

# FOMENTING AUTHORITARIANISM THROUGH RULES ABOUT RULEMAKING

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## I. INTRODUCTION

In recent years, the President of the United States has assumed increasing power. Among other things, the President now makes decisions that federal administrative agencies previously would have made. This trend is not new, but it has reached a new height in the current administration. Some of the reasons for this development are obvious: the Congress's lawmaking ability has atrophied, and technology and the media encourage the President to take credit for federal policy decisions. Just as Congress's inaction contributes to this trend, so too does agency inaction. When agencies cannot make or change policy in a timely and efficient manner, the President is more inclined to do it himself.

Agency rulemaking has become extremely resource-intensive making them increasingly unable to respond to changing circumstances in a timely fashion. That is due in part to requirements imposed by the Congress, the President, and the courts. Though well-intentioned, the judicial rules about rulemaking are particularly problematic. Many of those rules conflict with the Administrative Procedure Act (APA), the primary statute governing federal agency procedure and judicial review. That conflict is of great concern because the passage of the APA in 1946 marked a significant moment in deliberative democracy: after years of debate among the Congress, the Executive Branch, and the public, Congress passed the APA unanimously, and the President signed it into law. The APA balanced multiple values, concerns, and variables. When the courts to disturb that balance, they raise exceptional separation-of-powers and political-accountability concerns.

The judicial rules governing agency rulemaking also are problematic because they have unanticipated consequences. Of the three branches of the U.S. government, the courts are the least capable of considering various positions and proposals and predicting which approach to administrative policymaking will be most effective. Thus, their rules seeking to enhance transparency, accountability, and public participation in administrative processes yield other results as well. Among other things, the courts' rules about rulemaking have fomented the growth of authoritarianism by making agency rulemaking more difficult.

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Changing times require changing policy. Congress's policymaking ability, however, is severely compromised, and federal agencies are overburdened by procedural requirements. Thus, the President has stepped into the policymaking breach. The courts should recognize their role in the changing power structure of the U.S. government and adhere to the careful balance achieved in the APA. They should require agencies to adhere to the APA's requirements without overburdening them.

## II. AGENCIES IN THE U.S. GOVERNMENT

### *A. The Original Design*

The United States Constitution assigns the powers of government to three different branches: legislative powers are vested in a Congress; judicial powers are vested in a Supreme Court and whatever other courts the Congress creates; and executive powers are vested in a President.<sup>1</sup> Along with that separation of governmental powers, the U.S. Constitution provides for each branch of the government to be able to check the power of the other branches. For example, Congress may enact a statute only with the President's agreement or a supermajority vote to override his veto.<sup>2</sup>

This model of government was intended to protect liberty and avoid tyranny.<sup>3</sup> No single branch can exercise all of the powers of government, and no single branch can act without limit. As James Madison explained, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>4</sup>

The U.S. Constitution also anticipated that the President could not execute all of the law on his own. It recognized that governmental powers might be vested in a "Department or Officer."<sup>5</sup> It provided for principal officers to be appointed by the

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<sup>1</sup> U.S. CONST. Art I, § 1, Art. II, § 1, Art. III, § 1.

<sup>2</sup> *Id.* Art. I, § 7.

<sup>3</sup> See Boumediene v. Bush, 553 U.S. 723, 742 (2008); Theodore B. Olson, *Tex Lezar Memorial Lecture*, 9 TEX. REV. L. & POL. 1, 2 (2004).

<sup>4</sup> The Federalist Papers are 85 essays written by Alexander Hamilton, James Madison, and John Jay in 1787 and 1788 urging ratification of the U.S. Constitution. Madison wrote a series of essays on separation of powers that "were then, and still are today, considered a seminal work on the nature of the Constitution and its structure." Victoria Nourse, *Toward A "Due Foundation" for the Separation of Powers: The Federalist Papers As Political Narrative*, 74 TEX. L. REV. 447, 521 (1996).

<sup>5</sup> U.S. CONST. Art I, § 8, cl. 18.

President with the advice and consent of the Senate.<sup>6</sup> It authorized the President to request a written opinion from “the principal Officer in each of the executive Departments.”<sup>7</sup> And it delegated to Congress the responsibility for specifying which officer would act as President if the President and Vice President could not.<sup>8</sup> The Departments of War, Treasury, and State came first, followed by the Post Office.

Over the years, Congress has increasingly delegated both rulemaking and adjudicatory authority to agencies. Congress typically enacts broad statutory outlines, leaving gaps for agencies to fill. These broad statutory delegations have become an entrenched part of the U.S.’s constitutional structure, making the federal bureaucracy a necessary element of the U.S. government.<sup>9</sup>

There are multiple, overlapping means for controlling federal agencies. The Constitution authorizes the President to control agencies through his power to appoint their leaders (with the advice and consent of the Senate);<sup>10</sup> Congress appropriates agency funds and writes the statutes that delineate agency authority;<sup>11</sup> and the federal courts review the legality of agency actions.<sup>12</sup> Many other mechanisms for controlling agencies have arisen over the years as well. For example, the President can remove most of his appointees at will.<sup>13</sup> He can issue Executive Orders to direct agency action.<sup>14</sup> Agency budget requests filter through the President’s office.<sup>15</sup> Congress can investigate and hold hearings on agencies,<sup>16</sup> and it can invalidate agency rules using a fast-track procedure.<sup>17</sup>

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<sup>6</sup> *Id.* Art. II, § 2, cl. 2.

<sup>7</sup> *Id.* Art. II, § 2, cl. 1.

<sup>8</sup> *Id.* Art. II, § 1, cl. 6.

<sup>9</sup> See Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 2, 95 (2017).

<sup>10</sup> U.S. CONST. Art. II, § 2, cl. 2.

<sup>11</sup> U.S. CONST. Art. I, § 8, cl. 1 & 18.

<sup>12</sup> See U.S. CONST. Art. III, § 2, cl. 1 (extending the Judicial Power “to Controversies to which the United States shall be a Party”).

<sup>13</sup> See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010).

<sup>14</sup> See Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 546-57 (2005).

<sup>15</sup> See Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016).

<sup>16</sup> See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 124-27 (2006).

<sup>17</sup> Congressional Review Act, Pub. L. No. 104-121, title II, § 251 (1996), *codified at* 5 U.S.C. §§ 801-808.

### *B. Recent Changes*

Over the past 50 years, the structure of the United States government has shifted dramatically. Among other things, the President has increasingly made policy decisions himself that previously would have been made either by Congress or by a government agency. This phenomenon began decades ago, but it has reached a frightening crescendo in the current administration.<sup>18</sup>

For example, when President Reagan wanted a change in immigration policy, he left the matter to Congress.<sup>19</sup> In the Obama administration, the policy change came from the Secretary of Homeland Security, but the President held a press conference to announce it.<sup>20</sup> President Trump simply issued a Proclamation banning immigration from certain countries.<sup>21</sup> Other recent examples of the President taking on the role of an agency include his order directing the Secretary of the Interior to expand broadband in rural areas;<sup>22</sup> his order establishing a policy regarding mental healthcare for veterans;<sup>23</sup> the memorandum dictating timing and testing requirements under the Clean Air Act;<sup>24</sup> and the memorandum establishing a new policy regarding arms transfers.<sup>25</sup> Years ago, such policy changes would have come from an agency exercising power delegated by Congress. Now, the President makes the policy himself.

There are of course many reasons for this development. First, Congress is increasingly unable to enact legislation.<sup>26</sup> Congress has not even enacted a federal budget on time in more than twenty

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<sup>18</sup> See Daniel A. Farber, *Presidential Administration Under Trump* (2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3015591](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015591), at 4, 30.

<sup>19</sup> Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3445 (1986).

<sup>20</sup> See Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), available at <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>; see also Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. REG. \_\_\_ (forthcoming), at 22–23.

<sup>21</sup> Exec. Order No. 13,769 § 3(c) (2017).

<sup>22</sup> Exec. Order No. 13,821 (2018).

<sup>23</sup> Exec. Order No. 13,822 (2018).

<sup>24</sup> Presidential Memorandum for the Administrator of the Environmental Protection Agency (Apr. 12, 2018).

<sup>25</sup> National Security Presidential Memorandum Regarding U.S. Conventional Arms Transfer Policy (Apr. 19, 2018).

<sup>26</sup> See Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1103 (2013).

years.<sup>27</sup> If Congress does not make policy to address new problems and circumstances as they arise, then doing so is left to the executive branch. Congress has largely abdicated its central role in policy making and acquiesced in the transfer of that power to the President.<sup>28</sup> Justice Jackson's prediction has come to pass that Congress's power would slip through its fingers if it was "not wise and timely in meeting its problems."<sup>29</sup> Moreover, even when Congress does act, the President cannot rely on the Congress to make the policy he desires unless his party controls both houses. That sort of governmental unity has been scarce since the administration of Franklin Delano Roosevelt ended in the 1940s.<sup>30</sup> Thus, legislative atrophy has fostered presidential unilateral action.

Another reason for this development is technology and the media. Everything the government does is promptly splashed across the internet, and Americans do not distinguish between the President and federal agencies. In this atmosphere, the President is inclined to take the credit for and control policy decisions, particularly because he is likely to be blamed for them if they go wrong regardless of whether the decision was actually his or not.<sup>31</sup>

Federal agencies' inability to act is another reason why the President has increasingly stepped into their shoes. It is commonly accepted that Congress's inaction is one of the primary reasons for increasing presidential power. By the same token, agencies' inaction creates a power vacuum for the President to fill. Just as Congress's ineptitude inspires the President to make policy himself, so too does agency sloth increase the tendency towards presidential power.<sup>32</sup> Governmental power in the U.S. may be seen as a hydraulic system. The Supreme Court observed that each of the three branches of the government applies pressure "to exceed the outer limits of its power."<sup>33</sup> On the other hand, if one branch contracts its activity and reduces that outward pressure, another

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<sup>27</sup> John Dickerson, *The Hardest Job in the World*, THE ATLANTIC (May 2018), available at <https://www.theatlantic.com/magazine/archive/2018/05/a-broken-office/556883/>.

<sup>28</sup> *Id.*

<sup>29</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

<sup>30</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2311 (2001).

<sup>31</sup> Farber, *supra* note 18, at 23. Other motivations for the President to act unilaterally include "paying political debts, demonstrating action for a constituency, responding to political adversaries, or sending political signals." Phillip J. Cooper, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* 66 (2d ed. 2014).

<sup>32</sup> Cooper, *supra* note 31, at 85.

<sup>33</sup> 462 U.S. 919, 951 (1983).

branch will expand to fill the void. Like water, governmental power “has to go somewhere.”<sup>34</sup>

Professor Gillian Metzger argued recently that bureaucracy is essential for constraining presidential power.<sup>35</sup> Federal agencies combine expert, professional, civil-service personnel with multiple oversight and accountability mechanisms, public participation, and procedural requirements.<sup>36</sup> That complexity makes them “the key to an accountable, constrained, and effective executive branch.”<sup>37</sup> A necessary corollary to Metzger’s argument is that without functioning agencies, the executive branch would be less accountable, constrained, and effective.<sup>38</sup>

In short, if agencies cannot make policy in a timely fashion, the President will. Notably, the President is far less accountable than agencies. The President’s actions are often insulated from judicial review,<sup>39</sup> and aside from quadrennial elections, he can only be removed from office through impeachment<sup>40</sup> or by the written declaration of the Vice President and a majority of the President’s principal officers that he is “unable to discharge the powers and duties of his office.”<sup>41</sup> The President is not constrained by the APA<sup>42</sup> and thus need not solicit input from effected interests to hone his policy. Presidential policymaking entails less transparency, public participation, and accountability than agency rulemaking.

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<sup>34</sup> Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705, 1708 (1999).

<sup>35</sup> Metzger, *supra* note 9, at 7, 51.

<sup>36</sup> *Id.* at 72, 78-87.

<sup>37</sup> *Id.* at 72.

<sup>38</sup> Jon Michaels propounds a theory of administrative separation of powers: presidentially appointed agency heads, civil servants, and members of the public work with and against each other and the three constitutional branches of government, making the federal bureaucracy “a self-regulating, constitutionally sound ecosystem unto itself.” Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 232 (2016). Interference by one of the constitutional branches disturbs that balance and may inspire civil servants and the public might to team up against it. *Id.* at 259, 268. Specifically, “presidential efforts to direct a particular agency result ... directly weaken the administrative separation of powers.” *Id.* at 269.

<sup>39</sup> *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (holding that the President is not an “agency” under the Administrative Procedure Act).

<sup>40</sup> U.S. CONST. Art. I, §§ 2 & 3. Removal through impeachment requires a majority vote in the House of Representatives followed by a trial and conviction by a supermajority in the Senate.

<sup>41</sup> U.S. CONST. Amend. XXV.

<sup>42</sup> *Franklin*, 505 U.S. 788.

### III. AGENCY INERTIA

The Administrative Procedure Act of 1946 (APA) fills in the gaps in the U.S. Constitution regarding agency procedure and judicial review of agency action. It has effectively become the constitution for the fourth branch of the U.S. government.<sup>43</sup> It took many years of deliberation, discussion, and compromise for Congress to pass the APA, which it did unanimously, in a form that President Truman would endorse.<sup>44</sup>

When Congress first codified requirements for agency policymaking in the APA, it agreed on a process for rulemaking that was simple and left much to agency discretion.<sup>45</sup> When an agency proposes a rule, it must publish a notice including the time, place, and nature of any public proceedings; the authority for the proposed rule; and “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” Any interested person may submit comments on the proposal in writing, and the agency may allow oral presentations as well. The agency then must consider “all relevant matter presented” and “incorporate in any rules adopted a concise general statement of their basis and purpose.”<sup>46</sup> This process is known as notice-and-comment rulemaking.

Despite that unanimous agreement in 1946, agency policymaking in the United States has become increasingly difficult.<sup>47</sup> Congress has piled requirements for rulemaking on agencies without providing adequate resources to meet those requirements. Agencies must examine the potential impacts of their proposals on the environment and on small businesses; minimize the burden of paperwork; and analyze the financial impact on state, local, and tribal governments<sup>48</sup> among many other mandates.<sup>49</sup>

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<sup>43</sup> See Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1208 (2015).

<sup>44</sup> See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996). A bill becomes law only if the President signs it or Congress overrides his veto with a supermajority of both houses. U.S. Const. Art. I, § 7.

<sup>45</sup> See Kathryn E. Kovacs, *Rules or Rulers? The Rise of the Unitary Executive*, 70 ADMIN. L. REV. (forthcoming), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3126791](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126791), at 17-19.

<sup>46</sup> Administrative Procedure Act, Pub. L. No. 79-404 § 4, 60 Stat. 237 (1946), codified at 5 U.S.C. § 553.

<sup>47</sup> U.S. government agencies also may make policy through case-by-case adjudication. *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947).

<sup>48</sup> Jeffrey S. Lubbers, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 130-71 (5th ed. 2012).

<sup>49</sup> Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. L. REV. 533 (2000).

The President also has piled on requirements for rulemaking. Most notably, Executive Order 12,866, signed by President Clinton in 1993, requires agencies to send their proposed rules, some of which must be accompanied by a cost-benefit analysis, to the Executive Office of the President for review. Agencies must retrospectively review rules as well to determine which may be modified or repealed.<sup>50</sup> In the new administration, agencies must repeal two rules for every one they promulgate.<sup>51</sup>

The courts have added to the burden of rulemaking as well. In the 1960s and 1970s, Congress enacted statutes that gave agencies the authority to issue rules that could have an enormous impact on the economy and on people's lives. The courts responded to that development with legal doctrines that they believed would support judicial review of agency actions and enhance accountability, fairness, and accuracy in agency rulemaking.<sup>52</sup> For example, agency actions are now subject to so-called "hard look" review: the Supreme Court moved away from its traditional deference to agency determinations and instead subjected them to "thorough, probing, in-depth" review.<sup>53</sup> In addition, the Supreme Court opened the door for challenges to rules before the agency seeks to enforce them; previously, rules would be challenged in enforcement actions initiated by the agency.<sup>54</sup> Moreover, the courts must review agency actions based on the agency's contemporaneous explanation for its decision, not on a *post-hoc* justification.<sup>55</sup>

Those doctrines necessitated changes to the rulemaking process. To enable hard-look review before enforcement, the courts required agencies to keep a record of their rulemaking processes and provide an elaborate explanation for the final rule, including a discussion of why it rejected alternatives and reacted to policy issues the way it did, as well as a response to all significant comments on the proposed rule.<sup>56</sup> Courts also require agencies, when giving notice of a proposed rule, to include in the notice the

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<sup>50</sup> Exec. Order No. 13,563 (2011).

<sup>51</sup> Exec. Order No. 13,771 (2017).

<sup>52</sup> Kovacs, *supra* note 45, at 39-40.

<sup>53</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

<sup>54</sup> Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 192 (1996); Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 198, 205 (1974).

<sup>55</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 50 (applying *SEC v. Chenery*, 332 U.S. 194, 196 (1947), to notice-and-comment rulemaking).

<sup>56</sup> Lubbers, *supra* note 48, at 287, 341; *see also* Section of Administrative Law and Regulatory Practice, American Bar Association, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 28 (2d ed. 2013) (explaining that the rulemaking record includes all notices, materials the agency relied on, and public comments).

information the agency considered in drafting the rule<sup>57</sup> and to document *ex parte* contacts during the rulemaking process.<sup>58</sup>

While these myriad rules about rulemaking were well-intentioned to maintain a proper balance of power in the U.S. government, ensure transparency and public participation, and advance other laudable goals, they have made it difficult for agencies to publish rules in a timely and efficient manner. Rulemaking has become “a complex, time-consuming, resource-intensive procedural maze.”<sup>59</sup> None of the judicial rules about rulemaking appears to be all that burdensome standing alone, but taken together they increase the difficulty of rulemaking considerably. In particular, writing preambles to rules has become increasingly onerous given the need to explain rules in more depth and respond to a rising number of public comments.<sup>60</sup> Creating a rulemaking record requires staff time and external contractors,<sup>61</sup> and all of the judicial rules about rulemaking increase the risk of litigation, which also demands agency resources.<sup>62</sup>

Rulemaking is now sufficiently difficult that agencies avoid it and presidents do not rely on it. Thus, agencies have become increasingly unable to respond to changing circumstances and elections.<sup>63</sup> At the same time, congressional policymaking also has atrophied, leaving a power vacuum for the President to fill.

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<sup>57</sup> Lubbers, *supra* note 48, at 277.

<sup>58</sup> Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 885 (2007).

<sup>59</sup> Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking Via Pre-Notice Transparency*, 47 WAKE FOREST L. REV. 681, 687–88 (2012); *see also* Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1400-01 (1992); Aaron L. Nielson, *Sticky Regulations*, \_\_ U. CHI. L. REV. \_\_, (forthcoming), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2950732](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2950732), at 10-11; Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1494 (2012).

<sup>60</sup> *See* McGarity, *supra* note 59, at 1400; Nielson, *supra* note 59, at 11; Alec Anthony Webley, *Seeing through a Preamble, Darkly: Administrative Verbosity in an Age of Populism and ‘Fake News’*, \_\_ ADMIN. L. REV. \_\_ (forthcoming), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3014162](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3014162), at 34, 35, 39.

<sup>61</sup> *See* Paul R. Verkuil, *The Wait Is over: Chevron As the Stealth Vermont Yankee II*, 75 GEO. WASH. L. REV. 921, 928 (2007) (“The use of consultants to prepare rules for review has become a common practice.”).

<sup>62</sup> *See* McGarity, *supra* note 59, at 1400.

<sup>63</sup> Kovacs, *supra* note 45, at 37. The courts have invalidated many of the Trump administration’s rushed policy changes. *See, e.g.*, *Natural Resources Defense Council v. Nat’l Hwy. Traffic Safety Admin.* No. 17-2780 (2d Cir. Apr. 23, 2018); *Clean Air Council v. Pruitt*, 862 F.3d 1, 4 (D.C. Cir. 2017); *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062 (N.D. Cal. 2018); *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054 (N.D. Cal. 2018); *Nat. Res. Def. Council, Inc. v. Perry*, No. 17-CV-03404-VC, 2018 WL 922032 (N.D. Cal. Feb. 15, 2018).

#### IV. THE TROUBLE WITH JUDICIALLY-CREATED RULES ABOUT RULEMAKING

##### A. *Conflict with Precedent*

The judicially created rules about rulemaking are particularly problematic for a number of reasons. First, the judicially imposed requirements for rulemaking are contrary to Supreme Court precedent. In *Vermont Yankee Nuclear Power Corp. v. NRDC*, the Supreme Court held that courts may not impose procedural requirements on rulemaking beyond those codified in the APA, unless the Constitution requires it.<sup>64</sup> Leaving procedure to agency discretion, the Court said, was not only consistent with Congress's intent, but also normatively preferable because it would make judicial review more predictable.<sup>65</sup>

Yet, each of the judicial rules about rulemaking highlighted above is directly contrary to the text and history of the APA. Congress deliberated about whether to require agencies to keep a record in rulemakings and decided not to require such records in notice-and-comment rulemaking. Rulemaking records are required only when another statute requires the rulemaking to be “on the record.”<sup>66</sup> Such so-called “formal” rulemakings must adhere to a host of other requirements that resemble a full trial.<sup>67</sup> For example, in formal rulemakings, agencies may not rely on *ex parte* communications, but must limit their consideration to the public record.<sup>68</sup> Prohibiting *ex parte* communications in notice-and-comment rulemaking exceeds the terms of the statute.<sup>69</sup>

Similarly, Congress decided to require a notice of a proposed rulemaking to include “either the terms or substance of the proposed rule or a description of the subjects or issues involved.”<sup>70</sup> Requiring agencies to include information they considered in drafting a proposed rule exceeds the terms of the statute.<sup>71</sup> Finally,

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<sup>64</sup> 435 U.S. 519, 524, 542 (1978).

<sup>65</sup> *Id.* at 546-47. *See generally* Kathryn E. Kovacs, *Pixelating Administrative Common Law in Perez v. Mortgage Bankers Association*, 125 YALE L.J. F. 31 (2015).

<sup>66</sup> 5 U.S.C. § 553(c); *see also* Kovacs, *supra* note 45, at 24-26.

<sup>67</sup> *See* 5 U.S.C. § 556 & 557.

<sup>68</sup> 5 U.S.C. § 557(d)(1).

<sup>69</sup> *See* Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 883-88 (2007).

<sup>70</sup> 5 U.S.C. § 553.

<sup>71</sup> *Am. Radio Relay League v. FCC*, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part) (“One searches the text of APA § 553 in vain for a requirement that an agency disclose other agency information as part of the notice or later in the rulemaking process.”); *see also* Beermann & Lawson, *supra* note 69, at 894-95.

the APA requires agencies to provide “a concise general statement” of each rule’s “basis and purpose.”<sup>72</sup> Pre-enforcement judicial review of rules necessitates far more robust explanations than Congress judged would be sufficient.<sup>73</sup>

### B. Structural Concerns

In the U.S., courts often exceed the terms of statutes, bending and stretching them to keep up with new and changing circumstances.<sup>74</sup> The APA, in particular, has long been considered a “common law statute.”<sup>75</sup> Congress has not updated the law significantly in more than forty years, hence few people complain when the courts keep the law in step with changing times.<sup>76</sup> While “dynamic” statutory interpretations are often criticized,<sup>77</sup> in administrative law, they are typically accepted, if not welcomed.<sup>78</sup>

That traditional view extends back to 1946. As mentioned above, the APA reflects a compromise between liberals and conservatives. Though the Act passed unanimously, neither side was fully satisfied. Thus, after President Truman signed the APA, the two sides tried to influence the courts’ view of the law. Conservatives pitched the APA as imposing new constraints on agencies. Liberals sold it as restating pre-existing common law. For the most part, the liberals won the debate.<sup>79</sup> Courts not only interpret the terms of the APA loosely, but they also continue to apply doctrines that contradict the statute or exceed its boundaries entirely.<sup>80</sup>

That method of interpretation, while appropriate in other contexts, is not appropriate in U.S. administrative law. Adhering to

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<sup>72</sup> 5 U.S.C. § 553(c).

<sup>73</sup> *see also* Kovacs, *supra* note 45, at 33-34.

<sup>74</sup> *See* William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION (1994); Abner J. Mikva & Eric Lane, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS (1997); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 426 (1989).

<sup>75</sup> *See* David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525, 536 (2011).

<sup>76</sup> *But see, e.g.*, John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Kovacs, *supra* note 43.

<sup>77</sup> *E.g.*, Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

<sup>78</sup> *See, e.g.*, Kenneth Culp Davis, ADMINISTRATIVE LAW TREATISE § 2.17, 2.18, 6.37, 7.19, 14.10 (2d ed. 1978); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010).

<sup>79</sup> *See* Kathryn E. Kovacs, *A History of the Military Authority Exception in the APA*, 62 ADMIN. L. REV. 673, 706-7 (2010).

<sup>80</sup> *See* Kovacs, *supra* note 43, at 1208.

the terms of the APA is particularly important because it grew out of an epic legislative battle spanning seventeen years and codified one of the most monumental legislative compromises of the Twentieth Century. No single view of the administrative state prevailed. Instead, Congress balanced multiple views and values. “[T]he APA settlement reflects a particular effort to balance a range of variables, including stability, constraints on executive power, accountability, and the need for expedition and energy—for vigorous government.”<sup>81</sup> That legislative compromise mandates respect from the courts.<sup>82</sup> Failure to focus on the terms of the statute, as well as its context and history, risks undermining the legislative bargain.<sup>83</sup>

The deep deliberation underlying the APA also warrants judicial respect. Courts’ discounting of the results of civic republican discourse in the most democratically accountable branch of government raises serious concerns. First, while courts certainly deliberate, they do not involve the public in their deliberation. “Courts have neither the motivation nor the means to obtain information about the values of the general polity, on which civic republicanism’s common good depends.”<sup>84</sup> Congressional deliberation is often flawed or entirely absent. When Congress does deliberate in a meaningful way, the courts should pay close attention to the results of that process.<sup>85</sup>

Second, the U.S. Constitution assigns to the Congress the duty to make policy. Whenever a court makes policy, separation-of-powers concerns arise.<sup>86</sup> Third, and relatedly, court decisions that do not respect the terms of the APA lack political accountability and thus democratic legitimacy.<sup>87</sup> The separation-of-powers and political-accountability objections must answer to current legal doctrine, which recognizes that courts often “create law.”<sup>88</sup> Those concerns are particularly salient, however, in this context where the statute at issue resulted from a lengthy and deep debate between the Congress, the Executive Branch, and the public. The

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<sup>81</sup> Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 82 (2015).

<sup>82</sup> Federal judges in the U.S. enjoy life tenure. U.S. CONST. Art. III, § 1.

<sup>83</sup> See William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2053 (2006); John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1290 (2010); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 119 (2012).

<sup>84</sup> Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1543 (1992).

<sup>85</sup> See Glen Staszewski, *Statutory Interpretation As Contestatory Democracy*, 55 WM. & MARY L. REV. 221, 252 (2013).

<sup>86</sup> See Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 23, 27 (1985).

<sup>87</sup> *Id.* at 24-25, 27.

<sup>88</sup> Metzger, *supra* note 78, at 1347-48.

courts' decisions contradicting the text that concluded that debate provide particularly noteworthy examples of the unelected judiciary trespassing on the representative legislature's territory.<sup>89</sup>

### C. *Unanticipated Consequences*

Finally, the judicially created rules about rulemaking are problematic because they yield unanticipated consequences. Courts consider solely the views of the parties to a particular case, which typically includes only one federal agency. They do not have the institutional capacity to weigh competing policy considerations or predict the results of their decisions. Congress, on the other hand, can consider the views and insights of multiple parties and debate numerous proposals simultaneously.<sup>90</sup> Therefore, Congress is better suited than the courts to determine which rules of administrative procedure will be best.<sup>91</sup> In the APA, Congress balanced multiple values. "The courts have no constitutional authority to revise that judgment and no epistemic basis for thinking they can make a better one."<sup>92</sup>

The judicially created rules about rulemaking have had many consequences that the courts did not anticipate. Among them is the fomenting of authoritarianism, described above. Notably, Congress recognized the possibility that a growing administrative state might undermine the U.S.'s representative democracy when it started contemplating the APA in the 1930s. At the time, fascism was taking hold in Europe, and government agencies were tools of those administrations. Many people in the U.S. feared that President Roosevelt would go down the same road.<sup>93</sup> Congress designed the APA to avoid that danger.<sup>94</sup> Among other things, it provided that agencies would be able to flesh out statutes in rules following a quite simple procedure. Congress recognized that agency rulemaking gives regulated entities and the public notice of the agency's position and avoids the need for courts to fill the gaps

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<sup>89</sup> Kovacs, *supra* note 43, at 1255-57; *see also* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1320-21 (2014).

<sup>90</sup> *See* Bagley, *supra* note 89, at 1322.

<sup>91</sup> Kathryn E. Kovacs, *Scalia's Bargain*, 77 OHIO ST. L.J. 1155, 1193 (2016).

<sup>92</sup> Bagley, *supra* note 89, at 1330.

<sup>93</sup> *See* Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, in *TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II* 188 (Daniel R. Ernst & Victor Jews eds., 2002); *see also* Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 77 (2000).

<sup>94</sup> *See* Kovacs, *supra* note 45, at 4-19.

that Congress leaves in statutes.<sup>95</sup> The federal courts should not disturb the careful balance the APA achieved.

That said, the APA, the fundamental charter for the United States' vast federal bureaucracy, has not been updated significantly in forty years.<sup>96</sup> Congress has often considered updating the statute, but has not had the political wherewithal to pass an amendment. Many academics thank the courts for intervening to keep the APA up to date.<sup>97</sup> The courts' interventions, however, enable Congress's dysfunction. It is past time for Congress to do its job and for the courts to encourage that.

## V. CONCLUSION

Avoiding authoritarianism in the U.S. requires agencies that are empowered to be effective partners in governance. The federal courts must ensure that agencies play by the rules of the APA, but they should take a step back and recognize that every time they create a new rule of administrative procedure, that rule may have consequences that the courts cannot anticipate. Congress should enable agencies to do their jobs and not burden them beyond their capacity. Clearly, removing some of the obstacles to efficient and effective agency rulemaking will not solve all of the U.S. government's problems and will not reverse the trend toward authoritarianism. But it is a step in the right direction. Without effective agency policymaking, we cannot avoid falling into the trap the APA was designed to avoid.

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<sup>95</sup> See, e.g., S. Rep. No. 76-442, at 11 (1939).

<sup>96</sup> See Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 635 (2017).

<sup>97</sup> E.g., Metzger, , *supra* note 78.