

Trump's Administrative Abuse and the LGBTQ Community

Under the Obama administration, the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community experienced a landmark expansion of federal protections through administrative actions. These changes improved the quality of life for LGBTQ students, workers, and parents across the country. Since taking office in January, the Trump administration has taken steps to roll back these critical protections — limiting equal access to programs and services for LGBTQ people. Trump has not only tried to undermine our progress, but has also disregarded the legal safeguards in place to promote consistency and public accountability.

Recurrent Substantive Errors

Under President Trump, federal agencies have made egregious, substantive errors when reporting policy changes to the public — specifically changes targeting the LGBTQ community. These errors have undermined public trust, fostering an atmosphere of anxiety and skepticism.

Excessively Short Public Comment Periods

The Trump administration has ignored the longstanding policy and custom that calls for 30 to 90 day public comment periods. The Trump Administration has released a series of complex, high-impact rules with excessively brief public comment periods — many consisting of mere weeks or even days.

Inappropriate Use of Interim Final Rules

Leaked documents show that the Trump administration is in the process of publishing interim final rules impacting our community. These IFRs go into effect immediately without the benefit of public comment. Although IFRs can be used, they should not be routine and should never be used for complex or controversial regulations.

Use of Informal Social Media to Initiate Policy Making

Trump's consistent reliance on social media platforms like twitter to announce Presidential intent reflects not only a disrespect for the process and the people impacted by his pronouncements, but also a dangerous misunderstanding of the limits of his own power. Tweets don't make policy. They don't carry the force of law, and as we have seen by President Trump's recent actions it is impossible to provide federal agencies and their staff with the concrete vision and guidance required to implement policy statements in 140 characters.

Unfortunately, what tweets can do is incite anxiety, undermine the real and valuable daily work of the federal government, and contribute to the corrosive and divisive political atmosphere in which we live.

Federal Regulations Can Change Lives— No, Really.

In 2007 Lisa Pond collapsed while waiting to depart on a cruise out of Miami with her partner and children.¹

Lisa was rushed to Jackson Memorial Hospital. Her partner of 18 years Janice Langbehn arrived minutes later with their children. Despite providing a package of legal documents including living wills, advanced directives, and a power of attorney, the hospital informed Janice that she, and their children, would be prevented from seeing Lisa because they were in “an anti-gay city and state.”² The hospital also refused to provide Lisa’s family with any information about her condition. Janice and her children were ignored by the hospital staff until Lisa’s sister arrived eight hours later.³

During those critical eight hours, Lisa slipped into a coma from a brain aneurysm. Lisa died completely alone with her family just feet away simply because she and her partner were gay. In April 2010, President Barack Obama, called Janice personally to apologize for the lack of compassion by this hospital and directed the U.S. Department of Health and Human Services (HHS) to create rules requiring hospitals to allow visitation for lesbian, gay, bisexual, transgender, and queer (LGBTQ) families. In January 2011, HHS issued regulations designed to prevent this

needless, cruel suffering by requiring hospitals to respect visitation documents regardless of the sexual orientation of the patient or spouse. These regulations have served as a critical step towards ending discrimination in hospitals and ensuring that all families receive the respect and recognition they deserve.

In January 2011 HHS issued regulations designed to prevent this needless, cruel suffering by requiring hospitals to respect visitation and designation documents regardless of the sexual orientation or gender identity of the patient or spouse. These regulations have served as a critical step towards ending discrimination in hospitals and ensuring that all families receive the respect and recognition they deserve.⁶

Under the Obama administration, the LGBTQ community experienced a landmark expansion of federal protections – like hospital visitation – through administrative actions. These changes have improved the quality of life for LGBTQ students, workers, and parents across the country.

Regulations Provide the Footing for Every Federal Program and Service We Depend On

Federal programs operated and funded by agencies like HHS and the Department of Housing and Urban Development (HUD) provide critical lifeline services to some of our nation's most vulnerable communities. Federal funding makes programs like Meals on Wheels and local emergency shelters accessible for millions of Americans each year.

Due to the increased risk for poverty, isolation, and discrimination, we know that LGBTQ people depend on these and other federal programs to stay safe and healthy every day. These programs are made possible by complex sets of regulations and policies that ensure that they operate efficiently and fulfill their missions as designed by Congress. Agency rulemaking and the development of guidance, surveys, and other informal actions demand precision. Outside of the beltway, these changes are too often dismissed as bureaucratic red tape, but these policies and decisions change lives. The public depends on agencies to honestly and fully report changes made to these programs.

Under Trump's leadership, federal agencies have made egregious, substantive errors that have muddied the bureaucratic, but otherwise straightforward, rulemaking and guidance process. Agencies like the Department of Health and Human Services (HHS) and the Environmental Protection Agency (EPA) have also evaded long established rulemaking norms – drastically cutting public comment periods or in some cases removing them all together. This disregard for the administrative process has signaled to many – including members of Congress – that the Trump administration not only disrespects good government, but also refuses to recognize its own obligations under the law.

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Federal Law Protects Rulemaking— Promoting Public Engagement and Good Government

The Administrative Procedures Act (APA)⁷ provides an incoming Administration with significant freedom to revise policies and the direction of federal programs, however there are tangible safeguards in place to ensure that abrupt changes in federal direction are tempered by public comment and judicial review.

The strength of these safeguards relies on respect for the established legal process and requirements. The Trump administration has routinely skirted these legal requirements and has wholly dismissed the administrative norms designed to promote good government.

The Administrative Procedure Act

Passed in 1946, sets forth the guidelines for the proposal and establishment of federal agency regulations. The APA requires agencies to keep the public informed and involved in rulemaking.

What is a rule? A rule is an entire or partial statement by an agency that has the effect of implementing or prescribing law. The process of rulemaking includes the process of formulating, amending, or repealing a rule.

Understanding the rulemaking process.

The rulemaking process begins with a published notice of proposed rulemaking in the Federal Register. This publication is required to give the public adequate notice of the proposed rule. A notice and comment period is then provided in order to allow the public to participate. Finally, the agency takes the public comments into consideration and publishes a Final Rule according to APA guidelines.

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The Trump Administration Has Ignored the Administrative Process

Consistent substantive errors reflect disrespect for the process and the impact of agency actions: Under President Trump, federal agencies have made egregious, substantive errors when reporting policy changes to the public – specifically changes targeting the LGBTQ community.

These errors have undermined public trust, fostering an atmosphere of anxiety and skepticism. One of the most troubling examples of these mistakes was contained in the federal register notice announcing the publication of the draft 2017 National Survey of Older Americans Act Participants (NSOAAAP) by the Administration for Community Living (ACL) at HHS.⁸ Since 2014, this annual survey included questions explicitly addressing sexual orientation. The survey obtains performance outcome information, identifies service gaps, and supports improvements for the program.

The Older Americans Act (OAA)⁹ is a federal statute that funds state, local, and non-profit agencies that offer aging services and support for the older population- including programs such as Meals on Wheels, in-home services, and community senior centers. In order to receive this funding, states are required to submit plans demonstrating how these funds will be used to serve adults with the greatest economic and social needs.

There are an estimated 2.4 million LGBTQ seniors living in America today, and this number is estimated to double by 2030.¹⁰ LGBTQ older adults are extremely vulnerable and face the challenges of age and illness often without the traditional support systems and legal protections other seniors take for granted. Studies have also shown that LGBTQ older adults are more likely to rely on community and governmental supports like those provided by the OAA than their straight and/or cisgender counterparts due to an absence of family and the reliance on peer support networks.¹¹

In 2012, ACL recognized that older adults experiencing isolation because of their sexual orientation or gender identity may be recognized as a population with a “greatest social need” for purposes of OAA programs.¹²

Given these barriers to successful aging and previous recognition as a “greatest social need population” by the Department, the retention of a sexual orientation question – and the inclusion of a gender identity question— within the OAA survey promotes the development of data-driven public policy that does the most good and furthers the mission of the statute. Comprehensive, uniform data collection is an essential tool to ensure that LGBTQ seniors have equal access to the federal programs and services to which they are entitled to.

On March 13, 2017 ACL published a federal register notice with a link to the 2017 draft survey stating that there were “no changes” to the survey.¹³ However, there was a single, significant change. ACL had removed the question pertaining to sexual orientation. This is the only alteration to the survey from 2016 to 2017. A correction was issued in the federal register 11 days later on March 24, 2017 after swift public outcry.¹⁴ However, the public comment period was not lengthened to account for the notice error. Undoubtedly due to the explosive public response for comment – almost 5,000 HRC members and supporters spoke out against the change alone – ACL published a new draft in June including lesbian, gay, and bisexual older adults, but still excluding transgender seniors.

The Trump Administration has also capitalized on non-substantive, clerical errors to rescind agency actions that would serve the LGBTQ community. For example, also in March 2017, HUD published two notices simultaneously withdrawing critical data collection and notice requirements for two of the Department's flagship LGBTQ programs. The first publication withdrew notice-posting requirements for shelters operating HUD-funded emergency shelters.¹⁵

This notice was originally published alongside the September 21, 2016 Equal Access Rule ensuring equal access to HUD funded shelters for transgender and gender nonconforming beneficiaries. The withdrawn notice required shelters to publicly post beneficiary rights, including the right to be served safely in gender-appropriate housing. The Paperwork Reduction Act notice, withdrawing this September 2016 requirement, cites a clerical error as one of the reasons for withdrawal—the original notice stated that the regulation was published September 20 instead of September 21. This slight technical error could have easily been corrected with a brief federal register notice similar to that used by ACL in the context of the NSOAP.

The second notice withdrawn provided data collection and implementation guidelines for evaluating the LGBTQ Youth Homelessness Prevention Initiative operated in coordination with the True Colors Fund.¹⁸ As described by HUD this “first-of-its-kind” initiative was designed to “identify successful strategies for ensuring that no young person is left without a home because of their sexual orientation or gender identity.”¹⁹ This project began with two pilot communities in 2014 and was intended to develop a model for preventing LGBTQ youth homelessness that could be replicated by other communities. The rescission of this important survey element will undoubtedly make replicating this impressive project nationwide challenging.

Although this notice and the LGBTQ youth homeless initiative were completely unrelated to the Equal Access Rule notice, they were inextricably tied together by HUD allowing the casual observer to assume there was an error with both notices. However, the only characteristic these notices share is that they were designed to better serve the most vulnerable members of the LGBTQ community.

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HUD finalized the “Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity” in 2012.¹⁶

The rule prohibits discrimination in any program receiving HUD funding including emergency shelters, voucher and public housing programs, and FHA mortgage and loan programs.

The Equal Access Rule has proven to be an effective tool to end harmful discrimination in housing and loan programs. Within a year of publication HUD announced a settlement with a major banking institution for discriminating against a Florida lesbian couple seeking a home loan insured by the FHA.¹⁷

Despite being told throughout the process that they would qualify for the loan, the bank refused to finalize the loan when they realized they were a same-sex couple. HUD brought an action against the bank, which agreed to pay a fine and re-train its employees to ensure that discriminatory practices are not standard protocol.

The Public Deserves Transparency and the Opportunity to Comment. It's the law.

Excessively Short Public Comment Periods: The APA defines rulemaking as “formulating, amending, or repealing a rule,”²⁰ thus any attempt to rescind rights previously granted under these provisions require compliance with the procedures set forth in the APA, as well as with statutory and executive order requirements.

The APA requires that agencies seeking to engage in any of the covered forms publish a notice of proposed rulemaking in the Federal Register to allow “interested persons” to comment on the proposed rule.²¹ This provision would require the agency in question to publish the proposed rule, indicating the proposed changes, as well as any supporting evidence relied on by the agency to make the determination that the rule had to be altered or formulated.

Although the APA does not provide explicit guidelines for the length of public comment periods, longstanding policy²² and custom has led most to be between 30 and 90 days,²³ based on the complexity of the rule and the impact on the public.²⁴ The Trump administration has released a series of complex, high-impact rules with excessively brief public comment periods – many consisting of mere weeks or even days.²⁵ This rush severely limits the ability of the public to adequately comment and deprives government officials of needed feedback to prevent errors and unintended consequences.

For example, in February 2017 HHS issued a Notice of Proposed Rulemaking (NPRM) with the express goal of stabilizing the Affordable Care Act (ACA) insurance marketplace.²⁶ This so-called “market stabilization” rule responds to many of the complaints that powerful insurance companies have lodged against the ACA and its marketplace regulations. Over the course of 71 pages, the NPRM lays out numerous, complex, and significant changes to marketplace participation and enrollment requirements. The majority of these changes would directly undermine access to the increased coverage made possible through the ACA and essential healthcare benefits for millions of individuals and families.

The ACA has served as a lifeline for millions of LGBTQ people, who have too often found themselves cut off from critical healthcare services and report some of the lowest insurance rates of any population in the country. The ACA has made it possible for many in our community and those impacted by HIV & AIDS to obtain health insurance for the first time in their lives.²⁷ February’s NPRM undermines the guaranteed availability provision of the ACA, which protects individuals who fall behind on their premium payments, and drastically cuts the open enrollment time period in half. The NPRM also makes significant changes to the Special Enrollment Periods (SEP).²⁸

One significant change would require individuals to maintain and prove continuous coverage when applying for an SEP after a life event like the birth of a child or a marriage. If individuals are unable to prove that they have maintained coverage they could face lengthy waiting periods or other punitive actions that could result in the delay or avoidance of necessary medical treatment. These changes are particularly concerning for individuals with chronic illness, including those living with HIV & AIDS.

HHS gave the public 17 business days to provide public comments in response to this complex NPRM, which would impact millions of individuals seeking coverage through the marketplace. Due to the complex nature of ACA implementing regulations, the number of interested stakeholders, and the number of individuals impacted the Obama administration routinely utilized public comment periods of 30, 60, or even 90 days.²⁹

The Trump EPA has also become notorious for flouting the long-established public comment period. This spring, the agency provided the public a shocking four day comment period to respond to an announced delay in implementing a pesticide safety regulation.³⁰ This four day period deviates from the often 60, 90, or even 180 day public comment periods that are common to the EPA. These brief public comment periods fail to meet the standards of public engagement governed by the APA and envisioned by Congress in its creation. They represent disingenuous and undoubtedly insufficient attempts to truly engage the public.

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**IFRs pose a dangerous and
immediate threat to the
administrative protections
the LGBTQ community has
come to rely upon over the
past decade. The leaked IFR
is a chilling signal that the
Trump administration is willing
to use these publications as
a tool to bypass the essential
safeguards designed to
promote public engagement
and an honest and transparent
administrative process.**

Inappropriate Use of Interim Final Rules

Leaked documents show that the Trump administration is in the process of publishing interim final rules (IFR) impacting our community. These IFRs go into effect immediately without the benefit of public comment. Under the APA, an agency can publish an IFR and be exempt from the public and comment process for “good cause.”³¹ This exemption does not require public comment when it would be “impracticable, unnecessary, or contrary to public interest.”

The agency invoking this exception must have good cause for finding that notice is not required and must incorporate that finding and a “brief statement of reasons therefor” in the final rule.³² Although IFRs can be used, they should not be routine and should never be used for complex regulations that impact multiple stakeholders.

In May 2017, a draft IFR was leaked to the public that would severely undermine patient access to care and expand current religious exemptions – increasing the risk for denial of essential care.³³ As written, the leaked IFR would expand the current religious exemption that is included in the ACA’s “contraceptive mandate.” This expanded exemption would undermine access to critical contraceptive services care that is essential for many lesbian and bisexual women and transgender men. Lesbian and bisexual women and transgender men of every age utilize contraception for various healthcare needs including for the prevention of pregnancy and family planning, as well as for the treatment of medical conditions like endometriosis, polycystic ovarian syndrome (PCOS), migraines, and painful or irregular periods.

The revised regulation would provide access to expansive religious exemptions for any employer providing insurance coverage as an employment benefit. Under the existing policy, organizations seeking a religious accommodation must oppose providing the required contraception coverage due to a religious objection, and must be either a religious non-profit organization or a closely held for-profit entity where the objection is based upon the owner’s sincerely held religious belief. The draft IFR expands the category of eligible organizations substantially – reaching far beyond religious organizations. It extends to private for profit businesses and “any other non-governmental employer.”³⁴ In practice, this expansion makes the exemption available to every private employer in the country – empowering almost any employer to stand in the way of worker’s access to essential, comprehensive reproductive care based on the employer’s personal beliefs.

The leaked IFR also provides that an employer could be eligible for the exemption on the basis of a moral conviction. Moral convictions are not protected under federal statute, the Constitution, or the majority of state laws. They are generally treated separately from religious beliefs by the courts as well.³⁵ If published, this IFR would depart from settled religious exemption law and policy and would be in place immediately – divorced from public comment or engagement.

Dear Mr. Trump, You Can't Tweet Your Way to Good Policy

Trump's use of informal public messaging venues, like Twitter, in lieu of Presidential Memoranda or other formal avenues to communicate major federal policy shifts is irresponsible, destabilizing, and ineffective.

Presidential Memoranda communicate a policy shift or priority and then delegate authority to implement the change to different federal agencies. These documents are driven by the White House and carry the force of law. They also provide federal agencies with the clear guidance they need to execute the President's vision.

Tweets can't make policy. They don't carry the force of law, and as we have seen by President Trump's recent actions it is impossible to provide federal agencies and their staff with the concrete vision and guidance required to implement policy statements in 140 characters. Unfortunately, what tweets can do is incite anxiety, undermine the real and valuable daily work of the federal government, and contribute to the corrosive and divisive political atmosphere in which we live.

Most recently, in late July 2017 Trump issued a series of tweets in which he purported to disallow transgender servicemembers from serving in the military. The tweets provided that,

"After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail."

Trump clearly intended his tweet to rescind the current policy regarding transgender service that was developed across multiple years and after intentional study conducted by the Obama Administration. As early as 2014, the transgender ban had been under review by the Department of Defense, and its rescission reflects the consensus of our country's top military leaders – informed both by data and common sense.

Trump's assertions regarding the healthcare costs of transgender service are at best misinformed, and at worst sacrifice our nation's military readiness to further political aspirations. The study conducted by the Department of Defense prior to the June 2016 lifting of the ban estimated the cost of health care coverage to be between \$2.4 million and \$8.4 million per year, less than 1/10 of 1 percent of the military's annual budget.³⁶ This amount is also just 1/10th of the amount the military spends on medication to treat erectile dysfunction.³⁷

This jarring about-face by our nation's Commander in Chief has been called out as bad policy by members of both sides of the aisle in Congress and by the very Generals and military experts Trump claims to have relied upon when making his decision. It is also critical to note that it is, in effect, not policy.

Although he is Commander in Chief, Trump's tweets to the American people do not make law and as our nation's top military leaders have shown, they don't even set policy. General Joseph Dunford, the Chair of the Joint Chiefs of Staff, made clear that no modifications would be made to current military operations until actual, formal guidance is issued from the White House³⁸ which was not formally issued until August 25, a month after the initial tweets.

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**@realDonaldTrump
July 26, 2017**

Appendix

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- ² Devin Dwyer, *Hospital Visitation Rights for Gay, Lesbian Partners Take Effect* (January 19 2011) available at <http://abcnews.go.com/Politics/hospital-visitation-rights-gay-lesbian-partners-effect/story?id=12642543>.
- ³ *Supra* at note 1.
- ⁴ *Supra* at note 1.
- ⁵ Lambda Legal, *Summary of Langbehn v. Jackson Memorial Hospital*, available at <https://www.lambdalegal.org/in-court/cases/langbehn-v-jackson-memorial>.
- ⁶ Medicare and Medicaid Programs: Changes to the Hospital and Critical Access Hospital Conditions of Participation To Ensure Visitation Rights for All Patients, 75 Fed. Reg. 70,831 (Nov. 19, 2010).
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- ⁸ *National Survey of Older Americans Act Participants*, Administration for Community Living, 82 FR 13457 (Mar. 13, 2017).
- ⁹ Older Americans Act of 1965, 89 P.L. 73 (1965).
- ¹⁰ Choi, S.K. & Meyer, I.H. (2016). *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications*. Los Angeles: The Williams Institute.
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- ¹² National Resource Center on LGBT Aging, *LGBT Populations and "Greatest Social Need,"* (2012) <http://lgbtagingcenter.org/resources/resource.cfm?r=544> (Explaining the details of the Dept. of Health and Human Service guidance definition of "greatest social need" inclusion of "individuals isolated due to sexual orientation or gender identity").
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- ¹⁴ National Survey of Older Americans Act Participants Correction, Administration for Community Living, 82 FR 15062, (Mar. 24, 2017).
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- ¹⁶ *Final Rule on "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity,"* 77 Fed. Reg. 5662 (Feb. 3, 2012). available at https://www.hudexchange.info/resources/documents/EqualAccessToHousing_3.6.12.pdf.
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- ¹⁹ HUD Exchange, *LGBT Homelessness*, available at <https://www.hudexchange.info/homelessness-assistance/resources-for-lgbt-homelessness/#resources-for-homeless-lgbt-individuals-in-crisis>.
- ²⁰ 5 U.S.C. § 551(5) (2017).

- 21** 5 U.S.C. § 553(c) (Section 553 provides that “the agency [in informal rulemaking] shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.”).
- 22** See, ACUS Recommendation 93-4, Improving the Environment for Agency Rulemaking, 58 Fed. Reg. 4670 (1994) (Recommending that Congress amend the APA to specify a comment period no fewer than 30 days, so long as there was an exemption for agencies to show good cause for a shorter comment period).
- 23** Executive Order 13563 § 2(b), 76 Fed. Reg. 3821 (Jan. 18, 2011) (Issued by President Obama reaffirming President Clinton’s 1993 executive order stating that rulemakings should include a comment period not less than 60 days).
- 24** See, Fla. Power & Light Co. v. United States, 846 F. 2d 765, 772 (D.C. Cir. 1998) (Court considered the amount of comments submitted and the quality of the comments in order to determine whether the length of time provided for public comment was reasonable).
- 25** Certification of Pesticide Applicators Rule, Environment Protection Agency, 82 Fed. Reg. 22,294 (May 15, 2017) (All public comments were required to be submitted within four days of publication).
- 26** Patient Protection and Affordable Care Act Market Stabilization, Centers for Medicare and Medicaid Services, 82 Fed. Reg. 10,980 (Feb. 17, 2017).
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- 31** 5 U.S.C. § 553(b)(B) (2017).
- 32** *Id.*
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- 38** Bryan Bender and Jacqueline Klimas, Politico, *Pentagon takes no steps to enforce Trump’s transgender ban* (July 27, 2017) available at <http://www.politico.com/story/2017/07/27/trump-transgender-military-ban-no-modification-241029>.

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