in the judicial review the administration would then have to provide the reasons why it decided not to follow the indications of central offices.

The new approach tends to strengthen proportionality in rulemaking and make the procedure more transparent.[29] Agencies would be required to evaluate a reasonable number of alternative proposals, determine whether existing federal acts or regulations have created or contributed to the issues the administration intends to overcome, and, if so, whether they could be reversed or modified. The provisions being approved would then require agencies to make all the information acquired available to civil society, through a summary that is part of the regulatory proposal.[30]

Biden's reform is also more in line with the recent tendence to rethinking rulemaking process than the Trump's approach. The bill plans to strengthen the power of Congress to proactively approve rules with the greatest economic impact, before they can take effects.[31] Agencies could not issue substitute rules that are substantially identical to those opposed.[32] Congress wants to reformulate the relationship with representative democracy. This is a complex and difficult reform in American constitutionalism: there is the risk of distorting the rulemaking process, based on the well-known mechanisms of participation, and on the technical and professional capacity of the American administrations.[33] Prior congressional approval would allow elected representatives to make assessments for which they possess no professional technical skills. The primary rules typically cover highly technical and complex scientific data, requiring specific knowledge and proven industry experience, which members of Congress typically lack. According to some American scholars, the opposing groups of the regulatory projects would have an easy channel to assert their ideas outside participation, with the risk that the private contributions not accepted in the final decision they could return to take on value, if shared by the Congress. The lack of training and experience of the

[28] L.R. Revesz, B. Unel, *Just Regulation: Improving Distributional Analysis in Agency Rulemaking* (December 27, 2022). Available at SRN: https://ssrn.com/abstract=4314142

[29] R.M. Levin, *The Regulatory Accountability Act and the Future of APA Revision*, 94 *Chicago-Kent Law Review* 2, 523 (2019).

[30] *Regulatory Accountability Act of 2017*, S. 951, § 3, 115th Cong. (2017).

[31] Cfr. *HR 26, Regulations from the Executive in Need of Scrutiny (REINS) Act of* 2017.

[32] Cfr. *HR 21, Midnight Rules Relief Act of* 2017.

[33] J.L. Mashaw, D.L. Harfst, *From Command and Control to Collaboration and Deference: The Transformation of Auto Safety Regulation*, 34 *Yale J. On Reg.*, 167, 188 (2017).

members of the legislative body would then make it highly probable that organized groups possessing significant financial resources would have a high incidence in rulemaking process.[34]

Biden's order restored the balanced model between the control of the Presidential Offices and the discretionary power of agencies, in a delicate phase of American constitutionalism which is constantly evolving and transforming, in search of a new role of representative democracy in delegated rulemaking, that seems difficult to define.[35]

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[34] R.M. Levin, *The Regulatory Accountability Act and the Future of APA Revision*, in 94 *Chicago-Kent Law Review* 2, 523 (2019), e C.J. Walker, *Modernizing the Administrative Procedure Act*, cit., 638 ss.

[35] V. De Falco, *Judicial review and Independent Authorities Rulemaking. L'America alla ricerca di un nuovo equilibrio nella separazione dei poteri*, in *DPCE online*, 2, 2021, 2113 ss. A.L. Nielson, *Response, Confession of the anti-administrativist*, 131 *Harv. L. R. F.*, 1 (2017).

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