

## Comment

# A PROCESS-BASED APPROACH TO PRESIDENTIAL EXIT

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### INTRODUCTION

In 2015, Professors J.B. Ruhl and Jim Salzman published a pathbreaking article: *Regulatory Exit*.<sup>1</sup> That article suggests that regulators ought to pay more attention to how regulatory programs and relationships end, rather than just focusing on creating programs without any thought to their termination. Furthermore, Ruhl and Salzman identify two dimensions that characterize regulatory exit that can help creators of regulatory programs think about how to structure “exit.” The first is whether the criteria for exit are (or should be) specified *ex ante*—when the design of the program or regulatory interaction is established—rather than *ex post*—after the program is operating and the interaction is ongoing.<sup>2</sup> The second dimension is whether the specification of what triggers exit should be transparent and rule-like—depending only on the existence of clearly delineated facts—rather than opaque or fuzzy—like flexible standards whose operation depend on imperfectly specified balancing of a variety of factors.<sup>3</sup>

In their contribution to this symposium on *Exit and the Administrative State*, Ruhl and Salzman focus on *Presidential Exit*—exit from regulatory programs created and administered by the president without need for action by any congressionally created administrative agency.<sup>4</sup> Such exit is especially interesting because the source of the president’s authority to create regulatory programs varies: sometimes that authority is granted to the president by statute;

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1. J.B. Ruhl & James Salzman, *Regulatory Exit*, 68 VAND. L. REV. 1295 (2015).
2. *Id.* at 1312–14.
3. *Id.* at 1312, 1314–16.
4. J.B. Ruhl & James Salzman, *Presidential Exit*, 67 DUKE L.J. 1729, 1736–40 (2018).

other times the president's authority flows directly from his constitutional powers, such as his role as commander-in-chief or his responsibility to see that the laws are faithfully executed.<sup>5</sup> One might reasonably surmise that the propriety of Congress imposing exit criteria on the president must depend on the source of the president's authority in that instance. Additionally, unlike the heads of administrative agencies, the president is the embodiment of the executive branch, and constitutionally he is coequal with the other two branches, Congress and the courts. This too might affect the propriety of congressionally imposed criteria for presidential exit. This Essay comments on both of these Ruhl and Salzman articles by distinguishing process-based constraints on exit from substantive exit criteria. This Essay posits that, because of difficulties in specifying substantive exit criteria that serve the goals of a regulatory program, often process-based criteria can more effectively serve such goals.

Part I addresses the general notion of regulatory exit that was the subject of *Regulatory Exit*. I note that Ruhl and Salzman focus on substantive criteria for when exit should occur. But, it is virtually impossible to know *ex ante* all of the substantive criteria that should trigger some type of exit—whether that be an end to the program, the end of the relationship of a particular participant in the program to the remainder of the regulated community, or more nuanced changes to either the program or its relationship to a particular participant. For this reason, I contend that although substantive criteria for exit may be beneficial, process-based requirements for exit are probably more fundamental to a vast majority of programs. Moreover, in contrast to Ruhl and Salzman's insight that substantive criteria for regulatory exit generally are underspecified and not sufficiently considered, the regulatory state nearly always provides the procedures that an agency must follow before engaging in exit of any kind,<sup>6</sup> and usually a process for judicial appeal or review.<sup>7</sup> Furthermore, such processes are usually structured to ensure that exit is justified by either objective analyses or

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5. For the purposes of this Essay, it is not important to distinguish those situations in which Congress shares authority over a matter with the president from those in which the president has exclusive authority. *See generally* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (offering opinions of several justices on the relationship of the president's constitutional powers to those of Congress); *see also* *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015) (holding that the president has exclusive power to decide whether to recognize Jerusalem as part of Israel).

6. *See* Administrative Procedure Act, 5 U.S.C. §§ 553–557, 559 (2012).

7. *Id.* § 706; *Abbott Labs. v. Gardner*, 387 U.S. 136, 139–41 (1967) (stating that there is a presumption of availability of judicial review).

changes in the values of the polity. That is, the administrative state has spent considerable time and effort developing policymaking processes that essentially require agencies to lay out the implications of their exit decisions; these processes increase the transparency of the values furthered by the agency's regulatory action, and thereby foster political accountability.<sup>8</sup>

Part II turns to the particular question of presidential exit, for which procedures are less studied and developed. I address how the sources of presidential regulatory authority and the president's role as the head of a constitutionally coequal branch of government explain the dearth of process-based prerequisites to presidential exit. Finally, I appeal to deliberative democracy's justification for the administrative state to suggest that the public interest might be well served by subjecting presidential regulatory decisions to judicial review, requiring the president to explain why he believes these actions promote the public interest. Throughout this Essay, I use President Trump's efforts to exit President Obama's Deferred Action for Childhood Arrivals (DACA) policy to illustrate how process-based criteria that govern regulatory change can meaningfully constrain agency and presidential decisions to exit from preexisting regulatory policies.

## I. PROCESSES FOR REGULATORY EXIT

It is helpful to carefully define Ruhl and Salzman's concept of regulatory exit in order to identify the processes that law mandates an agency follow before engaging in such exit. They define exit broadly as "the intentional, significant reduction in governmental intervention initiated at a particular time under specified processes and conditions."<sup>9</sup> Ruhl and Salzman then go on to state that, from the perspective of the administrative agency, exit may be the elimination of a program in its entirety, or it may be relaxation of "a regulatory threshold defining the class of regulated entities . . . or [reduction of] the intensity of permitting standards and procedures . . . as is done through the general permit mechanism."<sup>10</sup> Exit may also reflect a determination that an entity subject to regulation has met some threshold that removes it from regulatory oversight.

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8. See Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 162, 194-97 (2012).

9. Ruhl & Salzman, *Regulatory Exit*, *supra* note 1, at 1302.

10. *Id.*

Of course, regulatory exit requires a preexisting regulatory relationship with private entities. Hence, exit can be seen as part of the general concept of administration action. “Entrance” creates the relationship and “exit” reduces or eliminates it. Ruhl and Salzman’s contribution to this symposium, *Presidential Exit*, clarifies that exit from one policy is really the imposition of a substitute policy. For example, President Obama maintained DACA as a policy that created enforcement priorities that essentially guaranteed that noncitizen residents of the United States who had entered the country prior to their sixteenth birthday and remained without proper immigration documentation would not be deported, and would instead be able to obtain work permits allowing them to work legally in the United States. When President Trump’s acting secretary of homeland security reversed the Obama administration’s DACA policy,<sup>11</sup> so-called dreamers exited the DACA program and entered into a different and more invasive relationship with Immigration and Customs Enforcement.<sup>12</sup> Thus, there often is no clear distinction between exit of one regulatory relationship and entrance into another. So understood, in terms of governmental action, Ruhl and Salzman’s concept of exit essentially covers any regulatory action that alters some entity’s (often many entities’) legal rights or obligations. And as any student of administrative law knows, much of that subject is devoted to the procedures that entities must follow when taking regulatory action and judicial review of such action.

For example, a regulator often initiates exit via an adjudicatory

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11. David Nakamura, *Trump Administration Announces End of Immigration Protection for ‘Dreamers,’* WASH. POST (Sept. 5, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/09/05/trump-administration-announces-end-of-immigration-protection-program-for-dreamers/?utm\\_term=.3a6d331e9fbd](https://www.washingtonpost.com/news/post-politics/wp/2017/09/05/trump-administration-announces-end-of-immigration-protection-program-for-dreamers/?utm_term=.3a6d331e9fbd) [<http://perma.cc/D8VT-HTC3>]; see also U.S. DEP’T OF HOMELAND SEC., MEMORANDUM ON RESCISSION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<http://perma.cc/3E3D-6ZQP>] [hereinafter DACA Rescission Memo].

12. After the termination of DACA, lawsuits were filed challenging the Trump administration’s action to terminate the program. Multiple district court judges granted preliminary injunctions requiring the government to maintain the DACA program. See *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018) (granting a preliminary injunction requiring the federal government to maintain DACA and allow individuals to submit applications to renew their enrollment in DACA); see also *Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018) (granting a preliminary injunction requiring the government to accept DACA applications from people who previously had DACA); Elizabeth Redden, *DACA Lives, but for How Long?*, INSIDE HIGHER ED (Mar. 5, 2018), <https://www.insidehighered.com/news/2018/03/05/daca-continues-now-colleges-and-students-face-uncertainties> [<http://perma.cc/ZW7H-9MHM>].

proceeding evaluating whether a private entity has satisfied ex ante established regulatory criteria, or whether changed circumstances render an entity no longer subject to regulation. The regulator looks at past conduct to determine the rights and obligations of the entity under the program that the regulator administers.<sup>13</sup> Under the federal Administrative Procedure Act (APA), if the statute authorizing regulatory action calls for a hearing and a decision based on the record thereby created, the regulatory hearing must follow the formal trial-type procedures laid out in the APA.<sup>14</sup> If the authorizing statute does not call for a hearing on the record, the APA requires minimal procedures,<sup>15</sup> although the authorizing statute itself might specify procedures above those the APA requires for such informal adjudication.

If the agency initiates exit by prospectively eliminating or modifying a program—and in the process changes the legal rights and obligations of regulated entities—then the agency usually acts through rulemaking.<sup>16</sup> As for adjudication, the APA requires trial-type procedures when the statute authorizing the rulemaking requires the agency to hold a hearing and base the resulting rule on the hearing record,<sup>17</sup> although today statutes calling for such formal rulemaking are unusual. More frequently, the agency must provide a notice of proposed rulemaking and an opportunity for interested persons to comment on the proposal before adopting a final rule.

Crucially, almost all agency action, whether based on evaluation of ex ante criteria or changing those criteria ex post, is subject to judicial review to ensure that the agency followed proper procedures, acted within its statutory authority, and did not act arbitrarily and capriciously.<sup>18</sup> Significantly, courts have molded the arbitrary and

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13. Under the APA, any retrospective agency action that applies, rather than creates, standards is adjudication. *See* Administrative Procedure Act, 5 U.S.C §§ 551 (4), (6)–(7) (defining adjudication as “the process for the formulation of an order,” which in turn is any action other than a rule, which is any agency “statement of . . . future effect designed to implement, interpret or prescribe law or policy”).

14. *Id.* § 554(a).

15. *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655–56 (1990); *see also* *Finer Foods, Inc. v. U.S. Dep’t of Agric.*, 274 F.3d 1137, 1140–41 (7th Cir. 2001) (holding that a statute calling for a hearing triggered informal adjudication under the APA, but nonetheless entitling the petitioner to some hearing before a neutral decisionmaker under the statute).

16. *See* 5 U.S.C §§ 551 (4)–(5).

17. *Id.* § 553(c).

18. There is a presumption that agency action is reviewable, although the action must be ripe for review, and usually final, before a court will review it. *See* 5 U.S.C. § 706(2); *Abbott Labs.*

capricious standard into a process-oriented review, requiring the agency to clearly set out the factual predicates for its action, and to explain the implications of its action—the trade-offs between that action and alternatives, including the alternative of doing nothing.<sup>19</sup> In addition, courts have structured review of agencies' interpretation of their statutory authority to require an inquiry similar to *Chevron* step-two analysis.<sup>20</sup>

One might wonder what procedures and judicial review have to do with Ruhl and Salzman's call for consideration of exit criteria. Judicial review does not undercut the importance of their call for agencies to consider substantive criteria for ending or modifying programs; however, judicial review does provide an important backstop to agency exit decisions. Even when factors are relatively transparent and specified *ex ante*, there may be uncertainty about precisely what they entail, or about how an agency should best apply them. Hence, even for this determinate category of exit, there is bound to be some discretion in how an agency ultimately evaluates whether exit is appropriate and what that exit should entail. Given the necessary uncertainty surrounding the relationship between exit decisions and regulatory goals, the public interest requires use of agency expertise and decisionmaking structures that emphasize deliberation rather than political decisionmaking.<sup>21</sup> The need for explicit deliberation becomes

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v. Gardner, 387 U.S. 136, 139-41 (1967).

19. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 46-52 (1983). The current approach to judicial review is predicated on the idea that the courts must ensure that the agency took a hard look at all matters relevant to the action under review. *See* *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-53 (D.C. Cir. 1970) (creating the hard look test); *see also* *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (demanding under arbitrary and capricious review that an agency consider all "relevant factors"); *see also* Seidenfeld, *supra* note 8, at 155-57 (describing how arbitrary and capricious review requires the agency to identify the trade-offs inherent in its action).

20. *See, e.g.*, *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) (suggesting in dicta that *State Farm's* arbitrary and capricious standard and *Chevron* step-two analysis are "the same"); *Michigan v. EPA*, 135 S. Ct. 2699, 2706-07 (2015) (holding that the EPA's interpretation of the Clean Air Act's provisions governing regulation of existing power plants to allow the EPA to ignore the costs of regulation was unreasonable under step two of *Chevron*); *see also* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 5-10, 33-45 (2017); Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359, 2390-91 (2018); Mark Seidenfeld, *Revisiting Congressional Delegation of Interpretive Primacy as the Foundation for Chevron Deference*, 25 SUP. CT. ECON. REV. (forthcoming) (manuscript at \*22-24) (on file with the *Duke Law Journal*).

21. Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 852, 885-896 (2012); *see also* Mark Seidenfeld, *Foreword to the Annual Review of Administrative Law: The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1444-1457 (2013) [hereinafter Seidenfeld, *The Role of*

even greater when the factors that bear on the exit decision are not known *ex ante*, and when the manner of weighing those factors cannot be established in a predetermined—and therefore transparent—fashion. In addition, value judgments about what kind of exit, if any, is best for society often attach to exit decisions. Although such value judgments usually fall within the ambit of politics rather than law, judicial review can help ensure that an agency does not hide these value judgments behind faulty factual determinations and predictions; judicial review, therefore, facilitates political accountability for exit decisions.<sup>22</sup>

## II. PROCESSES AS A CONSTRAINT ON PRESIDENTIAL EXIT

Before addressing process as a constraint on presidential exit, it is important to clarify just what I, along with Professors Ruhl and Salzman, mean by presidential exit. The past few presidents have issued numerous regulatory executive orders. These often reverse actions of the prior administration, and hence constitute exit under Ruhl and Salzman's definition.<sup>23</sup> Many of these orders, however, are instructions to executive officials to implement regulatory programs as the president dictates. The president, as the coordinator of the executive branch, can certainly issue such instructions, but the most widely held view—and the view to which presidential conduct has conformed—is that the president does not have inherent power as head of the executive branch to dictate actions to officials that Congress has authorized to act.<sup>24</sup> Under this understanding of the president's

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*Politics*].

22. See Seidenfeld, *Irrelevance of Politics*, *supra* note 8, at 144, 163–64.

23. See Ruhl & Salzman, *Presidential Exit*, *supra* note 4, at 1738–39.

24. Scholars who argue that the Constitution created a unitary executive headed by the president, contend that the president has authority to make all decisions left to the executive branch. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 596 (1994); Saikrishna B. Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 991–94 (1993). However, the traditional view sees the constitutional role of the president as overseer—not decider—of administrative policy that has been delegated by statute to an agency official. See Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006); Peter Strauss, *Foreword: Overseer or "the Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704–05 (2007). *But see* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2249–53 (2001) (arguing against the unitary executive position as a matter of constitutional law, but arguing that statutes allow the president to direct agency decisions whenever the decisionmaker is removable at will by the president); Kathryn Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 728 (2016) (stating that the Supreme Court has not answered the question: “when can the president step into the shoes of the agency and make a

constitutional power, a congressionally authorized official need not heed the president's instructions if she is willing to pay the price of ignoring them.<sup>25</sup> If, as usually occurs, the official does comply with the president's instructions, then it is the *official's* action—not the president's instruction—that has the force of law; the processes dictated for regulatory action then apply to the official's action.

For example, in September 2017 the media reported that President Trump reversed the Obama administration's DACA program.<sup>26</sup> In actuality, DACA was created by an exercise of enforcement discretion granted by statute to the secretary of homeland security, and not by President Obama. Similarly, the DACA termination was implemented by a memorandum issued by the acting secretary of homeland security, and not by an action of President Trump.<sup>27</sup> The memorandum constitutes a general statement of policy, which as an agency—as opposed to a presidential—action is subject to judicial review. Given that such constraints already exist for presidential decisions that have to be implemented by agency action, I will limit my discussion, as Ruhl and Salzman do, to presidential orders

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decision that Congress delegated to a specified agency official?"). Even when President Richard Nixon wanted to fire Special Prosecutor Archibald Cox during the Watergate investigation, he did not do so directly. Nixon instead asked the person acting as attorney general to do so. This resulted in Attorney General Elliot Richardson and Deputy Attorney General William French Smith resigning rather than following the president's order, and Cox remained in his position until he was fired by Solicitor General Robert Bork, who became acting attorney general upon the resignations of Richardson and French Smith.

25. If the matter is of sufficient importance to the president, and if he has the power to do so, presumably the president will fire the official for ignoring his instructions. Another potential cost of ignoring presidential will is reduction of White House support for programs headed by the official, which is likely to result in loss of funding for such programs. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 822–824 (2013); Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 594 (1984) ("The commissions need goods the president can provide: budgetary and legislative support, assistance in dealing with other agencies, legal services, office space, and advice on national policy."). Of course, the president may also pay a price for exacting a price from the official, for example, the loss of an effective member of the president's administration or a decrease in funding for programs the president supports. See Strauss, *supra*, at 589–91; see also Kagan, *supra* note 24, at 2274 ("[T]he president often cannot make effective use of his removal power given the political costs of doing so.").

26. Tal Kopan, *Trump Ends DACA but Gives Congress Window To Save It*, CNN (Sept. 5, 2017), <http://www.cnn.com/2017/09/05/politics/daca-trump-congress/index.html> [https://perma.cc/9W8S-8D4D]; Veronica Stracqualursi & Adam Kelsey, *Trump Administration Announces Plan To End DACA*, ABC NEWS (Sept. 5, 2017), <http://abcnews.go.com/Politics/trump-expected-announce-daca-decision-today/story?id=49611829> [https://perma.cc/97AP-2XAB]; Anthony Zurcher, *Trump's DACA Dilemma- and Dodge*, BBC NEWS (Sept. 5, 2017), <http://www.bbc.com/news/world-us-canada-41153609> [https://perma.cc/AT4G-FZV5].

27. DACA Rescission Memo, *supra* note 11.



that have direct force of law.

Having clarified what constitutes presidential exit, let me proceed to address why the benefits of procedure and judicial review attach to presidential action. From a deliberative democratic perspective, procedures help ensure that the decisionmaker, whether agency or president, receives and considers relevant stakeholder input.<sup>28</sup> Judicial review, properly structured, ensures that the decisionmaker takes care;<sup>29</sup> it also restrains the decisionmaker from creatively spinning facts to essentially mislead the public about the implications of its action.<sup>30</sup>

To be sure, the president has different strengths and incentives than do agencies. The costs of procedure and judicial review may be greater for presidential action than for agency action. Presidents may have to act so quickly that there is not time for procedures prior to their decisionmaking. The president may also have a greater need to keep deliberations confidential to protect national security. The potential for delay caused by procedures and judicial review, therefore, may render them inappropriate for a greater percentage of presidential action than agency action. The benefits of procedure and judicial review may also be less for presidential action than for agency action. Unlike agency heads, the president is a political being who is directly accountable to the people. Accordingly, the White House is structurally more attuned to popular reaction to presidential action than are agencies with respect to agency action.<sup>31</sup>

At the same time, the president's political outlook is likely to

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28. See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1559–62, 1572–76 (1992); see also Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 448–49 (2010); Staszewski, *supra* note 21, at 885–893.

29. See Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002)

30. See Seidenfeld, *Irrelevance of Politics*, *supra* note 8, at 144, 177–79. I am not alone in looking for process-based constraints on presidential control of regulation. See, e.g., Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1130–31 (2010); Watts, *supra* note 24, at 740–45. The proposals by Watts and Mendelson address presidential influence on agency action already subject to procedural constraints and judicial review, and hence cannot control direct regulatory actions by the president. In addition, I have explained why disclosure of White House interaction with agencies and crediting judicial review is unlikely to constrain, and may even exacerbate, problematic presidential influence. See Seidenfeld, *The Role of Politics*, *supra* note 21, at 1454–57. President Trump's tweets, by which he directly communicates with the public, have strengthened my conviction that disclosure of the president's position on regulatory matters will not constrain politically motivated decisions that undermine the public interest.

31. See Kagan, *supra* note 24, at 2335; Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 507–08 (1985).

encourage him to view data and predicted effects of his actions in a light most favorable to his action and to spin the action accordingly. Established procedures can provide a reliable record to counter questionable presidential factual assertions, and judicial review can provide an objective analysis of that record. The phenomenon of White House spin, which today rises to the level of the Trump White House alleging “fake news,”<sup>32</sup> suggests that procedures and judicial review for presidential action may provide huge returns in increased quality of presidential decisionmaking. Thus, while courts might need to massage the availability and perhaps the precise structure of hard look review to make it work for presidential exit, some version of such review does promise potentially enormous benefits.

Returning to the termination of DACA example, a district court reversed the “Trump” change in DACA, which the acting secretary had premised on the unlawfulness of the creation of the program in the first place.<sup>33</sup> The judge ruled that the secretary of homeland security had authority to create the program, and therefore that the justification given by the assistant secretary was inadequate. The ultimate result, if the district court ruling stands, is that the Trump administration will either acquiesce in continuing DACA, or it must justify ending the program as a policy matter. In essence, if President Trump ends DACA, he will have to take responsibility for that action as a matter of policy; that would be at odds with his public position that he favors DACA but thinks that Congress must authorize it for it to be lawful.<sup>34</sup> Although judicial review was available because the secretary of homeland security, rather than the president, had the authority to take this action, the termination of DACA illustrates how process-based constraints on exit can help the electorate hold the president politically

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32. Steve Coll, *Donald Trump's “Fake News” Tactics*, NEW YORKER (Dec. 11, 2017), <https://www.newyorker.com/magazine/2017/12/11/donald-trumps-fake-news-tactics> [http://perma.cc/K2CF-LEXE]; see also Donald Trump (@realDonaldTrump), TWITTER (Jan. 7, 2018, 12:35 P.M.) (“The Fake News Awards, those going to the most corrupt & biased Mainstream Media, will be presented to the losers on Wednesday, January 17<sup>th</sup> . . . .”), <https://twitter.com/realdonaldtrump/status/950103659337134080?lang=en> [https://perma.cc/24NC-TN7Z].

33. *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018); see also Aubree Eliza Weaver, *Trump Calls Courts ‘Broken’ After Judge Blocks DACA Wind-down*, POLITICO (Jan. 10, 2018), <https://www.politico.com/story/2018/01/10/judge-daca-ruling-trump-response-333153> [https://perma.cc/X7BL-MHKY].

34. Katie Reilly, *Here’s What President Trump Has Said About DACA in the Past*, TIME (Sept. 5, 2017), <http://time.com/4927100/donald-trump-daca-past-statements/> [https://perma.cc/7VSW-EA3W]; see also Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves To End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html> [https://perma.cc/G75R-rUXH].

accountable for his actions.

Although procedures and judicial review would undoubtedly encourage more deliberative—and therefore, I believe, wiser—presidential exit, the extent to which Congress and the courts can impose such process-based constraints may be severely limited. In particular, the ability to impose such constraints depends on whether the president is exercising statutorily granted authority when he demands exit from a regulatory program, or instead authority stemming from his inherent Article II constitutional powers. In the context of the administrative state, *Vermont Yankee* holds that it is inappropriate for courts to impose procedures on agency action beyond those required by statutory or constitutional law. This is usually sound policy because courts do not have the expertise to structure procedure for the vast array of contexts within which agencies act. They may well overestimate the benefits of procedures and fail to appreciate the burdens procedures impose. Moreover, procedures may be inextricable from outcomes; procedural burdens would increase the cost of action and thereby reduce or even preclude certain presidential action.<sup>35</sup> Courts have, of course, added to the minimal requirements of APA rulemaking by requiring that notice of a proposed rule allow for meaningful comment,<sup>36</sup> and by creating the hard look doctrine of judicial review.<sup>37</sup> But they have done so to implement the purposes underlying specific provisions in the APA and agency organic statutes that provide for notice-and-comment and arbitrary and capricious judicial review. Thus, courts are not creating burdens out of whole cloth. The question is whether courts can find similar pegs on which to hang required procedures and review for presidential exit.

Unfortunately, I can find no such pegs in the Constitution itself. While it specifies a precise procedure for enacting statutes and imposes due process as a constraint on judicial procedure, the Constitution is completely silent on procedure for actions by the president. Therefore, when the president acts pursuant to direct authority in the

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35. See Antonin Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 404–08 (noting that Congress may impose procedures to bias agency action toward certain outcomes).

36. See Peter Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497, 520 (2013) (“[For the past four decades] judges have understood the statutory requirement to publish a notice of proposed rulemaking in the Federal Register also to require agencies simultaneously to release important materials on which the proposal relies”).

37. See Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 128 & n.239 (1994).

Constitution—such as when he manages the operations of the executive branch in the absence of statutory direction,<sup>38</sup> or when he acts in his role as the commander in chief of the military—there does not seem to be a solid legal ground for imposing procedures or judicial review on such action.

The propriety of process-based constraints improves, I believe, when the president acts pursuant to a statutory delegation from Congress because statutes can prescribe procedures and judicial review on presidential action. Some might find this belief unremarkable because if Congress can withhold the power from the president entirely, it seems logical that Congress should be able to condition the exercise of that power however it sees fit. This does not necessarily follow.<sup>39</sup> If one views creation of law, which is at the core of the legislative power, as entirely distinct from the execution of the law, then one might argue that Congress oversteps its bounds if it constrains the head of the executive branch in implementing of the law. Virtually no one doubts the validity of statutorily created procedures and judicial review of agency action. There is a difference, however, between appointed agency officials—whose institutional existence depends on the agency organic statute—and the elected president, in whom “the executive Power [is] vested.”<sup>40</sup>

The distinction between creation and execution of the law, however, is not well defined, and drawing the line between the two types of action is impossible so long as one recognizes that execution of the law necessarily involves policymaking discretion. Jurists and scholars alike have relied on the difficulty of distinguishing execution from creation of law to justify the current moribund state of the nondelegation doctrine.<sup>41</sup> When a statute specifies the process by which

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38. If Congress either lacks power over a matter or simply has not exercised its power, then the president's action on the matter is pursuant to his powers under Article II of the Constitution. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636–37 (1952) (Jackson, J., concurring) (noting that the president may have power to take actions to execute statutory law in the face of congressional silence regarding such implementation).

39. Cf. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–41 (1985) (holding that state discretion to create a property interest does not allow the state to restrict procedures to which a property owner is entitled by the due process clause of the Constitution).

40. U.S. CONST. art. II, § 1, cl. 1.

41. See *Whitman v. Am. Trucking Assoc., Inc.*, 531 U.S. 457, 472–76 (2001) (explaining why courts defer to legislative judgments about how much policy making can be left as part of the execution of a statute). See generally Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (describing various justifications for the nondelegation doctrine but concluding that the doctrine cannot be supported).

the executive branch is to implement and enforce law, those statutory instructions could reach the point of being sufficiently “executive” to constitute interference with the execution of the law; this question is the inverse of that posed by the nondelegation doctrine. And the line between legislation and execution of law is no easier to draw in this context. This is especially so given that the Constitution explicitly grants Congress the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing [legislative] Powers . . . .”<sup>42</sup> Thus, courts have routinely held that statutes can constrain prosecutorial discretion by specifying priorities in prosecuting various types of statutory violations.

A staunch formalist might contend, nonetheless, that specifying procedures and providing for judicial review of presidential administration of statutes interferes with value judgments regarding execution of statutes that are appropriately left to the popularly accountable president. Value judgments are clearly relevant to such decisions as how to balance the benefits and costs of procedures, and how intensely to prosecute various types of statutory violations. The Necessary and Proper Clause, however, suggests that Congress, whose members are also elected by the people, has authority to interfere with executive value judgments in order to effectuate the execution of the laws it creates.<sup>43</sup> This justifies my belief that Congress can impose process-based constraints on presidential exit. And if Congress agrees with me that process is important to ensure that the president makes exit decisions carefully and accountably, it would do well to specify procedures and judicial review when authorizing the president to implement a statute directly.

## CONCLUSION

Ruhl and Salzman’s insight that the regulatory state should pay more attention to the substantive criteria for exit from relationships between regulators and regulated entities is pathbreaking. Yet the uncertainties surrounding regulation—whether due to unknown future developments or simply the complexity of regulation at work—makes specification of substantive exit criteria difficult. This Essay points out that the administrative state has reacted to this difficulty by creating

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42. U.S. CONST. art. I, § 8.

43. Cf. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 (2002) (arguing that Congress does not encroach on judicial power by specifying the means by which courts are to interpret statutes).

process-based “backups” for determining exit criteria, such as procedures and judicial review. Unfortunately, it has not done so for direct regulatory action by the president. When the president predicates such action on direct constitutional authority, the Constitution provides no peg on which courts can “hang” process-based constraints. However, when the president acts pursuant to statutory delegation of regulatory authority, this Essay suggests that Congress can and should provide process constraints such as procedures for and judicial review of such actions.