"TIRED OF WINNING": JUDICIAL REVIEW OF REGULATORY POLICY IN THE TRUMP ERA

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Bethany A. Davis Noll[*]

As Congress has declined to act on major presidential priorities, presidents have increasingly turned to administrative agencies to make substantive policy. Agency regulations are subject to judicial review, but it is conventional wisdom that agencies are unlikely to lose in court and thus that presidents have considerable room to make policy through their agencies. But does that observation hold in the Trump administration? This Article presents an original empirical analysis of the Trump administration's success rate in legal challenges to the administration's regulation. The findings are striking. While prior administrations prevailed in approximately 70% of legal challenges to agency regulations, the Trump administration's success rate is currently 17%.

To better understand that top-line finding, the Article probes the factors that have contributed to the Trump administration's difficulty defending agency regulations from legal challenges. The data demonstrate that Trump-era agencies have consistently failed to comply with procedural requirements governing agency regulations and have violated statutory limits on agency policymaking. Several arguments that have been raised to explain the low win rate, including appeal effects and judicial ideology are lacking. These findings offer a powerful rejoinder to the claim that judicial review is a feeble check on presidents' use of the administrative agencies to make regulatory policy. The conclusions also offer important guidance to future administrations on the limits of what can be achieved through administrative action.

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CHARTS

"We're going to win so much, you may even get tired of winning, you're gonna say, 'please it's too much winning, we can't take it anymore. Mr. President: that's too much.' And I'll say no it isn't. We have to keep winning. We have to win more. We're going to win more."

– Candidate Donald Trump, 2016[*]

INTRODUCTION

Faced with congressional gridlock, presidents have increasingly turned to their administrative agencies to make policy.[1] President Clinton used the strategy to pursue policies designed to combat youth smoking and to provide leave to new parents through the unemployment insurance system.[2] President George W. Bush reportedly made efforts to influence his agencies' scientific decisions.[3] And after the attempt to cut carbon emissions through congressional action failed,[4] the Obama administration turned to agencies to make climate change policy.[5]

President Trump has followed that trend, using agencies to make immigration policy[6] and attack the overall level of federal regulation.[7] And after the attempt to repeal the Affordable Care Act failed in Congress, the Trump administration has used rule after rule to cut back on the statute's coverage.[8]

Is this policymaking constrained by law? Commentators have long suggested that the answer is "not really." Broad delegations of statutory authority combined with deferential standards of review[9] have led to a legal framework that allows presidents to use agencies to implement policies consistent with their political preferences.[10]

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[*] *Trump: We're going to win so much*, CNN (2016), https://www.cnn.com/videos/politics/2017/08/18/trump-albany-rally-winning-sot.cnn.

[1] Richard E. Levy, *Presidential Power in the Obama and Trump Administrations* at 46, 47, J. KAN. B. ASS'N (Sept. 2018); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2264 (2001).

[2] Kagan, *supra* note 1, at 2284.

[3] *See* Kathryn Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 697 (2016).

[4] American Clean Energy and Security Act of 2009 (Waxman-Markey Bill), H.R. 2454, 111th Cong. § 721 (2009); Amanda Reilly & Kevin Bogardus, *7 Years Later, Failed Waxman-Markey Bill Still Makes Waves*, E&E NEWS (June 27, 2016), https://www.eenews.net/stories/1060039422 [https://perma.cc/9QYR-A6MM].

[5] EXEC. OFF. OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN, (2013), https://obamawhitehouse.archives.gov/sites/default/files/image/president27sclimateactionplan.pdf.

[6] See *infra* note 54 and accompanying text.

[7] Public Citizen, Inc. v. Trump, 435 F. Supp. 3d 144 (D.D.C. 2019) (discussing President Trump's executive order directing agencies to repeal two regulations for every new regulation they issue); see also *infra* Part I.A.

[8] *See generally* Abbe R. Gluck, Mark Regan & Erica Turret, *The Affordable Care Act's Litigation Decade*, 108 GEO. L.J. 1471, 1488 (2020).

[9] *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844, 104 S. Ct. 2778, 2782-83 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.").

[10] PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009); Peter L. Strauss, *The Trump Administration and the Rule of Law* (Columbia Public Law Research Paper No. 14-650, 2019) (discussing research on the trend "toward essentially unchecked presidential exercise of authority"); *see also* Fed. Commc'ns Comm'n v. Fox TV Stations, Inc., 556 U.S. 502, 515 (2009)

Scholars have sought to test this prediction by analyzing the rates at which agency policies are held up in court (known as agency "validation rates"). In studies covering different time periods going back several decades, all told, the findings are that agencies prevail in approximately 70% of the legal challenges to their actions.[11] That success in court tends to support the theory that presidents have a large amount of discretion to make policy through their agencies. In fact, scholars find that agencies generally win under most any standard of review.[12]

This Article presents original empirical research on the Trump administration's success in defending legal challenges to its uses of agencies to make policy.[13] It shows a striking statistic. Rather than winning most legal challenges to agency actions, as was the historical norm, the Trump administration's win rate is 17% at current count.

This finding upsets the conventional wisdom that presidents have significant leeway to make policy through agency rulemaking. The Article goes

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(explaining that an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better"); Nat'l Cable & Telecommns. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1001 (2005) (explaining that the agency "is free within the limits of reasoned interpretation to change course if it adequately justifies the change").

[11] *See, e.g.*, Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 28-29 (2017) (finding that, consistent with prior studies, agencies prevailed "most of the time—in 71.4% of interpretations" in statutory interpretation cases); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 170 (2010) (surveying numerous prior studies and conducting his own and finding an "overall agency validation rate" of 69%).

[12] Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1444-45 (2018); Barnett & Walker, *Chevron in the Circuit Courts*, *supra* note 11, at 28-29; William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1099 (2008) (focusing on cases decided by the Supreme Court); Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 796 (2008); Caruson & J. Michael Bitzer, *At the Crossroads of Policymaking: Executive Politics, Administrative Action, and Judicial Deference by the DC Circuit Court of Appeals (1985-1996)*, 26 L. & POL'Y 347 (July & Oct. 2004).

[13] I have been gathering the cases used to inform this research since the early days of the Trump administration and have posted them on an online tracker. *See* Roundup: Trump-Era Agency Policy in the Courts, https://policyintegrity.org/trump-court-roundup. The statistics have been cited repeatedly by scholars and in the media. *See, e.g.*, Lee Epstein & Eric Posner, *Trump Has the Worst Record at the Supreme Court of any Modern President*, The WASHINGTON POST (July 20, 2020); Elliot Spagat, *Asylum Rules Test Trump's Legal Skills to Make New Policy*, AP (July 16, 2020), https://apnews.com/656c7e5442cf2917363af40c2cc4253e; Lawrence Hurley, *Trump Administration's 'Sloppy' Work Has Led to Supreme Court Losses*, REUTERS (June 18, 2020), https://www.reuters.com/article/us-usa-court-immigration-trump-analysis/trump-administrations-sloppy-work-has-led-to-supreme-court-losses-idUSKBN23P3M2; Michael Hiltzik, *Trump's Response to Legal Defeats Suggests He's Often a Paper Tiger*, L.A. TIMES (Feb. 28, 2020), https://www.latimes.com/business/story/2020-02-28/trump-paper-tiger; Jerry Ellig & Catherine Konieczny, *Here's How Federal Agencies Can Write More Effective Regulations — and Win Regulatory Battles in Court*, WASHINGTON POST (June 17, 2019); Alex Leary, *Trump Administration Pushes to Deregulate With Less Enforcement*, WALL ST. JOURNAL (June 23, 2019); HARPER'S INDEX (June 2019), https://harpers.org/archive/2019/06/harpers-index-june-2019/Magazine; Margot Sanger-Katz, *For Trump Administration, It Has Been Hard to Follow the Rules on Rules*, N.Y. TIMES (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/upshot/for-trump-administration-it-has-been-hard-to-follow-the-rules-on-rules.html; Connor Raso, *Trump's deregulatory efforts keep losing in court—and the losses could make it harder for future administrations to deregulate*, BROOKINGS (October 25, 2018), https://www.brookings.edu/research/trumps-deregulatory-efforts-keep-losing-in-court-and-the-losses-could-make-it-harder-for-future-administrations-to-deregulate/.

further to analyze what could explain that low win rate. The data provide several insights into what has contributed to the Trump administration's poor record in court and what distinguishes the Trump administration from prior administrations. As the data show, agencies under the Trump administration have repeatedly flouted procedural rules, such as notice-and-comment requirements. Failing to abide by those requirements led to string of losses early in the administration, as well as a number of cases where agencies withdrew the challenged action after a lawsuit was filed.[14]

The administration has also tripped up in a significant way when providing analytical analyses, such as a cost-benefit analysis, to support agency rules. The administration has sought to roll back several Obama-era rules that were accompanied by analyses that showed the policies promised benefits that far outweighed their costs. To roll such a rule back, an agency is not permitted to ignore the underlying record.[15] And without a significant change, rolling back a rule that promised net benefits generally means that the agency will now be forgoing those benefits and thus causing net harms. To justify such a rule, the administration has met reversal in cases where it ignored the forgone benefits[16] or where its new numbers did not make even a "modicum of sense."[17]

Another series of losses has involved agencies that violated a clear-cut statutory or regulatory duty. For example, EPA unreasonably delayed a pesticide regulation that is required by statute[18] and conceded that it violated its duty under the Clean Air Act to regulate coke ovens.[19]

By far the largest category of losses has involved agencies taking actions that fell clearly outside of their statutory authority. Courts have over and over made clear that agencies must have specific statutory authority to act.[20] And in case after case, courts have found that agencies either lacked statutory authority for a particular rule[21] or violated the governing statute.[22]

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[14] *See* Bethany A. Davis Noll & Alec Dawson, *Deregulation Run Amok* at 3-6, https://policyintegrity.org/publications/detail/deregulation-run-amok.

[15] *Fox TV Stations, Inc.*, 556 U.S. at 516 ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

[16] *See, e.g.*, *California v. U.S. Bureau of Land Management*, 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017) ("Without considering both the costs and the benefits of postponement of the compliance dates, the Bureau's decision failed to take this 'important aspect' of the problem into account and was therefore arbitrary.").

[17] *Mayor of Baltimore v. Azar*, No. 19-1614, 2020 WL 5240442, at *15 (4th Cir. Sept. 3, 2020).

[18] In re Natural Resources Defense Council, Inc., 956 F.3d 1134 (9th Cir. 2020) (EPA unreasonably delayed regulating tetrachlorvinphos, a pesticide found in household pet products and which poses a serious risk to the neurodevelopmental health of children, in violation of the Federal Insecticide, Fungicide, and Rodenticide Act).

[19] Citizens for Pennsylvania's Future v. Wheeler, No. 19-02004, 2020 WL 3481425 (N.D. Cal. June 29, 2020).

[20] *See, e.g.*, Clean Air Council v. Pruitt, 862 F.3d 1, 9 (D.C. Cir. 2017).

[21] *See e.g.*, New York v. National Highway Traffic Safety Administration, No. 19-2395, 2020 WL 5103860 (2d. Cir. Aug. 31, 2020).

[22] *See e.g.*, Natural Resources Defense Council v. Department of the Interior, No. 18-4596, 2020 WL 4605235 (S.D.N.Y. Aug. 11, 2020); *See also infra* IV.A.4.

The Article then addresses some of the typical arguments that the Trump administration and its supporters have made to excuse the low win rate. First, while the administration's supporters argue that the success rate could change on appeal, that has not been the case.[23] Even the U.S. Supreme Court has not delivered as the Trump administration may have hoped,[24] holding that the administration failed to justify its decision to add a citizenship question to the census[25] and failed to adequately explain its decision to rescind an immigration policy that helped young immigrants who were brought to the United States when they were children.[26]

Second, while observers may have thought that the Trump administration would learn over time how to issue rules that would hold up better in court, the win rate over the several years of the Trump administration has only climbed to 17%.[27] And if early corner-cutting, like failing to go through notice-and-comment, was the problem then we would expect to see those issues drop off. But agencies have instead continued to lose on that front, as well as all the others.[28] And a look at the loss rate when pegged to the dates of the rules at issue shows that the win rate has begun to dip again.[29]

Third, the data do not support the charge that the low win rate is due to "activist judicial rulings."[30] Traditionally, presidents can expect to win most of the time in general and especially in front of judges that were appointed by presidents of the same party.[31] But the Trump administration's low win rate in front of partisan-aligned judges is much lower than the norm, suggesting that the overall loss rate cannot be attributed to judicial ideology.

To be sure, judicial review does not provide a remedy against all extra-legal actions by a president.[32] And it is possible that with more Trump-appointees deciding these legal challenges to the administration's regulatory actions, the President could win more often.[33] But this Article's findings nonetheless demonstrate that procedural and statutory rules have to date limited the Trump

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[23] See *infra* III.A.

[24] Lisa Friedman & John Schwartz, *Election and Supreme Court Fight Will Decide Trump's Environmental Legacy*, The NEW YORK TIMES (Sept. 23, 2020), https://www.nytimes.com/2020/09/23/climate/trump-environment-courts.html (quoting Patrick Morrisey, attorney general of West Virginia, as saying that the Trump administration "wins on big-picture issues at the highest levels").

[25] U.S. Dep't of Commerce v. New York, 139 S.Ct. 2551 (2019).

[26] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S.Ct. 1891, 1913 (2020).

[27] See *infra* Part III.D.

[28] See *infra* Part III.E.

[29] *See id.*

[30] White House Fact Sheet, Activist Judicial Rulings Block the Administration from Enforcing Our Nation's Immigration Laws (Oct. 11, 2019), https://www.whitehouse.gov/briefings-statements/activist-judicial-rulings-block-administration-enforcing-nations-immigration-laws/.

[31] See *infra* Part III.E.

[32] *See* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2276–77 (2018); *infra* IV.B.

[33] *See* Carl Tobias, *Filling the Federal District Court Vacancies*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 421, 422 (2020).

administration's use of agencies to make policy. While agencies are traditionally thought to have significant leeway in making regulatory policy, even granting the Trump administration that space, courts have consistently found that agencies failed to provide a reasoned explanation for their actions or that their actions were not permitted by statute. With this especially aggressive administration, law and judicial review have constrained the President's ability to make policy through presidential administration.

The Article proceeds as follows. Part I describes the legal backdrop against which the Trump administration has operated. Part II describes the study's design. Part III provides the results. Part IV examines the implications of the data, describing the constraints at play in the cases challenging the Trump administration's use of agencies to make policy, while also highlighting examples which show how judicial review cannot constrain all agency efforts to skirt the law.

I. INCREASING PRESIDENTIAL CONTROL AND DOCTRINAL CHECKS

Presidents have moved towards more and more use of executive power over the last three decades and, with that move, concerns about the rule of law implications of the trend have also grown. (There are many definitions for the term "rule of law."[34] I am using the term in the common sense way of referring to whether the executive complies with constitutional, statutory, and common law limits on executive power.)

Rule of law generally presumes that those in charge will act according to the law. The question is what tools exist to stem the actions of an executive that is not interested in abiding by existing law. Congress is one option, but a current congress may be unlikely to forcefully enforce the policies of a prior congress.[35] Turning to judicial review then, it is not and has never been a full solution to the problem, but it does promise to provide some check on the executive.

This Part describes the trend towards more "presidential administration," concerns with that move, the Trump administration's aggressive use of the presidential administration, and the basic constraints promised by judicial review.

A. The Expanse of Presidential Administration

With the prevalence of congressional gridlock, presidents have increasingly turned towards agency action to serve their political agendas.[36] In

[34] David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 169–70 (2018).

[35] Kagan, *supra* note 1, at 2350.

[36] Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 269–70 (2019); *see also* Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1518–25 (2018) (discussing Congressional gridlock in the tax system); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1742 (2015).

fact, in today's political environment, presidential policymaking through agencies is considered more significant than congressional action.[37]

In a 2001 article, then-professor Elena Kagan coined the term to describe this trend towards increased presidential power over executive agency actions.[38] In Kagan's view, presidents had begun to view agencies more and more as "theirs" and to use them to supplement working with Congress.[39] She theorized that these changes would likely be long lasting and would change our understanding of presidential power.[40]

As Kagan predicted, presidents since have made use of agencies to expand their reach. President Obama for example used centralized review of regulations and relied on executive orders to push action by many different agencies on a wide range of issues.[41] In addition to unilateral directives, the Obama Administration used budget powers to force compliance with his directives, "used scientific processes to inform climate-related decisions, and elicited voluntary climate-conscious commitments from private-sector actors such as federal suppliers and contractors."[42] In fact, some scholars believe that the Obama Administration exercised more control over regulatory activity than any prior administration.[43]

Since Kagan's strong endorsement of presidential administration, a robust debate has grown up around it. In Kagan's view, presidential administration both "furthers regulatory effectiveness" and "advances political accountability by subjecting the bureaucracy to the control mechanism most open to public examination and most responsive to public opinion."[44] But other scholars voiced concerns ranging from constitutional concerns, concerns about whether presidential control over agencies undermines the public's role in agency decisionmaking, and concerns about whether that level of control frustrates judicial review. Peter Strauss has argued, for example, that Congress has the sole authority to enact laws, and that this aggrandizement of presidential power is contrary to fundamental Constitutional principles, because it "undermines the role of Congress in allocating power among governmental institutions."[45]

In addition, scholars worry that presidential administration can impede the public's ability to engage fruitfully in the agency rulemaking process. In Strauss's view, the president should operate more as an overseer rather than using agencies to make affirmative policy, "recommending budgetary appropriations,

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[37] Bulman-Pozen, *supra* note 36, at 269–70.

[38] Kagan, *supra* note 1, at 2246.

[39] *Id.*

[40] *Id.*

[41] Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 701 (2016).

[42] Yumehiko Hoshijima, *Presidential Administration and the Durability of Climate-Consciousness*, 127 YALE L.J. 170, 186 (2017).

[43] Watts, *supra* note 41, at 698.

[44] *Id.* at 2384.

[45] Strauss, *supra* note 10.

reminding agencies that they should exercise their discretion in ways that maximize aggregate social welfare, resolving policy disputes among agencies with overlapping authority, and acting as a constraint against excessive paperwork burdens on citizens."[46] When a president instead exerts excessive control over agencies, that leaves less room for interested individuals to affect the outcome of the regulatory rulemaking.[47] Other critics have similarly noted the opacity of the centralized regulatory review process and the tendency of political considerations to take precedence over the technical judgements better left to agency expertise.[48] Because of this, presidential administration may not have achieved "Kagan's purported benefits of enhanced democratic accountability and effective administration.[49]

Daniel Farber similarly argues that overt presidential influence over agencies may pose risks to agency integrity and the rule of law.[50] Similarly, as Strauss has pointed out, exerting more control over agencies may undermine the "legal constraints on administrative action." [51] Regardless of these concerns, presidential administration continues to play a significant role in executive policymaking.

B. Presidential Administration and the Trump Presidency

The Trump administration, initially so anti-regulatory that President Trump asserted staffing agencies was "totally unnecessary,"[52] has, by all accounts, far outpaced even the Obama administration in its zeal to use "presidential administration" to make policy.[53] With the issuance of two executive orders, Trump hired tens of thousands of border patrol agents, reprioritized deportation of undocumented immigrants, and strengthened immigration enforcement initiatives nationwide.[54] Because these efforts can be characterized as operational or managerial decisions, they have been less susceptible to judicial review.[55] As

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[46] Strauss, *supra* note 10.

[47] *Id.*

[48] Hoshijima, *supra* note 42, at 179–80.

[49] Hoshijima, *supra* note 42, at 179–80.

[50] Daniel A. Farber, *Presidential Administration Under Trump* (UC Berkeley Public Law Research Paper, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015591.

[51] Strauss, *supra* note 10.

52. *See* Randall Lane, *Inside Trump's Head: An Exclusive Interview with the President, and the Single Theory That Explains Everything*, FORBES (Oct. 10, 2017), https://www.forbes.com/donald-trump/exclusive-interview/#7efe027bdeca [https://perma.cc/52TY-FKQK#6fb8042cbdec].

[53] Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1824 (2019); Jerry L. Mashaw & David Berke, *Presidential Administration in A Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 563–588 (2018); Strauss, *supra* note 10 ("It will not have escaped my readers that President Trump appears to believe that he has the right monarchically to command all domestic government. Understand, however, that this view is not a radical change (however much more emphatic than his predecessors he has been about it), but rather the continuation of a trend that has been in place at least since the presidency of Richard Nixon.").

[54] Mashaw & Berke, *supra* note 53, at 563–88; *see also* Michelle Hackman, *How Trump Has Worked to Restrict Immigration*, N.Y. TIMES (Jun. 18, 2020), https://www.wsj.com/articles/how-trump-has-worked-to-restrict-immigration-11592491276; President Trump's Bold Immigration Plan for the 21st Century (May 21, 2019), https://www.whitehouse.gov/articles/president-trumps-bold-immigration-plan-21st-century/

[55] Mashaw & Berke, *supra* note 53, at 563–88.

a result, the increased enforcement efforts have been a largely successful exercise of presidential power over agency activity.[56]

Trump has made use of his varied presidential powers to achieve his deregulatory goals as well.[57] Almost immediately after his inauguration, President Trump issued Executive Order 13,771, requiring agencies to identify two regulations to repeal for each new regulation proposed.[58] The Trump Administration also significantly reduced its estimate of the social cost of carbon, a monetary estimate for the damages that each additional ton of carbon emissions poses to society.[59] The administration then used that move to claim that rolling back Obama-era rules that relied on those estimates is not as harmful as prior estimates would have showed.[60]

And spurred by industry requests to roll back specific Obama-era policies,[61] the Trump administration began its deregulation push by issuing a series of executive orders[62] demanding that agencies review and revise those policies.[63] The administration used the executive orders to direct agency business during the first year of the Trump administration when political appointees were not in place yet.[64]

The executive orders were followed shortly by public statements promising to "suspend, revise, or rescind"[65] the rules and claims (which were false at the

[56] See also *infra* note 180.

[57] *Id.* at 584.

[58] Manheim & Watts, *supra* note 53, at 1786. *See also* Public Citizen, Inc. v. Trump, 435 F. Supp. 3d 144 (D.D.C. 2019) (dismissing suit challenging this executive order for lack of standing).

[59] Lisa Friedman, *G.A.O.: Trump Boosts Deregulation by Undervaluing Cost of Climate Change*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/07/14/climate/trump-climate-change-carbon-cost.html.

[60] For example, in 2016, the Bureau of Land Management estimated the Waste Prevention Rule, would provide net benefits of up to $204 million per year by avoiding damages of methane emissions, Regulatory Impact Analysis for the Waste Prevention Rule at 111 (Nov. 10, 2016), https://www.blm.gov/documents/national-office/public-room/data. But with a new "interim" estimate, the Trump administration reduced the estimate of methane's damages per ton from $1,300 down to $176. Compare *id.* at 36 *with* Regulatory Impact Analysis for the Final Rule to Rescind or Revise Certain Requirements of the 2016 Waste Prevention Rule at 42, 52 (2018) (for year 2020 emissions, 3% discount rate), https://www.regulations.gov/document?D=BLM-2018-0001-223607. *See also* California v. Bernhardt, No. 18-05712, 2020 WL 4001480 (N.D. Cal July 15, 2020) (holding that reliance on the "interim" estimate was arbitrary and capricious).

[61] *The Action Plan Memorandum*, Rodgers Environmental Law, 2d. § 45:2 (March 1, 2017) (Murray Energy Corporation's list of action items for the Trump administration).

[62] *See* Lee Epstein & Eric Posner, *The Decline of Supreme Court Deference to the President*, 166 UNIV. PA. L. REV. 829, 851 (2018) (using the prevalence of executive order to help measure "executive overreach").

[63] 82 Fed. Reg. 16,093 (Mar. 31, 2017) (directing EPA and Interior to begin review of the Clean Power Plan, the Waste Prevention Rule, the Fracking Rule, and many other rules and, "if appropriate" to publish proposed rules suspending, revising or revoking them).

[64] *See* "EPA Administrator Andrew Wheeler on the policies behind environmental progress," American Enterprise Institute (Sept. 21, 2020), https://www.aei.org/events/a-conversation-with-environmental-protection-agency-administrator-andrew-wheeler/.

[65] Interior Statement on Venting and Flaring Rule Vote (May 10, 2017), https://www.doi.gov/pressreleases/interior-statement-venting-and-flaring-rule-vote

time) that the rules had already been repealed.[66] That deregulation effort[67] then focused on policies in the areas of environmental protection,[68] with rollbacks of regulations that were meant to cut toxic metal discharges from power plants,[69] regulations meant to cut methane leaks at oil and gas facilities,[70] and regulations meant to govern conservation on public lands,[71] among many others. It focused on housing, with rollbacks of policies meant to address racial segregation.[72] And the effort targeted public assistance programs[73] and programs meant to protect students from the harmful effects of fraudulent for-profit schools.[74] As tools to pursue this agenda, the administration used a series of aggressive regulatory maneuvers, including regulatory delays,[75] repeals,[76] new guidance documents,

[66] EPA Administrator Statement on President Donald J. Trump's State of the Union Address (Jan. 30, 2018), https://archive.epa.gov/epa/newsreleases/epa-administrator-scott-pruitt-statement-president-donald-j-trumps-state-union-address.html ("President Trump is getting things done for the American people. America is stronger and safer because the President kept his promise to cut unnecessary and duplicative regulations that shackled American businesses. From repealing the Waters of the U.S. rule and the job-killing Clean Power Plan to cleaning up toxic Superfund sites, EPA is implementing President Trump's agenda to protect the environment and grow our economy.").

[67] *See* Keith B. Belton & John D. Graham, *Trump's Deregulation Record: Is It Working*?, 71 ADMIN. L. REV. 803, 815 (2019) ("Donald Trump . . . has declared that his tenure will be marked by deregulation"), https://perma.cc/B4ZM-9MR6; *see also* Brookings, *Tracking deregulation in the Trump era* (June 24, 2020), https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/ (explaining that the Trump administration "has major deregulatory ambitions" and tracking deregulatory efforts across eight major categories); Council of Economic Advisers, How Deregulation Can Increase Economic Growth (October 2, 2017), https://perma.cc/AL6A-VJ8K.

[68] Nadja Popvich, Livia Albeck-Ripka, & Kendra Pierre-Louis, *The Trump Administration Is Reversing 100 Environmental Rules. Here's the Full List*, N.Y. TIMES (last updated July 10, 2020), https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks.html

[69] Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017).

[70] Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49,184 (Sept. 28, 2018).

[71] *See* Western Watersheds Project v. Schneider, 417 F. Supp. 3d 1319 (D. Idaho 2019), appeal dropped (9th Cir. 19-36065).

[72] Jason Schwartz, *Weakening our Defenses* at 19 (July 2020) (collecting examples of ways that the Trump administration has created obstacles to safe, affordable, and fair housing), https://policyintegrity.org/files/publications/Weakening_Our_Defenses_Covid_Deregulation_Report.pdf; *see also* Lola Fadulu, *Trump Pulls Back Efforts to Enforce Housing Desegregation*, N.Y. TIMES (Jan. 3, 2020), https://www.nytimes.com/2020/01/03/us/politics/trump-housing-segregation.html (summarizing various housing policies).

[73] *See, e.g.*, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (denying lawful permanent residency to immigrants who have participated in public assistance programs like Medicaid and Supplemental Nutrition Assistance Program); Schwartz, *supra* note 72, at 23 (listing other restrictions on Medicare, Medicaid, and the Affordable Care Act).

[74] Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 84 Fed. Reg. 49,788 (Sept. 23, 2019).

[75] *See, e.g.*, Bauer v. DeVos, 325 F. Supp. 3d 74 (D.D.C. 2018) (vacating three successive delays of the Borrower Defense Rule); Becerra v. Department of Interior, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (vacating delay of rule meant to provide clarity for royalty payments for mining on public lands).

[76] *See, e.g.*, California v. Dep't of Interior, 381 F. Supp. 3d 1153, 1169 (N.D. Cal. 2019).

memoranda,[77] and foot-dragging.[78] Many of the rollbacks cited the administration's executive orders as the basis for the rollback.[79]

The administration also used numerous other techniques to expand its power. President Trump installed a "shadow cabinet" of agency officials who were not subject to Senate confirmation and who reported directly to the President.[80] These officials served to "monitor political appointees' compliance with administration priorities" and thereby strengthened the president's control over agency actions in a way that had not been done in prior administrations.[81] While this arrangement was eventually disbanded, Jerry Mashaw and David Berke theorized that its demise had more to do with "the pride and self-worth of agency heads" than legal objections.[82]

C. Bases for Judicial Review of Regulations

Given the continued expansion of presidential administration and the concerns that have been voiced, the question is whether the appropriate checks on this type of power exist. In her article, Kagan noted the importance of presidents respecting the limits of congressional delegation,[83] but that presumes that a president will abide by general rule of law principles. And presidents' greater and greater use of their agencies to make policy presents what Kagan described as a danger for the rule of law: that agency heads would "tend to push the envelope when interpreting statutes."[84] Judicial review—"a simple, if sometimes imperfect, solution to the problem"—is potentially the only alternative to keep a president from displacing the "clear preferences of prior enacting" Congress.[85]

In general, in its actions to aggrandize presidential power, the Trump administration has not won accolades on the rule-of-law front.[86] The Trump

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[77] Memo from Susan Parker Bodine to Bill Wehrum (July 6, 2018), https://www.epa.gov/sites/production/files/2018-07/documents/glidernoactionassurance070618.pdf.

[78] California v. Envtl. Prot. Agency, 385 F. Supp. 3d 903 (N.D. Cal. 2019) (ordering the agency to stop delaying on implementation of a rule designed to limit methane emissions at landfills).

[79] *See, e.g.*, California v. Bernhardt, 2020 WL 4001480, at *19 (N.D. Cal. 2020) (discussing the agency's reliance on Executive Order 13,783 to justify Waste Prevention Rule repeal); *California*, 381 F. Supp. 3d at 1169 (discussing the agency's reliance on same executive order to justify the repeal of the Valuation Rule).

[80] Mashaw & Berke, *supra* note 53, at 604.

[81] *Id.*

[82] *Id.* at 605.

[83] Kagan, *supra* note 1, 2320.

[84] Kagan, *supra* note 1, at 2349.

[85] *Id.* at 2351.

[86] RICHARD PAINTER & PETER GOLENBOCK, AMERICAN NERO: THE HISTORY OF THE DESTRUCTION OF THE RULE OF LAW, AND WHY TRUMP IS THE WORST OFFENDER (2020) ("Has any president so blatantly and consistently violated the Constitution and the rule of law? As we explain in this book, the answer is clearly 'NO'"); John Kruzel, *Democrats Fear Rule of Law Crumbling Under Trump*, THE HILL (Feb 16., 2020), https://thehill.com/regulation/court-battles/483206-democrats-fear-rule-of-law-crumbling-under-trump; Emily Bazelon & Eric Posner, *There Used to Be Justice. Now We Have Bill Barr*, N.Y. TIMES (May 13, 2020), https://www.nytimes.com/2020/05/13/opinion/barr-trump-rule-of-law.html; Paul Rosenzweig, *Trump's Defiance of the Rule of Law*, THE ATLANTIC (June 3, 2019), https://www.theatlantic.com/ideas/archive/2019/06/trumps-unique-assault-rule-law/590875/.

administration has drawn sharp criticism for undermining trust in the "institutions that implement the law" and in this way "destabiliz[ing] the law itself."[87] His public criticisms of judges (which are ad hominin at times[88]) have caused observers to question "whether courts can be a safeguard against his belligerence."[89]

President Trump has been criticized for seeking to "destroy" the administrative state through non-legislative actions such as hiring freezes encouraging resignations, and censorship and efforts to "deliberately . . . undermine" the goals of Congress.[90] And in court, the Trump administration is seen as bypassing longstanding legal norms.[91] Many scholars have now come to the conclusion that the Trump administration has not followed basic principles governing agency rulemaking,[92] and that we cannot expect agencies to consider the threat of judicial review when promulgating rules in the Trump era.[93] The "regulatory slop," as two scholars have named this phenomenon, has included "improperly suspending the effective dates of final rules; failing to provide for notice and comment; failing to meet mandatory deadlines; and failing to make required findings."[94] Theories are that such disregard for the law may reflect the prioritization of political agendas over the rule of law, lack of concern for the legitimacy of the administration's actions, or lack of experience.[95] All of these possibilities may "suggest a lack of respect for the legitimacy of our institutional structure."[96]

Combined with President Trump's unilateral directives, such as using the president's secret emergency powers,[97] and the increase of presidential interventions in areas such as prosecution decisions and government science,[98] these measures demonstrate how much closer we are now to a presidential administration that has gone too far.

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[87] Rebecca Roiphe, *A Typology of Justice Department Lawyers' Roles and Responsibilities*, 98 N.C. L. REV. 1077, 1080–81 (2020).

[88] Zach Wolf, *Trump's Attacks on Judge Curiel Are Still jarring to Read*, CNN (Feb. 27, 2018), https://www.cnn.com/2018/02/27/politics/judge-curiel-trump-border-wall/index.html.

[89] Michael J. Gerhardt, *Presidential Defiance and the Courts*, 12 HARV. L. & POL'Y REV. 67, 68–69 (2018).

[90] David M. Driesen, *President Trump's Executive Orders and the Rule of Law*, 87 UMKC L. REV. 489, 514-17 (2019).

[91] Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1653 (2019).

[92] Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 HARV. L. & POL'Y REV. 13, 15 (2018) ("[T]he Trump Administration has not obeyed these basic rules.").

[93] Glicksman & Hammond, *supra* note 91, at 1653.

[94] *Id.* at 1653–54.

[95] *Id.* at 1655.

[96] *Id.*

[97] Gary Hart, *How Powerful Is the President?*, N.Y. TIMES (July 23, 2020), https://www.nytimes.com/2020/07/23/opinion/trump-presidential-powers.html

[98] Mashaw & Berke, *supra* note 53, at 606; *see also* Farber, *supra* note 33.

Courts are "inescapably limited players"[99] and "the judiciary is beyond comparison the weakest" of all three branches of government.[100] But there are significant benefits to upholding the rule of law in the administrative sphere, including providing "security and predictability so that individuals and firms can plan their pursuits and do so without fear."[101] Given the concern with the especially aggressive actions of the Trump administration, it is time to look again at whether judicial review has a meaningful role to play in constraining a president bound to flout norms and produce regulatory "slop."[102]

The Administrative Procedure Act (APA), passed and signed in 1946 by President Truman, provides for that judicial review. The purpose of the statute was to make agency decisionmaking more uniform and fair while at the same time preserving the ability of agencies to do their jobs efficiently and economically.[103]

The statute contains a set of rules that govern agency decision-making, regardless of political party.[104] Those rules leave room for agencies to make reasoned judgments about the impacts of their policies[105] and to resolve technical and fact-specific questions.[106] They also require agencies to comply with several uniform procedural rules when resolving those questions.[107] The rules help curb quick and frequent agency vacillation[108] because shepherding a rule through full notice and comment rulemaking in a way that works to satisfy these requirements can take several years.[109]

This "ossification" carries with it some benefits. Studies have found that when agencies are required to take this time before changing the regulatory landscape, industry has more opportunity for investment and innovation; conversely, an unpredictable regulatory landscape can lead to a decrease in investment.[110] In an annual survey of utility executives, for example, executives

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[99] Renan, *supra* note 32, at 2276–77.

[100] Federalist No. 78.

[101] Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. OF INT'L L. 361, 377 (2018); *see also id.* ("From a socio-legal perspective, the rule of law provides restraints on arbitrary state behavior, backed by norms that enable people to reasonably know what is required of them, combined with the institutionalization of these norms so that they 'count as a source of restraint and a normative resource' that may be used in practice.").

[102] Glicksman & Hammond, *supra* note 91, at 1652.

[103] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT Appendix B (1947).

[104] *Id.*

[105] Nat'l Assoc. of Regulatory Util. Comm'rs v. Fed. Energy Reg. Comm'n, 2020 WL 3886199 (D.C. Cir. 2020).

[106] Ctr. for Auto Safety v. Peck, 751 F.2d 1336, 1370 (D.C. Cir. 1985).

[107] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT Appendix B (1947).

[108] *See* Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 116 (2018) (explaining how the rules governing regulatory change make such change more difficult and thus promote regulatory certainty, innovation, and investment).

[109] *See* Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 55-56 (2019) (summarizing research on rulemaking timing).

[110] Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. Rev. 112, 156-57 (2011) (explaining that erratic legal change carries its own costs).

listed regulatory uncertainty as the "single greatest challenge" to preparing for an inevitable market shift towards renewable energy.[111] And from the political scientist perspective, making sure that industry and advocates can rely on a predictable set of rules, regardless of political power shifts, is a crucial feature of a functioning democracy.[112] The next subsections will provide more detail on these requirements.

1. *Notice-and-Comment Requirements*

The APA gives the public a check on possible agency overreach by requiring agencies to provide the public with notice of a planned action and an opportunity to comment on it.[113] Agencies are required to give the public "fair notice" of both their view as to the legal authority they have to issue a particular regulation and the substance of the proposed rule.[114] In the final rule, the agency must then respond to any significant comments,[115] including comments that raise points relevant to the agency's decision and which, "if adopted, would require a change in an agency's proposed rule."[116]

2. *Reasoned Explanation*

The second significant mechanism that the public and courts use to hold agencies accountable is the requirement that agencies give a reasoned explanation for their decisions.[117] The requirement keeps agency "officials from cowering behind bureaucratic mumbo-jumbo"[118] and finds its roots in the oft-cited *State Farm* case.

In *State Farm*, the Court held that the National Highway Traffic and Safety Administration had failed to provide an adequate explanation for rescinding an

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[111] David Roberts, *The Power Sector Craves Stability. Trump Has Brought It Chaos*, VOX (Mar. 9, 2018).

[112] ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET 19, 26, 51 (2012) (explaining that a stable democracy is one where "conflicts are processed through democratic institutions"); *See* Noam Lupu & Rachel Beatty Riedl, *Political Parties and Uncertainty in Developing Democracies*, 46(11) COMP. POL. STUD. 1339, 1347 (2012), http://journals.sagepub.com/doi/pdf/10.1177/0010414012453445 (explaining that uncertainty about the rules of the game can negatively affect democratic processes).

[113] *See* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT Appendix B, at 9 (1947); S. Doc. No. 77-8, Administrative Procedures in Government Agencies, at 102-8 (1941) (explaining that notice and comment is "essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests").

[114] Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S.Ct. 2367 (2020); *see also* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015)

[115] Cigar Assoc. of Am. v. U.S. Food and Drug Admin., 2020 WL 3738096, at *5 (D.C. Cir. 2020).

[116] Nat'l Shooting Sports Found. v. Jones, 716 F.3d 200, 215 (D.C. Cir. 2013) (internal quotation marks omitted); *see also* Gresham v. Azar, 950 F.3d 93, 103 (D.C. Cir. 2020) ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."); Carlson v. Postal Reg. Comm'n, 938 F.3d 337, 344 (D.C. Cir. 2019) (an agency must respond to comments "that can be thought to challenge a fundamental premise" underlying the proposed agency decision); Del. Dep't of Nat. Res. & Envtl. Control v. Envtl. Prot. Agency, 785 F.3d 1, 17 (D.C. Cir. 2015) ("the agency's response to public comments must at least enable the court to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did." (internal quotation marks omitted)).

[117] Fed. Commc'ns Comm'n v. Fox TV Stations, Inc., 556 U.S. 502, 515 (2009).

[118] Competitive Enterprise Inst. v. Nat'l Highway Traffic Safety Admin., 956 F.2d 321, 326 (D.C. Cir. 1992).

airbag requirement.[119] The court explained that under the APA, an agency is required to "examine the relevant data and articulate a satisfactory explanation for its action."[120] And that it is arbitrary and capricious for an agency to ignore "an important aspect of the problem" or to offer an explanation for their "decision that runs counter to the evidence before the agency."[121] In *State Farm*, the agency had previously found "that airbags are an effective and cost-beneficial life-saving technology."[122] Given that record, rescinding the requirement without explanation was arbitrary and capricious.[123]

When agencies are changing course, under this "reasoned explanation" requirement, an agency must (1) "display awareness that it *is* changing position," (2) show that "the new policy is permissible under the statute," and (3) show that there are good reasons for the new policy.[124] Agencies are "free within the limits of reasoned interpretation to change course," but they must "adequately justif[y] the change."[125] This "reasoned explanation" requirement is a procedural requirement and a regulation which fails to comply with this requirement is unlawful and "receives no *Chevron* deference."[126]

The Supreme Court has firmly reaffirmed these principles as it met with Trump-era agency rules. As the Court recently explained, in the census case, the reasoned explanation requirement "is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public."[127] And in *Department of Homeland Security v. Regents* of the University of California, addressing the Trump administration's recission of the Deferred Action for Childhood Arrivals program, the court held that the agency had not satisfied the reasoned explanation requirement because it both failed to offer any reason for terminating the forbearance policy at the heart of the program and failed to address reliance interests in the program.[128]

3. *Statutory Constraints and Deference Doctrines*

Agencies are also bound by their governing statutes. Agencies both need specific statutory authority to take any particular action[129] and must act "within defined statutory limits."[130] And an agency's regulations operate as a similar

[119] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40 (1983).

[120] *See id.* at 43.

[121] *Id.*

[122] *Id.* at 51.

[123] *Id.*

[124] *Fox*, 556 U.S. at 514-15.

[125] Nat'l Cable & Telecommns. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1001 (2005).

[126] Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117, 2126 (2016).

[127] Dep't of Commerce v. New York, 139 S.Ct. 2551, 2575-76 (2019).

[128] Dep't of Homeland Security v. Regents of the Univ. of Cal., 140 S.Ct. 1891, 1913 (2020).

[129] Clean Air Council v. Pruitt, 862 F.3d 1, 9 (D.C. Cir. 2017).

[130] Mass. v. Envtl. Prot. Agency, 549 U.S. 497, 533 (2007).

constraint; agencies must comply with the plain and unambiguous meaning of their own regulations.[131]

Often regulatory action requires an agency to interpret the directions Congress gave it in the governing statute. Where agencies are interpreting their governing statutes, courts use a range of different standards of review, beginning most prominently with *Chevron*.[132] These standards of review afford agencies significant "wiggle room,"[133] but there are limits.

Under *Chevron,* the question is whether Congress delegated to the agency the responsibility for filling in any gaps in the regulatory structure envisioned and whether the agency invoked its delegated lawmaking authority.[134] To determine this, a court looks at whether Congress spoke directly to the question at issue: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[135] An unambiguous statute limits the wiggle room ("*Chevron* Step One"). And when a statute's text is deemed unambiguous by the court—i.e., subject only to one interpretation—subsequent presidential administrations cannot attempt to reinterpret that statutory provision.[136]

But under *Chevron* Step Two, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[137] This standard of review applies to an agency's interpretation of its statutory authority as well.[138] And if an agency has chosen a permissible construction, it has significant leeway to advance executive goals.[139]

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[131] Nat. Resources Def. Council, Inc. v. Perry, 940 F.3d 1072, 1078 (9th Cir. 2019).

[132] *See, e.g.*, Barnett & Walker, *Chevron in the Circuit Courts*, *supra* note 11, at 1 (looking at Chevron, Mead, Skidmore, and de novo review); Eskridge & Baer, *supra* note 12, at 1094 (looking at deference under Curtiss-Wright, Seminole Rock, Chevron, Beth Israel, Skidmore, consultative doctrines, and doctrines that apply when agencies face a presumption against deference (termed "anti-deference" by the authors)). There are other doctrines that are applied less frequently and which either afford agencies more or less discretion. For example, under United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), the president (and by extension agencies he controls), receives the greatest level of discretion when they he operates in the realm of foreign affairs.

[133] *See* Daniel Hemel & Aaron Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 818 (2017).

[134] Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 843-44 (1984); *see also* Peter L. Strauss, "*Deference" Is Too Confusing-Let's Call Them "Chevron Space" and "Skidmore Weight*," 112 COLUM. L. REV. 1143, 1145 (2012).

[135] *Chevron*, 467 U.S. at 842–843.

[136] National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (noting that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion") (internal citations omitted).

[137] *Chevron*, 467 U.S. at 843.

[138] City of Arlington, Tex. v. Fed. Commc'ns Comm'n, 569 U.S. 290, 301 (2013).

[139] Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law*, 44 LOYOLA U. CHI. L. J. 141, 142 (2012) (positing that, upon its inception, the *Chevron* doctrine enlarged executive power by expanding both "[t]he sphere of legitimate agency lawmaking" and "[t]he sphere of legitimate agency interpretation").

Under what is now known as "*Chevron* Step Zero," the Court has created another limit by allowing *Chevron* deference only for "those agency interpretations arrived at by 'force of law,' or deliberative procedures."[140] Instead of looking at whether Congress delegated authority to the agency to interpret a particular statute and the provision in question,[141] the court asks whether the question at issue it "too big" to defer altogether.[142] In limiting *Chevron*'s applicability, scholars argue that "the Court has come full circle by expanding executive power and then dramatically contracting it."[143]

Another standard applies when agencies are interpreting one of their regulations. Under *Auer* and *Seminole Rock*, now re-invigorated in *Kisor v. Wilkie*,[144] when a regulation is "genuinely ambiguous,"[145] the question is whether a court should defer to an agency's interpretation of its own regulations.[146] The Court has explained that there is a "presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities."[147] An agency's power to interpret its own regulations, is part of the "agency's delegated lawmaking powers."[148] But if an interpretation "does not reflect an agency's authoritative, expertise-based, fair, or considered judgment" then that presumption will not be warranted.[149] If on the other hand, the presumption applies and genuine ambiguity exists, then an agency's interpretation stands as long as it falls "within the bounds of reasonable interpretation."[150]

And yet another set of rules applies when an agency has acted in a less-than-formal way, through a guidance document or similar action. In those instances, *Skidmore* applies.[151] Under *Skidmore*, the question can be quite

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[140] *Id.* at 180.

[141] United States v. Mead Corp., 533 U.S. 218, 226-27 (2001); *see also* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000).

[142] King v. Burwell, 576 U.S. 473, 487-488 (2015) (finding that *Chevron* did not provide the appropriate framework, for the tax credits in question "are one of the Act's key reforms and whether they are available on Federal Exchanges is a question of deep 'economic and political significance'; had Congress wished to assign that question to an agency, it surely would have done so expressly" and noting that "it is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort"); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes."); *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160 ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 231-32 (1994) (finding that the FCC exceeded its statutory authority and noting that "[w]hat we have here, in reality, is a fundamental revision of the statute," and concluding that the FCC's policy choice "may be a good idea, but it was not the idea Congress enacted into law in 1934"). This is often referred to as the "Major Question Doctrine." *See, e.g.*, Josh Blackman, Comment, *Gridlock*, 130 HARV. L. REV. 241 (2016).

[143] Jellum, *supra* note 139, at 142.

[144] 139 S.Ct. 2400, 2414-15 (2019).

[145] Kisor v. Wilkie, 139 S.Ct. 2400, 2414-15 (2019).

[146] Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

[147] *Kisor*, 139 S.Ct. at 2412.

[148] *Id.* (quotation marks omitted).

[149] *Id.* at 2414-18 (internal quotation marks and alterations omitted).

[150] *Id.* at 2415.

[151] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

complex,[152] but generally when an agency's decision lacks formality, for example if it appears in a guidance document that was not subject to notice and comment, the interpretation is not controlling. But depending on the thoroughness of the agency's reasoning and consistency with other regulations as well as other factors, the agency's interpretation may instead have the "power to persuade."[153]

Of course, while agencies enjoy different levels of discretion when interpreting their statutes, the reasoned explanation requirement applies regardless and when an agency fails to comply with this requirement its regulation is unlawful and receives "no *Chevron* deference."[154]

II. STUDY DESIGN

With that doctrinal background in mind, this Part provides an overview of prior empirical studies looking at agency "validation rates in court," meaning the rate at which an agency wins in court when its regulations or other regulatory actions with the force of law are challenged. This Part then describes this study's methodology and the dataset used to analyze administration's validation rate in court.

A. Prior Studies of Agency Validation

Many authors have looked at agency validation rates across time, across issues, and across courts. Those studies have focused on the "win" and "loss" rates under particular standards of review, such as under *Chevron* deference,[155] on decisions issued by particular courts (e.g., only the court of appeals or only the Supreme Court),[156] or on particular agencies/subject matters (e.g., the EPA or environmental law).[157]

All these studies have consistently found that agencies tend to win around 70% of cases challenging regulations. For example, upon examining a three-year period of environmental cases in courts of appeals, Jason Czarnezki found that when courts reviewed agency action under *Chevron*, "they likely affirmed agency action (69.55%)."[158]

Eskridge and Baer studied all Supreme Court decisions reviewing an agency's interpretation of a statute issued between 1983 and 2005.[159] Across all

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[152] *See* Barnett & Walker, *Chevron in the Circuit Courts*, *supra* note 11, at 17.

[153] *Skidmore*, 323 U.S. at 140.

[154] Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117, 2126 (2016).

[155] *See, e.g.*, Barnett & Walker, *Chevron Step Two's Domain*, *supra* note 12, at 1444-45.

[156] *See, e.g.*, Barnett & Walker, *Chevron in the Circuit Courts*, *supra* note 11, at 1 (focusing on agency cases in the court of appeals); Connor N. Raso & William N. Jr. Eskridge, *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010) (focusing on cases decided by the Supreme Court); Eskridge & Baer, *supra* note 12 (focusing on cases decided by the Supreme Court).

[157] *See, e.g.*, Czarnezki, *supra* note 12, at 769.

[158] Czarnezki, *supra* note 12, at 795-96.

[159] Eskridge & Baer, *supra* note 12, at 1094 (reviewing 1014 decisions in all).

of the standards of review that Eskridge and Baer identified, they found that agencies prevailed 68.3% of the time.[160] In another study, looking at the same dataset,[161] Raso and Eskridge looked at the rates at which judges upheld and overturned agency actions and compared these decisions in the context of the type of deference that was applied, if any at all.[162] When no deference or "anti-deference"[163] applied, the Court voted to uphold agency actions 60.76% of the time. When "consultative deference" under *Skidmore* applied, the Court voted to uphold agency actions 78.21% of the time. When *Chevron* deference applied, the Court voted to uphold agency actions 72.13% of the time.[164]

In a 2011 study by Pierce and Weiss, the authors looked at cases in which district courts *and* circuit courts applied *Auer/Seminole Rock* deference spanning between January 1, 1999 and December 31, 2001 (to represent a time frame that likely involved review of rules adopted by a Democratic administration), and between January 1, 2005, and December 31, 2007, (to look at rules that involved interpretations adopted by a Republican administration).[165] The authors found that courts "upheld agency interpretations in 76.26% of the cases" they studied.[166]

Two other studies compiled data across multiple studies and made similar findings. In 2010, David Zaring compiled eleven previous studies and gathered his own data set to conduct an additional study. Combining results from all these studies showed that agencies had prevailed in approximately 70% of the cases.[167] In 2011, Richard Pierce looked at ten prior studies and found that agency validation rates fell "in a narrow range" of 64% to 81.3%, indicating that courts had not drifted towards "more or less deference over time."[168]

These findings have held up as the datasets began to include Obama-era cases. Barnett and Walker studied a time period that included Obama's first term.[169] In that study, Barnett and Walker found that "agencies prevail under the *Chevron* framework 77.4% of the time."[170] And, consistent with earlier studies,

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[160] *Id.* at 1100.

[161] Raso & Eskridge, *supra* note 156, at 1742.

[162] *Id.* at 1767 (Table 6) (comparing deference regimes and Justices' decisions to uphold or overturn agency action).

[163] "Anti-deference" cases are those in which "[t]he Court invokes a presumption against the agency interpretation." Eskridge & Baer, *supra* note 12, at 1099. For example, in criminal cases, the Court may invoke the rule of lenity, and in other cases where the interpretation raises serious constitutional concerns, the Court may invoke the canon of constitutional avoidance. *Id*.

[164] *Id.*

[165] Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 518 (2011).

[166] *Id.* at 519.

[167] Zaring, *supra* note 11, at 170.

[168] Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean*, 63 ADMIN. L. REV. 77, 84 (2011).

[169] Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1444 (2018).

[170] *Id.*

agencies succeeded in 71.4% of the statutory interpretation cases "under any scope of review."[171]

B. Trump-Era Agency Validation Rates: Study Design

This study uses an empirical approach to examine outcomes of litigation challenging agency action that advances the Trump administration's agenda in areas such as environmental regulation, education, immigration, and healthcare. This section describes the design for the study's analysis of the Trump administration win-loss rate.

To build the dataset, I looked at all challenges to Trump-era regulations, whether they were brought in a court of appeals or in a district court, across all executive agencies.[172] The cases involve challenges to Trump-era regulations (including delays, repeals, and amendments, as well as new regulatory requirements) and efforts to weaken or change the regulatory landscape through guidance or memoranda.

In addition, consistent with the literature on agency validation rates,[173] lawsuits that were dismissed for reasons other than a finding that the agency had complied with the law are not included in the dataset.[174]

The study looks at agency decisions that might either change a regulation or be deregulatory. The term "deregulation" can have a variety of meanings, such as reducing the number of federal regulations in a purely numerical sense (such as with the Trump administration's 2-for-1 order[175]), scaling back regulatory requirements, or providing easier access to permits and relaxing enforcement.[176]

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[171] Barnett & Walker, *Chevron in the Circuit Courts*, *supra* note 11, at 1. These numbers do not necessarily prove that the standard of review mattered. Rather the applied standard of review could reflect how the judge feels about the rule on the front end. *See* Raso & Eskridge, *supra* note 156, at 1766 (discussing this possibility). Nonetheless, even if that was true, it would not influence a comparison between Trump-era regulations and other regulations, as the phenomenon would presumably hold constant across administrations.

[172] Independent agencies such as the Federal Energy Regulatory Commission are thus excluded. *See* Barnett & Walker, *Chevron in the Circuit Courts*, *supra* note 11, at 56, n. 248 (categorizing independent agencies).

[173] *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 766 (2008) (surveying cases that were decided in the merits); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L. J. 984, 1033 (1990) (including "remands for errors of substantive law; . . . remands for errors of procedural law; . . . remands for lack of adequate factual support; . . . remands for lack of adequate explanation; and . . . remands for which no basis is given for the court's action (e.g., table decisions)").

[174] *See, e.g.*, Make the Road N.Y. v. Wolf, 962 F.3d 612 (D.C. Cir. 2020) (finding decision unreviewable because committed to the agency's sole discretion); Cal. Communities Against Toxics, et al., v. Envtl. Prot. Agency, et al., 934 F.3d 627 (D.C. Cir. 2019) (finding decision unreviewable because not a final agency action); Organic Trade Assoc. v. Dep't of Agriculture, 370 F. Supp. 3d 98 (D.D.C. 2019) (holding that challenge to rule was moot because the rule had been replaced); Sierra Club v. Envtl. Prot. Agency, 926 F.3d 844 (D.C. Cir. 2019) (finding that plaintiffs had filed in the wrong venue); Free Press, et al. v. Fed. Commc'ns Comm'n, et al., 735 Fed. Appx. 731 (D.C. Cir. 2018) (finding that plaintiffs lacked standing).

[175] Executive Order 13771 (Jan. 30, 2017), https://www.govinfo.gov/content/pkg/FR-2017-02-03/pdf/2017-02451.pdf

[176] Belton & Graham, *supra* note 67, at 812, https://perma.cc/B4ZM-9MR6; Cayli Baker et. al, *Explaining the Brookings Deregulatory Tracker,* THE BROOKINGS INSTITUTION (Oct. 18, 2018), https://www.brookings.edu/blog/up-front/2018/10/18/explaining-the-brookings-deregulatory-tracker/.

This Article uses the term "deregulation" in second sense -- to include any action that reduces regulatory restrictions or requirements.

Because the study is specifically interested in *agency* regulation and deregulation, the study does not include litigation over self-executing executive orders, such as the executive orders banning asylum for certain types of people.[177] And though these were significant routes that President Trump used to pursue the part of his agenda pertaining to deregulation,[178] the study does not include deregulation through the Congressional Review Act[179] or individual decisions to forgo enforcement in ways that are unreviewable.[180]

Largely following methodology used in Eskridge and Baer's study as well as in Barnett and Walker's study, every case is coded for a variety of different variables, including the court, date of decision, date of the complaint, date of the agency's action at issue, subject matter of the agency action, agency, agency procedure used, outcome of the court decision, standard of review applied, legal issues that formed the basis for the court's decision, and the political party of the president of the deciding judge or judges. Details about several of these variables are provided in the Appendix.

The dataset also includes information about all the appeals related to the cases in the set in order to track the impact of appeals. But whenever results are reported, they are reported by reference to the latest ruling in the case, meaning that for case outcomes where there is an appeal pending, the study includes the last ruling in the appellate process that is currently available.[181]

III. THE TRUMP ADMINISTRATION'S RECORD

As of late October 2020, the dataset includes more than 150 cases. A deep analysis of those cases suggests that the administration's low success rate in legal challenges to agency actions results from a significant number of procedural errors as well as courts' views that agencies are not acting in a manner that is authorized by statute. This Part provides an overview of the findings, describing the categories of cases that have reached either a decision or a withdrawal of the challenged action by the Trump administration. It also catalogues the issues that have come up in the cases. To provide some insight into the timing of the administration's travails, the study then maps those legal issues to the dates of

[177] *See* Trump v. Hawaii, 138 S.Ct. 2392 (2018).

[178] Davis Noll & Revesz, *supra* note 109, at 14-19.

[179] *Congressional Review Act Resolutions in the 115th Congress*, COALITION FOR SENSIBLE SAFEGUARDS, https://sensiblesafeguards.org/cra [https://perma.cc/T6JQ-B69S] (providing a full list of rules that were disapproved during the Trump administration).

[180] For more on non-enforcement, *see* Daniel Walters, Cary Coglianese & Gabe Scheffler, *Unrules*, 73 STAN. L. REV. (forthcoming 2021); Daniel Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, MICH. L. REV. (forthcoming), available at SSRN: https://ssrn.com/abstract=3539595.

[181] See also *infra* section III.A (discussing appeals).

the Trump-era rules at issue. This Part then turns to the judicial ideology of the deciding judges, as measured by the party of the appointing president.

A. Win-Loss Rate

Studies of prior agency decisionmaking under administrations have consistently found a validation rate of around 70%.[182] The Trump administration came into office promising aggressive deregulatory work along with other priorities,[183] all of which required agency rulemaking, and he was met with significant resistance.[184] Given that agencies typically have success in court, the question is whether that win-loss rate has held up for the Trump administration.

1. *Outcomes*

The data show that as of late October 2020, there were a few more than 150 Trump-era agency actions that have reached some kind of resolution in court, whether through a court decision or because the agency withdrew the action after being challenged in court.

The data can be divided in two ways. First, the data can be divided by court decisions, without regard to whether multiple parallel courts are ruling on the same agency rule. There are 163 such cases and when looking at all those cases, the success rate is 17.1%.

Second, the data can be divided by the agency rules at issue.[185] When looking at whether the administration was successful or unsuccessful for a particular rule, some basic explanations are necessary: the study codes the rule as "unsuccessful," as long as the agency lost in one court or withdrew the action after being sued.[186] In cases where an agency won on a nationwide basis in one court but lost in another court on a non-nationwide basis,[187] that case would be coded as one "successful" case for the administration. If the agency lost in one circuit on a non-nationwide basis and had no other wins, then the case would also be coded as "unsuccessful." And in cases where the administration loses in one court but wins in another one, the case would be coded as a loss as long as one court ruled against the agency on a nationwide basis. When looking at the outcomes by *rule*, the Trump administration has been successful in 26 of those 153 actions (also 17%).

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[182] See *supra* Part II.A.

[183] *See, e.g.*, Belton & Graham, *supra* note 67, at 815.

[184] *See* William Barr, *The Role of the Executive*, 43 HARV. J.L. & PUB. POL'Y 605, 615 (2020) (describing opponents of the Trump administration as "rally[ing] around an explicit strategy of using every tool and maneuver available to sabotage the functioning of his administration").

[185] The public tracker logs wins and losses by rule in this way. *See* https://policyintegrity.org/trump-court-roundup.

[186] Some rules that went back into effect were later repealed or further suspended by the relevant agency.

[187] *See, e.g.*, Mayor of Balt. v. Azar, Civil Action No. RDB-19-1103, 2020 U.S. Dist. LEXIS 26061, at *49 (D. Md. Feb. 14, 2020) (enjoining the Title X rule in Maryland); California v. Azar, 950 F.3d 1067 (9th Cir. 2020) (upholding the Title X rule).

2. *When Agencies Withdrew the Action*

Of the agency losses, the administration withdrew the action or gave up the position after being sued in 18.5% of the cases. That happened repeatedly in the beginning of the administration across agencies. For example, in May 2017, the Department of Energy abandoned[188] a delay[189] of conservation standards for ceiling fans after being sued.[190] In June 2017,[191] the Environmental Protection Agency published a final rule setting limits on mercury discharges after being sued for unlawfully rescinding the rule.[192] In August 2017, the Food and Drug Administration agreed to allow a calorie-counting rule to come into effect after being sued[193] for illegally delaying the rule.[194] But withdrawing an agency rule in the face of a lawsuit did not stop that year. For example, in June 2020, after being sued for failing to comply with notice-and-comment requirements,[195] EPA announced that it would be terminating its COVID-19-related policy of non-enforcement.[196]

Prior studies did not include cases where agencies withdrew an action after being challenged.[197] They pulled data from judicial decision databases and by necessity could not include those types of cases. And though there is no public record of exactly why the agency withdrew the policy,[198] it is still appropriate to examine them as the litigation accomplished its goal, which was to eliminate the policy.

To examine the impact of including these cases, one need only remove the cases where agencies withdrew an action. And when looking only at adjudicated cases, the win rate is 20%, not significantly higher than the rate that includes the withdrawn cases.

3. *Split or Mixed Decisions*

At times, agencies bundle rules together in one action,[199] and when addressing challenges to those rules, courts sometimes issue split decisions. In

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[188] 82 Fed. Reg. 23,723 (May 24, 2017).

[189] 82 Fed. Reg. 14427 (March 21, 2017).

[190] Nat. Res. Def. Council v. Perry, No. 17-916 (2d Cir.); New York v. Perry, No. 17-918 (2d Cir.).

[191] 82 Fed. Reg. 27,154 (June 14, 2017).

[192] Nat. Res. Def. Council v. Envtl. Prot. Agency, No. 17-00751 (S.D.N.Y.).

[193] Center for Science in the Public Interest v. Price, No. 17-1085 (D.D.C.)

[194] 82 Fed. Reg. 20825 (May 4, 2017).

[195] New York v. Envtl. Prot. Agency, No. 20-3714 (S.D.N.Y.).

[196] Memo from Susan Parker Bodine re COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program: Addendum on Termination (June 29, 2020), https://www.epa.gov/sites/production/files/2020-06/documents/covid19addendumontermination.pdf.

[197] *See, e.g.*, Barnett & Walker, *Chevron in the Circuit Courts*, *supra* note 11, at 25 (analyzing published cases).

[198] Ellen Gilmer, *EPA Touts Winning Record, but Some Attorneys Dispute Its Numbers*, BLOOMBERG (Aug. 26, 2020) (quoting EPA's general counsel as saying that its decision to withdraw a policy related to enforcement during the COVID crisis, "'had nothing to do with' the court case").

[199] *See* Jennifer Nou, *Agency Lumping and Splitting*, UCHICAGO LAW REVIEW ONLINE (Mar 2020) (describing the phenomenon).

less than ten cases in the dataset, the courts upheld a portion of the challenged rule and struck down another portion. In those cases, coding the cases is a judgment call. Generally speaking, the study codes the cases as a win if the main thrust of the decision is that the agency won or lost. For example, the U.S. Court of Appeals for the D.C. Circuit vacated a portion of EPA's Risk Evaluation Rule, holding that the rule's categorical exclusion of legacy uses when regulating dangerous chemicals violated the Toxic Substances Control Act.[200] The court upheld two other portions of the rule, but the case is nonetheless coded as a loss because the court found that those challenged provisions did not do as petitioners alleged.[201]

In a different case about the Federal Communications Commission's internet regulations, the agency won several big claims in the case, but the court struck down the agency's preemption provision. That case is coded as a win despite the piece of the case that the administration lost. To analyze whether these mixed cases and their coding causes a significant difference in the findings, the study also presents the results with and without those mixed cases.

B. Appeals

Some observers have noted that the Trump administration's low win rate may turn around on appeal.[202] And according to reports, the administration may have been "pinning its hopes on the Supreme Court to overturn lower-court rulings and preserve its policy changes."[203] But the data do not support that hope.

At this time, out of the 163 cases, there are only 17 cases pending on appeal. In fact, the government has appealed in only a little over a third of the cases. As Figure 1 shows, at current count, the government has not appealed 40% of the losses.[204] And in another 18.5% of the government's losses, the agency withdrew the challenged actions (marked as "not litigated").

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[200] Safer Chemicals, Healthy Families v. Environmental Protection Agency, 943 F.3d 397 (9th Cir. 2019).

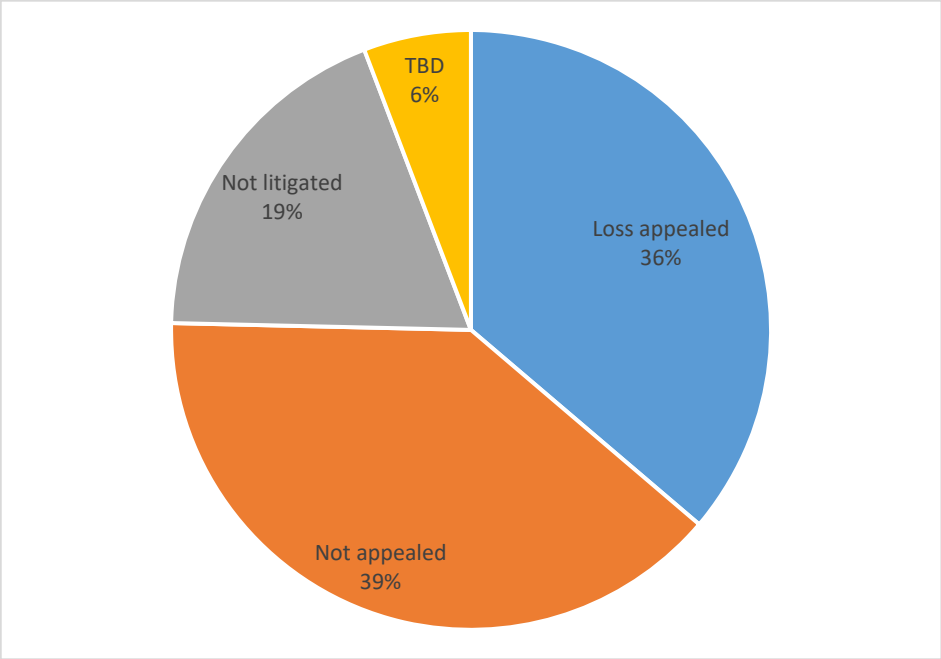
[201] *See also* Natural Resources Defense Council v. Environmental Protection Agency, 961 F.3d 160 (2d Cir. 2020) (striking one exemption and upholding two others after holding that the reporting requirements that petitioners sought would have been duplicative).

[202] Fred Barbash & Deanna Paul, *The real reason the Trump administration is constantly losing in court*, WASHINGTON POST (March 19, 2019), https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html.

[203] *Id.*; Damian Paletta, Mike DeBonis & John Wagner, *Trump declares national emergency on southern border in bid to build wall*, WASH. POST (Feb. 15, 2019) (quoting Trump as saying: "then we'll end up in the Supreme Court, and hopefully we will get a fair shake").

[204] That number includes cases where the government filed an appeal, but then dropped the appeal. In one case, intervenors appealed, but not the government. *See* Am. Acad. of Pediatrics v. Food and Drug Adm., 379 F. Supp. 3d 461, 497 (D. Md. 2019).

Figure 1: Affirmative Appeals in Cases that Agencies Lost



Of the appeals that the government has taken, agencies have lost on appeal 47% of the time.[205] That number includes three significant losses in the Supreme Court.[206] (Those losses naturally led to a presidential tweet calling for new Justices.[207])

Figure 2 shows the success rate that the Trump administration has met with in the cases that it has appealed. Agencies have won on appeal in 9% of the losses, one of which was in the Supreme Court.[208] Another 36% of the appeals remain pending.

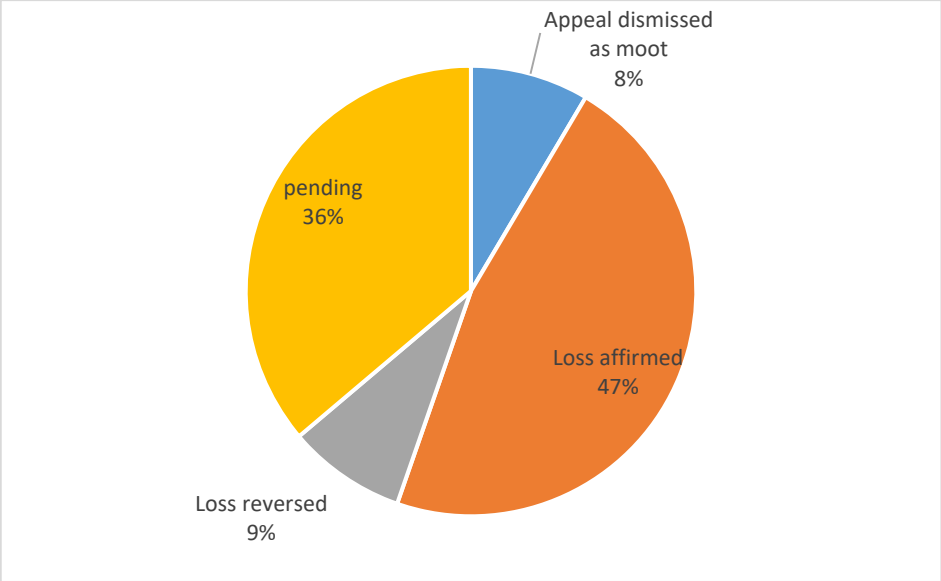
[205] *See, e.g.*, Pennsylvania v. Trump, 281 F. Supp. 3d 553 (E.D. Pa. 2017), aff'd 2019 U.S. App. LEXIS 20778 (3d Cir. No. 18-1253).

[206] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S.Ct. 1891 (2020) (holding that the administration's rescission of DACA had not addressed "important aspects of the problem before the agency" including the legitimate reliance interests of the program's participants); U.S. Dep't of Commerce v. New York, 139 S.Ct. 2551 (2019) (holding that the agency's rationale for adding a citizenship question to the census was contrived); Cty. of Maui v. Haw. Wildlife Fund, 140 S.Ct. 1462 (2020) (rejecting the Trump administration's new interpretation of the Clean Water Act).

[207] Brett Samuels, *Trump Calls for 'New Justices' on Supreme Court After Unfavorable Rulings*, THE HILL (June 18, 2020).

[208] Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, No. 19-431, 2020 WL 3808424 (U.S. July 8, 2020) (reversing orders enjoining a rule allowing more employers to claim exemptions from contraception requirements under the Affordable Care Act); Becerra v. Azar, 950 F.3d 1067 (9th Cir. 2020) (reversing orders enjoining rule that had imposed restrictions on healthcare providers receiving grants for family-planning services).

Figure 2: Outcomes on Appeal in Cases that Agencies Lost in a Lower Court



As my prior Article with Richard Revesz explained, if there is an inter-party transition, it is very possible that the incoming administration will make use of all available regulatory rollback strategies to undo Trump-era policies.[209] One of those strategies is to either decline to appeal or to ask for abeyances in all pending litigation.[210] Thus, if President Trump does not win reelection, pending appeals are likely to evaporate. If he does win reelection, outcomes in cases about agency rules from that second term will have to be the subject of a subsequent paper.

C. Legal Issues in the Cases

Given the starkness of the Trump administration's low win rate, when compared to prior administrations, the rate demands explanation. One way to answer that question is to look for patterns in the cases, analyzing them to see why the Trump administration won or lost.

As these numbers show, of cases that involved a notice and comment claim, agencies won 24% of the time. Of adjudicated cases that involved a reasoned explanation claim, agencies won on that issue just over 25% of the time. Of adjudicated cases that involved a statutory claim, agencies won on that issue a little under 22% of the time.

Another data point is that statutory claims have been by far the most frequent issue on which the Trump administration loses. In adjudicated cases,

[209] Davis Noll & Revesz, *supra* note 109, at 47–48.

[210] *Id.* at 24.

agencies lost a statutory issue 67 times, whereas they lost on a notice-and-comment claim 19 times and on a reasoned explanation claim 45 times.

D. Categories of Cases

Another question that could be asked is whether the administration's success rate differed depending on the subject matter. In prior studies, the subject matter and agency had a significant impact on the agency's win rate.[211] Barnett and Walker found for example that some agencies, like the Federal Communications Commission, had a very high win rate (82.5%), whereas other agencies, like the Equal Employment Opportunity Commission, had a significantly lower win rate (42.9%).[212]

In the Trump-era dataset, the cases have spanned several topic areas, with most cases in the environmental, energy, and natural resources area:

- The largest category of cases, "Environment, Energy, and Natural Resources," (at 97 total) includes rules rolling back numerous emissions rules,[213] rules delaying limits on harmful pesticide use,[214] repeals of rules meant to clarify royalties for mining on public lands,[215] among many other actions.

- The second largest category of cases (which overlaps with the other categories) is "Deregulation" (at 55 total). As explained above, this Article uses the term "deregulation" to include any action that reduces regulatory restrictions or requirements.

- The third largest category of cases, "Health," (at 28 total) includes rules designed to restrict Medicaid,[216] decisions to terminate teen pregnancy programs early,[217] rules governing drug advertisements,[218] rules changing contraception coverage requirements under the Affordable Care Act,[219] and other similar health-related rules.

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[211] Barnett & Walker, *Chevron in the Circuit Courts*, *supra* note 11, at 28; *see also* Pierce, *supra* note 168, at 87 (explaining that different affirmance rates should be expected for different substantive contexts).

[212] Barnett & Walker, *Chevron in the Circuit Courts*, *supra* note 11, at 7-8.

[213] California v. Bernhardt, No. 18-5712, 2020 WL 4001480 (N.D. Cal. July 15, 2020) (vacating the repeal of the Waste Prevention Rule); Sierra Club v. Pruitt, 293 F. Supp. 3d 1050 (N.D. Cal. 2018) (vacating the stay of the formaldehyde emissions rules).

[214] Pineros y Campesinos Unidos del Noroeste v. Pruitt, 293 F. Supp. 3d 1062 (N.D. Cal. 2018).

[215] California v. U.S. Dep't of the Interior, 381 F. Supp. 3d 1153 (N.D. Cal. 2019).

[216] Stewart v. Azar, 313 F. Supp. 3d 237 (D.D.C. 2018)

[217] Healthy Teen Network v. Azar, 322 F. Supp. 3d 647 (D. Md. 2018), appeal dropped (4th Cir. 18-1709)

[218] Merck & Co., Inc. v. U.S. Dep't of Health & Human Servs., 962 F.3d 531 (D.C. Cir. 2020).

[219] Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, No. 19-431, 2020 WL 3808424 (U.S. July 8, 2020).

- The "Immigration" category (at 21 total) includes rules restricting work visas,[220] limiting asylum for certain categories of immigrants,[221] and requiring asylum seekers to remain in Mexico during the duration of their immigration proceedings,[222] among other rules.

- In the "Consumer Protection & Education" group of cases (at 17 total), agencies had delayed rules that were supposed to aid student borrowers who had fallen into debt at fraudulent for-profit schools[223] or delayed rules meant to make air travel safer and easier for passengers with disabilities,[224] among other rules.

- The "Housing & Public Assistance" category (at 8 total) includes cases involving rules seeking to decrease access to low-income housing,[225] changes to Medicaid eligibility,[226] and changes to the Supplemental Nutrition Assistance Program,[227] among other rules.

- The "Worker Protection and Discrimination" category (at 4 total) includes a case striking a rule that had loosened mine safety rules,[228] another case involving a rule that governed the collection of wage discrimination data at the Equal Employment Opportunity Commission, among other cases.

- The "Public Safety" category is a small category (at 4 cases), which includes cases about 3D-printed gun rules,[229] and a few other cases.

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[220] National Venture Capital Ass'n v. Duke, 291 F. Supp. 3d 5 (D.D.C. 2017)

[221] East Bay Sanctuary Covenant v. Trump, 932 F.3d 742 (9th Cir. 2018) (enjoining rule that barred asylum for immigrants who entered the country outside of a designated port of entry); East Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922 (N.D. Cal. 2019), stayed Barr v. East Bay Sanctuary Covenant, 140 S. Ct. 3 (2019), aff'd East Bay Sanctuary Covenant v. Trump, 950 F.3d 1242 (9th Cir. 2020), 2020 WL 3637585 (9th Cir. July 6, 2020) (enjoining rule that denied asylum to those who had not applied first in another country).

[222] Innovation Law Lab v. Nielsen, 366 F. Supp. 3d 1110, 1114 (N.D. Cal. 2019), stayed (U.S.S.C. March 11, 2020).

[223] Bauer v. DeVos, 325 F. Supp. 3d 74 (D. D.C. 2018).

[224] Paralyzed Veterans of Am., Inc. v. U.S. Dep't of Transp., Nos. 17-1272, 18-5016 (D.C. Cir.).

[225] Open Communities Alliance v. Carson, 286 F. Supp. 3d 148 (D. D.C. 2017).

[226] Gresham v. Azar, 950 F.3d 93 (D.C. Cir. 2020).

[227] District of Columbia v. U.S. Dep't of Agriculture, No. 20-119, 2020 U.S. Dist. LEXIS 43853 (D.D.C. March 13, 2020).

[228] United Steel v. Mine Safety & Health Admin., 925 F.3d 1279 (D.C. Cir. 2019)

[229] Washington v. U.S. Dep't of State, 420 F. Supp. 3d 1130 (W.D. Wash. 2019).

At times, agency actions fell into more than one topic area. For example, the case involving funding for the border wall[230] falls into the immigration category, because the wall was being built to "secure the southern border," but it falls into the environmental category because plaintiffs' challenge was based on their allegations of environmental harm.[231] And all "deregulation" cases fall into at least one other substantive area.

And as Figure 3 shows, in the Trump-era dataset, the win rates have all been low regardless of the category, ranging between 0% to 25% depending on the category.

Figure 3: Win Rates by Category

Category	Win Rate
Immigration	5% win rate (1 out of 20)
Deregulation	13% win rate (7 out of 55)
Health	14% win rate (4 out of 28)
Environment, Energy, and Natural Resources	17.5% win rate (17 out of 97)
Housing & Public Assistance, Public Safety, Worker Protection, and Discrimination	23% win rate (3 out of 16)
Consumer Protection & Education	24% win rate (4 out of 17)

E. Time Trends

Another theory that has been floated to explain the Trump administration's losses in court has been that early on, the President relied on less experienced agency heads who incompetently cut corners in an effort to rush out rollbacks; this could be called the "Scott Pruitt effect."[232] As the Attorney General of Oklahoma, Pruitt had made a name for himself as one of EPA's staunchest foes, suing the agency fourteen times during the Obama years.[233] That experience did not set him up to run the agency competently though. When he resigned in the

[230] California v. Trump, 963 F.3d 926 (9th Cir. 2020).

[231] *Id.* at 947.

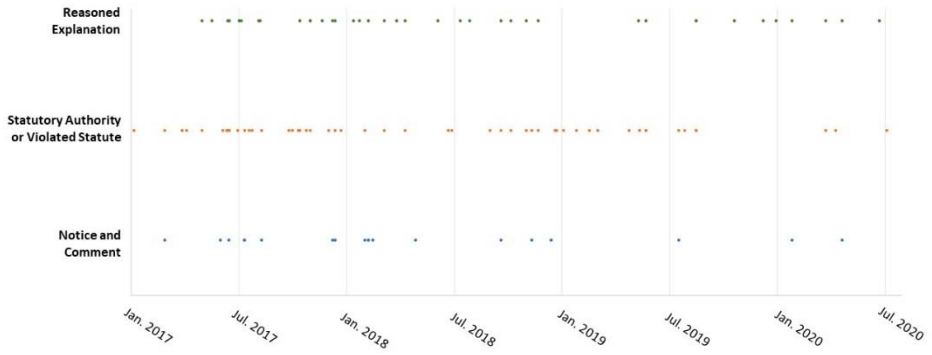
[232] Richard Revesz, *Institutional Pathologies in the Regulatory State: What Scott Pruitt Taught Us About Regulatory Policy*, 34 J. LAND USE & ENVTL. L. 211 (2019); Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, WASHINGTON POST (March 19, 2019), https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html; Coral Davenport & Lisa Friedman, *In His Haste to Roll Back Rules, Scott Pruitt, E.P.A. Chief, Risks His Agenda*, N.Y. TIMES (Apr. 7, 2018), https://www.nytimes.com/2018/04/07/climate/scott-pruitt-epa-rollbacks.html (Pruitt has been "less than rigorous in following important procedures, leading to poorly crafted legal efforts that risk being struck down in court"); Bethany Davis Noll & Richard Revesz, *Pruitt's Deregulation Spree Has Cut Corners*, SLATE (July 31, 2017), https://slate.com/technology/2017/07/pruitts-deregulations-wont-hold-up-in-court.html.

[233] *Pruitt v. EPA: 14 Challenges of EPA Rules by the Oklahoma Attorney General*, N.Y. TIMES (Jan. 14, 2017), https://www.nytimes.com/interactive/2017/01/14/us/politics/document-Pruitt-v-EPA-a-Compilation-of-Oklahoma-14.html.

summer of 2018, Scott Pruitt had already racked up a string of court defeats for EPA[234] and was under multiple ethics investigations when he resigned.[235]

Figure 4 shows the date each rule came out and reasons that courts cited for vacating or enjoining the rule. If rushed decision-making usually involves rules issued without taking the time to go through notice and comment or develop a reasoned explanation for the decision, you would expect that those types of violations would drop off as the administration had more time to issue the rules. But as this timeline shows, those violations have continued, suggesting that even now that agencies have had time to prepare rules, agencies are not doing significantly better. It is true that there are many losses involving rules that were issued in the early days of the administration. But that shows only that more rules were issued then and that those rules have reached a decision. Though the pace of challenged rules slowed down, losses on all fronts have continued throughout the Trump administration.

Figure 4: Timeline of Rules



F. Judicial Ideology

Another theme that has been floated to explain the Trump administration's losses in court has been that "liberal activist judges" are to blame.[236] Past studies have consistently found that judicial partisan affiliation has a significant impact

[234] *See, e.g.*, Sierra Club v. Pruitt, 293 F. Supp. 3d 1050 (N.D. Cal. 2018); Pineros y Campesinos Unidos del Noroeste v. Pruitt, 293 F. Supp. 3d 1062 (N.D. Cal. 2018); Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017).

[235] Coral Davenport, Lisa Friedman & Maggie Haberman, *E.P.A. Chief Scott Pruitt Resigns Under a Cloud of Ethics Scandals*, N.Y. TIMES (July 5, 2018), https://www.nytimes.com/2018/07/05/climate/scott-pruitt-epa-trump.html.

[236] Priscilla Alvarez and Geneva Sands, *Judge Blocks Policy Forcing Some Asylum Seekers to Remain in Mexico*, CNN, https://www.cnn.com/2019/04/08/politics/asylum-seekers-mexico/index.html.

on case outcomes in judicial review over agency decisions.[237] For court of appeals decisions, scholars have also found that voting is significantly affected by the ideology of the other judges on a panel and that "in fact, the party affiliation of the other judges on the panel has a greater bearing on a judge's vote than his or her own affiliation."[238]

Thus, the study set out to measure the rates at which Democratic-appointed judges and Republican-appointed judges ruled for the Trump-era agencies. The study uses the affiliation of the President who nominated the judge as a proxy for the ideology of the reviewing judge.[239] If the decision was issued by a panel of judges, the study assigns ideology according to the political party affiliation of the nominating president for the majority of the judges on the panel.[240]

The results show that the standard expectation that agencies will win in front of a partisan-affiliated judge has not held. Prior studies showed a high agency validation rate when the agency decision matches the judge's partisan

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[237] *See* Pierce, *supra* note 168, at 89 (surveying studies and explaining that they showed that "a circuit court panel was approximately 30 % more likely to uphold an agency action when the action was consistent with the ideological preferences of the members of the panel than when the action was inconsistent with those preferences"); Connor N. Raso & William N. Eskridge Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1793 (2010) ("the Justices are also more likely to overturn agency policies when the Justices are ideologically closer to the lower courts than to agencies"); Eskridge & Baer *supra* note 12, at 1156 (finding that "the best indicator of whether the agency will win in any given case is the ideological characterization of the agency interpretation"); Miles & Sunstein, *Do Judges Make Regulatory Policy?*, *supra* note 238, at 827 ("the role of political judgments in judicial review of agency interpretations of law, at both levels of appellate review, is unmistakable"); Caruson & Bitzer, *supra* note 12, at 361 (finding that judges "are more willing to affirm an agency decision when the agency's policy position is consistent with the judge's own partisan preferences"); Martha Anne Humphries & Donald R. Songer, *Law and Politics in Judicial Oversight of Administrative Agencies*, 61 J. OF POL. 207, 217 (1999) (concluding "that agency success in the appeals courts, . . . is strongly related to political considerations"); David H. Willison, *Judicial Review of Administrative Decisions: Agency Cases Before the Court of Appeals for the District of Columbia, 1981-1984*, 14 AM. POL. Q. 317, 325 (1986) (concluding that "party affiliation is at least partially useful in accounting for the range of individual support across the court's staff of judges"). Others have cautioned against putting too much weight on judicial ideology. James J. Brudney, Sara Schiavoni & Deborah Jones Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L. J. 1675 (1999) (identifying "a strong interaction between gender and political party, the influence of prior experience representing management clients under the Act, and associations based on race, religion, and educational background"); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 40, 59 (1998) (finding that "judges are more likely to defer to agency interpretations that support judges' personal political preferences than they are to interpretations that oppose their personal political preferences" but characterizing this effect as "modest").

[238] Revesz, *supra* note at 239, at 1719 (finding that judges are more likely to vote based on their ideological preferences if they are sitting on a panel with like-minded peers); *accord* Pierce, *supra* note 168, at 78 (describing studies as finding that judges' tendency to vote along partisan lines is approximately half as strong when judges sit in politically mixed panels as when they sit in politically unified panels); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? – An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 852 (2006) (reaching findings akin to those identified by Revesz); Miles & Sunstein, *The Real World of Arbitrariness Review*, *supra* note 173, at 767 (same); Caruson & Bitzer, *supra* note 12 (finding support for Revesz's hypothesis and discussing constraints on the influences of ideology in judicial decisionmaking).

[239] This is consistent with the literature. *See* Eskridge & Baer, *supra* note 12, at 1153; Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit,* 83 VA. L. REV. 1717, 1718 (1997).

[240] When looking at the impact of judicial ideology, the study looks at the judge appointments for all cases, including cases from multiple different district courts when they handled cases challenging the same rule. The reason for this is that when a rule has been reviewed in multiple parallel courts, for example, it would be arbitrary to select just one of those courts to analyze the judicial ideology of the deciding judge or judges.

affiliation: more than 70% in one study finding an overall validation rate of 64%,[241] more than 80% in another study[242] and 68% in yet another study.[243]

But with the Trump administration, that validation rate has been much lower: 36%. No study has ever found that the administration loses at this high of a rate in front of judges that are partisan-aligned with the president.

Figure 5: Judicial Ideology[244]

	Win rate %
Republican-appointed judges	36% (16 out of 44)
Democratic-appointed judges	10% (8 out of 83)

To be sure, the Trump-era data show that there is a disparity between the win-rate for agencies in front of Democratic-appointed judges and Republican-appointed judges (or majority Democratic appointed and majority Republican-appointed judges when it is a panel decision). The Trump administration has a win rate of 10% in front of Democratic-appointed judges and a win rate of 36% in front of Republican-appointed judges.

Other studies have found that a similar *difference* in win rates in front of Democratic or Republican-appointed judges supports a conclusion that judicial ideology has an impact on the results. For example, a 2004 study found that judges were expected to validate the agency action 68% of the time "when the agency's policy position is consistent with the judge's own partisan preferences."[245] In contrast, absent such policy convergence, judicial deference was expected in only 32% of cases.[246] In a study looking at the application of *Chevron*, Miles and Sunstein found that when faced with a "liberal" agency decision, "the validation rates of Democratic appointees [were] almost 23 percentage points higher, and those of Republican appointees [were] more than

[241] Miles & Sunstein, *The Real World of Arbitrariness Review*, *supra* note 173, at 767.

[242] Kerr, *supra* note 237, at 38-39.

[243] Caruson & Bitzer, *supra* note 12; *see also* Miles & Sunstein, *Do Judges Make Regulatory Policy?*, *supra* note 238, at 850.

[244] These numbers were also run through a simple logit regression to look at the impact of a Democratic-appointed judge on a ruling. A logit regression is a calculation done to determine the probability of an event y happening (here a ruling for the agency), given some feature x (here where a Democratic-appointed judge decided the case). That analysis shows that whether a Democratic-appointed judge decides the case is correlated with whether the agency will lose. The probability that the Administration wins when the judges are appointed by Republicans is an odds ratio of $\frac{1}{2.87} \approx 26\%$ of winning. If the judge(s) were appointed by Democrats, the odds ratio is $\frac{1}{2.87} * \frac{1}{5.65} = \frac{1}{16.25} \approx 6\%$ of winning. Both odds ratios are statistically significant. But the regression only explains a small fraction of the variation in the data, meaning the amount of variation explained by party affiliation alone is small and there could be an underlying phenomenon that would explain the results. One reason for this is that regardless of affiliation, the government is likely to lose. Therefore, these regression results should be interpreted cautiously.

[245] Caruson & Bitzer, *supra* note 12, at 361.

[246] *Id.*

10 percentage points lower."[247] But none of those studies found such a low win rate for a president's policies in front of partisan-aligned judges.

A more granular look at the cases also shows another result. In cases involving statutory interpretation claims, Republican-appointed judges ruled for the administration less than half of the time (46%). Democratic-appointed judges ruled for the administration on statutory claims 9% of the time. And in cases involving reasoned explanation claims, Republican-appointed judges ruled for the administration 41% of the time. Democratic-appointed judges ruled for the administration 13.8% of the time. There is still a stark difference on both fronts of course. But regardless of partisan leaning of the judge, under any of these circumstances, the Trump administration loses at rates far above the traditional average.

Of course, President Trump has recently hit a milestone in the appointment of 200 federal judges.[248] The President filled appellate court vacancies at an unprecedented speed[249] and has now filled three Supreme Court seats.[250]

Observers have wondered if all of the Trump-era judicial appointments would make a difference, theorizing that "empowered conservatives could uphold almost anything from a Trump agency as lawful."[251] And indeed in filling these vacancies, the Trump administration has continued with some of the trends scholars pointed to as evidence that the rule of law is at risk. For example, President Trump is one of the only presidents since President Eisenhower to exclude the American Bar Association from the selection process (President George W. Bush being the only other one to do so), relying instead on lists of prospective nominees furnished by the Federalist Society and the Heritage Foundation.[252] The Senate majority has similarly disregarded traditions of judicial confirmation, deviating from typical procedures in both the "100-year-old practice for blue slips—which permit Judiciary Committee hearings only

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[247] Miles & Sunstein, *Do Judges Make Regulatory Policy?*, *supra* note 238, at 849.

[248] Jennifer Bendery, *Trump Notches His 200th Lifetime Federal Judge: Senate Republicans Have Filled the Nation's Highest Courts with Dozens of White Men — and Zero Black Judges*, HUFFPOST (Jun 24, 2020), https://www.huffpost.com/entry/trump-courts-judges-mitch-mcconnell-senate-white-male-ideologues_n_5ef15626c5b6af94211185b5?ukf

[249] Carl Tobias, *Filling the Federal District Court Vacancies*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 421, 422 (2020) ("In the haste of President Trump to quickly nominate, and the Republican Senate majority to expeditiously confirm, many able, ideologically conservative, young appeals court jurists, the President and the Senate neglect myriad open posts in the district courts. The district courts now realize seventy-three vacancies in 677 positions, forty-five of which are considered "judicial emergencies" due to remaining protracted and immense filings.").

[250] Lena Zwarensteyn, *Trump's Takeover of the Courts*, 16 U. ST. THOMAS L.J. 146, 149 (2020); *Supreme Court Nominee Amy Coney Barrett: 'Judges Are Not Policymakers,'* 1600 DAILY (Sept. 29, 2020), https://www.whitehouse.gov/articles/supreme-court-nominee-amy-coney-barrett-judges-not-policymakers/.

[251] Charles Cameron, *Courts to the Rescue?*, BOS. REV. (Aug. 20, 2018), http://bostonreview.net/law-justice/charles-cameron-courts-rescue [https://perma.cc/46QM-A52F].

[252] Tobias, *supra* note 249, at 428–31; *see also* Zwarensteyn, *supra* note 250, at 150 ("This list was compiled by the Federalist Society and Heritage Foundation—extreme right-wing institutions that have been masterminding the takeover of our courts to roll back vital civil rights and protections. Trump promised that his nominees would be in the mold of Justice Antonin Scalia and that they would eviscerate *Roe v. Wade*, devastate the Affordable Care Act, and strike down any gun safety law.").

when senators proffer slips"—and panel hearings.[253] For these reasons, scholars believe that the Trump administration has failed to fulfill "the constitutional responsibilities to nominate and confirm excellent jurists."[254]

This trend may have serious implications.[255] Trump's nominees are largely chosen based on a "demonstrated commitment to the conservative legal movement,"[256] and they "proudly tout their loyalty to the conservative agenda."[257] Scholars have found that President Trump has "implemented only nominal efforts to pursue, identify and seat ethnic minorities or lesbian, gay, bisexual, transgender or queer (LGBTQ) judicial prospects."[258] And have argued that the nominees "demonstrate hostility toward reproductive rights, racial justice, health care, disability rights, immigrant rights, rights of working people, voting rights, LGBTQ equality rights, and environmental protections."[259] These judges' rulings could have a marked impact on the future of these issues.

Carl Tobias asserts that ultimately Trump's efforts to fill the courts with a specific brand of conservative judges could "undermine judicial independence, separation of powers, checks and balances, the rule of law and democracy, make the judiciary appear beholden to, or captured by, one party or another government branch, and "undercut public respect for the judiciary, the President, the Senate, and the selection process."[260]

But at current count, agencies are not winning cases even when there are Trump-appointees on the panel or assigned to the case. Out of all the cases where either the district court judge was appointed by President Trump or at least one of the panel members on a higher court was appointed by Trump, agencies have won 9 cases but lost 14, a win rate of 36%.

But because a Democratic president will likely reverse course on many of the Trump administration's agency policies,[261] thus muting the impact of this shift, any assessment of the shift will have to await more historical data and the results of the 2020 election. And regardless of this potential shift, at this time, the data show that the Trump administration cannot place all the blame on "judicial activist judges."

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[253] Tobias, *supra* note 249, at 436; *see also* Zwarensteyn, *supra* note 250, at 153–61 (detailing the Trump Administration's deviations from the conventional nomination and confirmation process).

[254] Tobias, *supra* note 249, at 422.

[255] Zwarensteyn, *supra* note 250, at 147.

[256] *Id.* at 162.

[257] *Id.* at 164.

[258] Tobias, *supra* note 249, at 435.

[259] Zwarensteyn, *supra* note 250, at 167.

[260] Carl Tobias, *President Donald Trump's War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531, 566 (2019).

[261] *See* Davis Noll & Revesz, *supra* note 109, at 63.

IV. CONSTRAINTS FACED BY PRESIDENT TRUMP (AND SOME CAVEATS)

There are those who have claimed that courts do not act as a meaningful check on agencies, potentially putting the rule of law at risk.[262] And prior studies showing that agencies win most of the time would tend to support that theory.[263] But what if agencies generally had a high win rate because they are doing what the law requires? In that case, the high win rate would not be evidence of judicial abdication or a rule of law crisis. Instead, it would be evidence that courts were policing agencies around the borders and that agencies can be expected to do what the law requires.

My findings shed new light on this debate and show that, in the unique circumstances of the Trump administration, in challenges that made it to the merits, the Trump administration was significantly constrained by the law governing agency action. In a time when the economy has almost collapsed due to a global pandemic and the president is sending federal agents into states that do not want them,[264] it is especially important to understand and highlight those constraining forces.

This Part takes on that task. But it also sounds an important warning: administrative law constraints are not enough. Even when there are judicial remedies (which is not always the case), a president set on implementing a specific agenda against the intent of a prior Congress, has multiple tools at his disposal. In addition, this Part discusses the Trump administration's unfinished business.

A. Constraints at Work

As the data show, the Trump administration has faced constraints in its attempt to use agencies to make policy. The administration is winning, at current count, 17% over time, a rate far outside the range found in previous studies. And as the data show, the low win rate cannot be explained by the fact that the cases still have to go through appellate review.[265] It cannot be explained fully by early corner-cutting by incompetent political appointees.[266] And though judicial ideology has an impact on case outcomes, the Trump administration loses at an

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[262] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) ("Chevron seems no less than a judge-made doctrine for the abdication of the judicial duty."); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 311 (2014) (explaining that "courts shy away" from voiding administrative decisions, but for example "refusing to reject administrative acts unless they are so appalling as to be 'arbitrary and capricious' or without "substantial evidence" and that "[a]lthough the judges do not say as much, they thereby treat administrative power as if it rose above the law and the courts"); Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 661 (2020) (summarizing the research).

[263] See *supra* at Part II.A.

[264] Kristofer Rios, Marjorie McAfee, Neil Giardino, Zoe Lake, John Kapetaneas, and Anthony Rivas, *Legality of federal agents in Portland scrutinized as protests become more violent*, ABC NEWS (July 22, 2020), https://abcnews.go.com/US/legality-federal-agents-portland-scrutinized-protests-violent/story?id=71908246.

[265] See *supra* Part III.A.

[266] See *supra* Part III.D.

unprecedented rate in front of *both* Republican-appointed and Democratic-appointed judges.[267]

Instead, the findings show the administration violating clear legal requirements in multiple ways. Agencies have repeatedly flouted standard procedural rules, including notice and comment requirements. They have ignored clear-cut statutory and regulatory duties. And they have consistently had a hard time explaining their choices to roll back beneficial rules and thus cause harm. These findings show that with an especially aggressive president seemingly bent on displacing "the clear preferences of prior enacting" Congress,[268] courts have managed to place a check on the behavior.

1. *Procedural Requirements*

When comparing win rates by issue, the biggest stumbling block for Trump-era agencies is the failure to either follow notice-and-comment procedures or provide a reasoned explanation for the agency decision.[269] To roll back a rule or change an immigration policy, the administration must provide the public with notice of the proposed decision and then in the final rule, give a "good reason" for the rule. The requirement that agencies provide a reason for the decision facilitates judicial review.[270] The requirements together are an important part of our system of checks and balances.

Yet a full half of the losses have implicated one of these two requirements. Strikingly, more than 40% of the Trump administration's losses have implicated the failure to provide a reasoned explanation and of the times when reasoned explanation formed a basis of the decision, Republican-appointed judges ruled against the administration almost 60% of the time. These numbers show a lack of respect for the law that is pervasive and problematic. The rule of law depends on agencies at least trying to follow the law, and these numbers do not demonstrate that this was occurring in the great majority of cases.

2. *Costs and Benefits in the "Reasoned Explanation" Requirement*

One surprising driver of these reasoned-explanation losses has been courts' review of the analytical underpinnings of the decisions, or more simply the agencies' efforts to address (or not) the harms of their actions. A quarter of the "reasoned explanation" losses involved agencies that failed to address the harms of their actions.

Scholars have argued that cost-benefit analysis is anti-regulatory in its focus on the costs of regulation and that it serves as the downfall of many important regulatory initiatives.[271] But others have made the progressive case for

[267] See *supra* Part III.E.

[268] *Id.* at 2351.

[269] See *supra* Part III.B.

[270] Department of Commerce v. New York, 139 S.Ct. 2551, 2575-76 (2019).

[271] RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH at 31-45 (2008) (describing the debate).

cost-benefit analysis arguing that a balanced assessment of the costs and benefits of many regulations would demonstrate that more stringent limits are justified.[272] And even others have argued that cost-benefit analysis is completely subject to manipulation.[273]

My findings show that, contrary to the view that the Trump administration has succeeded in killing good cost-benefit analysis,[274] courts have been setting aside agency rules that are based on bad analysis.

Traditionally, agencies have a significant amount of discretion when calculating the costs and benefits of their actions.[275] One court recently described this as an "extreme degree of deference" for the "evaluation of scientific data" within the agencies' "technical expertise."[276] But agencies are required under longstanding White House guidance, to "propose or adopt" a regulation only when the "benefits justify its costs"[277] and, when choosing between different alternatives, to select the regulatory alternative that maximizes net benefits, unless a statute requires otherwise.[278] And when rolling back a rule that was prepared with a cost-benefit analysis, an agency must look at the record underlying the decision and explain what the costs and benefits will be of loosening the restrictions.[279]

This means that to roll back a previously finalized rule, an agency will likely have to contend with a cost-benefit analysis showing that the rule was net beneficial and thus that the roll back is harmful to society. Providing a reasoned explanation for a rule that is harmful can be difficult. For example, in a rule cutting emissions from residential wood heaters, the Obama EPA calculated the compliance costs and societal benefits, in the form of reduced asthma cases or premature death, of cutting emissions from residential wood heaters.[280] That

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[272] *Id.* at 16 (making the case).

[273] Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209 (2012); Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 COLUM J. ENVTL. L. 191, 194 (2004) (book review) (arguing that cost-benefit analysis is "vulnerable to manipulation"); Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1556 (2002).

[274] RICHARD L. REVESZ & MICHAEL A. LIVERMORE, REVIVING RATIONALITY: SAVING COST-BENEFIT ANALYSIS FOR THE SAKE OF THE ENVIRONMENT AND OUR HEALTH ("The Trump administration's approach makes a mockery of the notion of cost-benefit analysis."); Stuart Shapiro, *OIRA and the Future of Cost-Benefit Analysis*, REG. REV. (May 19, 2020) ("[T]he battle between politics and analysis at OIRA has in the current Administration turned into a rout by politics."), https://www.theregreview.org/2020/05/19/shapiro-oira-future-cost-benefit-analysis/.

[275] Ctr. for Auto Safety v. Peck, 751 F.2d 1336, 1370 (D.C. Cir. 1985); *See* Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 591 (2015) (cataloging and analyzing cases showing judicial disapproval of agency cost-benefit analysis).

[276] Maryland v. Envtl. Prot. Agency, 958 F.3d 1185, 1196 (D.C. Cir. 2020).

[277] Executive Order 12,866 § 1(b)(6), 58 Fed. Reg. 51,735 (Oct. 4, 1993).

[278] *Id.* § 1(a).

[279] *Fox TV Stations, Inc.*, 556 U.S. at 516 ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

[280] *See, e.g.*, Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 80 Fed. Reg. 13,672, 13,673 (Mar. 16, 2015); Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 80 Fed. Reg. 13,672, 13,673 (Mar. 16, 2015).

analysis showed that the rule promised net benefits of between 3 and 7 billion dollars.[281]

EPA has been seeking to roll this rule back, as evidenced by two proposals to delay the rule,[282] but to deregulate, the agency must show how much asthma rates and premature death would go up and what the cost savings would be for that loosening. An honest accounting would essentially show that rolling back the rule will cause quantifiable harm of in the range of 3 to 7 billion dollars.[283] Because that is net of the cost savings, it is hard to imagine an explanation that would justify that kind of harm and the administration has yet to finalize that rule.

The Trump administration promised to roll back a significant number of regulations.[284] And in rule after rule, the administration failed to comply with *Fox*'s requirement, citing cost savings as a reason for the rollback–without giving the forgone benefits on the other side of the equation equal consideration.[285] But judicial scrutiny of cost-benefit analysis has been increasing,[286] and with the onslaught of lopsided rollbacks coming out of the administration, courts soon began holding that consideration of forgone benefits is required under the Administrative Procedure Act – as agencies must grapple with and explain their decision to forgo the benefits of a rule they seek to roll back.[287] Some of the cases dealt with very obvious errors, such as a deregulatory rule that looked "at only

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[281] EPA, Regulatory Impact Analysis for Residential Wood Heaters NSPS Revision: Final Report, EPA-452/R-15-001 (2015), https://beta.regulations.gov/document/EPA-HQ-OAR-2018-0195-0011.

[282] Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 85 Fed. Reg. 31,124 (proposed May 22, 2020); Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 83 Fed. Reg. 61,574 (proposed Nov. 30, 2018).

[283] *See, e.g.*, Envtl. Prot. Agency, Supplemental Regulatory Impact Analysis (RIA) for "Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces" (Nov. 20, 2018) (calculating forgone benefits for a delay of the rule), https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0195-0008; Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 83 Fed. Reg. 61,574 (proposed Nov. 30, 2018).

[284] *See* Gregory Korte, USA TODAY (Dec. 14, 2017), usatoday.com/story/news/politics/2017/12/14/trump-promises-reduce-federal-regulations-pre-1960-level/953072001/.

[285] *See, e.g.*, Nat'l Highway Traffic Safety Admin., Civil Penalties, Final Rule, 84 Fed. Reg. 36,007 (July 26, 2019) (reversing penalties adjustment while denying any substantial harms); Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018) (ignoring the harms of suspension of the Clean Water Rule); Nat'l Highway Traffic Safety Admin., Civil Penalties, Delay of Effective Date, 82 Fed. Reg. 32,139 (July 12, 2017) (same for suspension of penalties provision); Bureau of Land Mgmt., Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430 (June 15, 2017) (same for suspension of "Waste Prevention Rule"); EPA, 82 Fed. Reg. 27,133 (June 14, 2017) (claiming that forgone benefits of suspension of Chemical Disaster Rule were speculative); EPA, Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generation Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017) (ignoring harms in suspension of wastewater limits).

[286] Jonathan Masur & Eric Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 975 (2018).

[287] *See, e.g.*, Air All. Hous. v. Envtl. Prot. Agency, 906 F.3d 1049, 1067 (D.C. Cir. 2018) (holding that suspension was arbitrary in part for failing to adequately address the rule's forgone benefits); California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017) (holding that failure to consider forgone benefits was arbitrary and capricious).

one side of the scales, whether solely the costs or solely the benefits"[288] and a rule that failed to provide a "bottom-line estimate" about the rule's impact.[289]

But even agencies that attempted to provide a more nuanced analysis and address the forgone benefits, have met with defeat in court. In a recent case, the Department of Interior had attempted to redo the math so as to make the rollback of a rule that was meant to cut back on natural gas leaks at oil and gas facilities[290] look more beneficial. Cutting natural gas leaks helps cut back on methane, a by-product of natural gas. And that helps cut a significant contributor to climate change pollution. To support the Obama-era rule, the agency prepared an economic analysis that showed the rule would lead to $209 to $403 million per year in societal benefits, including industry profits.[291] In addition, the rule promised to provide significant unquantified benefits in the form of reduced emissions of volatile organic compounds and hazardous air pollutants.[292]

In order to make the repeal look justified in the face of those numbers, the Trump-era agency relied on an "interim" estimate for the damages from increasing climate-change pollution, which reduced the damages estimate by purportedly focusing only on the "domestic" damages of climate change.[293] But the "domestic-only" estimate ignored important problems in the United States that would be caused by spillovers from other countries affected by climate change.[294] The repeal was struck down for failure to consider important aspects of the problem and for relying on estimates that had "been soundly rejected by economists as improper and unsupported by science."[295] To be sure, eventually a district court judge in Wyoming struck down the Waste Prevention on a direct challenge, but the point here is that *agency* reversals are less likely to be successful when the agency seeking to change course faces a rigorous analysis underlying its prior policy.

Trump-era agencies have not met with complete failure. A district court upheld Interior's repeal of a regulation governing fracking, holding that the agency was entitled to change its assessment of the environmental impact of the repeal because the record contained evidence "consistent with the Agency's position" and the agency was entitled to prioritize "overall cost reduction when

[288] California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017).

[289] Stewart v. Azar, 313 F. Supp. 3d 237, 262 (D. D.C. 2018).

[290] Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016).

[291] Reg. Impact Analysis for the Waste Prevention Rule at 5-6 (Nov. 10, 2016), https://www.regulations.gov/document?D=BLM-2016-0001-9127.

[292] *Id.* at 6-7

[293] U.S. Bureau of Land Mgmt., Reg. Impact Analysis for the Final Rule to Rescind or Revise Certain Requirements of the 2016 Waste Prevention Rule at 7, 78 (2018).

[294] California v. Bernhardt, No. 18-5712, 2020 WL 4001480, at *27 (N.D. Cal. July 15, 2020) (faulting the agency for relying on an estimate that ignores the "important spillover effects given the global nature of climate change").

[295] *Id.*

weighing the costs and benefits of the Repeal." [296] In reviewing a Health and Humans Services rule that changed a program designed to provide family-planning and reproductive healthcare for low-income patients in drastic ways, the U.S. Court of Appeals for the Ninth Circuit deferred to HHS's "predictive judgment" that "the harms flowing from a gap in care would not develop."[297]

But even if the Trump administration has done its best to shake the foundations of cost-benefit analysis as a system for objectively analyzing the different routes an agency can take,[298] it remains a powerful tool that can be used to justify a rule and to help the rule resist rollbacks in the future. While agencies continue to enjoy substantial discretion when providing explanations for their actions, rules with a strong economic grounding have been more resilient in the face of rollback efforts.[299] And when an agency seeks to do something harmful, the reasoned explanation requirement is a strong force blocking those attempts.

Given the substantial deference that agencies enjoy on this front, it is that much more surprising how many cases the Trump administration has lost.

3. *Regulatory Violations*

A small but significant number of cases also shows agencies failing to abide by clear-cut regulatory duties. For example, in the U.S Court of Appeals for the Ninth Circuit, the court found that the Department of Energy had not complied with its own regulation governing publication of a new energy efficiency rule.[300] In several cases, EPA admitted liability under standards showing clear-cut duties. For example, EPA admitted liability in a case alleging that the agency had failed to promulgate plans to cut upwind emissions that affect air quality in downwind states.[301] EPA conceded liability in a case about the agency's failure to regulate coke ovens.[302] And EPA admitted liability in a case about the implementation of its regulations governing landfill methane.[303] These types of regulatory violations happen during any administration, as statutes often place deadlines on agency action and agencies often cannot meet those deadlines. But when combined with the sheer number of other violations, these types of violations add to a picture of an administration seeking to shirk its regulatory responsibilities under existing law.

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[296] California v. Bureau of Land Mgmt., No. 18-cv-00521-HSG, 2020 U.S. Dist. LEXIS 53958, at *40 (N.D. Cal. Mar. 27, 2020)

[297] Becerra v. Azar, 950 F.3d 1067, 1097 (9th Cir. 2020).

[298] *See* LIVERMORE & REVESZ, *supra* note 274, chps. 5-10.

[299] *See* Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593, 1628 (2019).

[300] Natural Resources Defense Council, Inc. v. James R. Perry, 940 F.3d 1072, 1079–80 (9th Cir. 2019).

[301] New Jersey v. Wheeler, 2020 WL 4331604, at *14 (S.D.N.Y., 2020).

[302] Citizens for Pennsylvania's Future v. Wheeler, No. 19-02004, 2020 WL 3481425 (N.D.Cal. June 26, 2020).

[303] California v. United States Envtl. Prot. Agency, 385 F. Supp. 3d 903, 916 (N.D. Cal. 2019).

4. *Statutory Constraints*

Trump-era agencies also lose on statutory authority grounds to a high degree. In fact, statutory claims explain more than half of the administration's losses in court. These findings cast doubt on claims that Congress has given agencies a blank check to make policy consistent with the preferences of the incumbent administration.

Traditionally, agencies are thought to have considerable room when interpreting their statutes. And confirming that hunch, agency interpretations have been found to be more likely to prevail under *Chevron* than under a stricter standard of review. For example, Christopher Walker found that agencies were "more likely to prevail under *Chevron* (77.4%) than *Skidmore* (56.0%) or, especially, de novo review (38.5%)."[304]

But while Trump-era agencies do succeed at times on statutory claims,[305] they also meet with a significant number of defeats. Over the course of just the past year alone, the Trump administration's policy objectives have been derailed by judicial review of agencies' statutory interpretations. And many of these cases have dealt with agencies that are found to skirting a statute's force or acting outside of their statutory authority.

For example, in *County of Maui v. Hawaii Wildlife Fund*, the Supreme Court rejected the EPA's self-serving interpretation of a provision of the Clean Water Act.[306] The Court noted that neither party had asked the Court to grant *Chevron* deference to EPA's interpretation of the statute, but went on to emphasize that *Chevron* deference would not be warranted here, for "to follow EPA's reading would open a loophole allowing easy evasion of the statutory provision's basic purposes. Such an interpretation is neither persuasive nor reasonable."[307] Similarly, in *Merck & Co., Inc. v. U.S. Dep't of Health & Human Servs.*, the U.S. Court of Appeals for D.C. held that a Department of Health and Human Services rule requiring drug manufacturers to post drug prices in T.V. advertisements was not statutorily authorized.[308] The court rejected the agency's

[304] Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y 103, 121 (2018) ("Chevron deference sure seems to matter to the federal agency officials who draft regulations. The 128 agency rule drafters surveyed in my prior study consider Chevron deference when interpreting statutes and drafting rules. They also think about subsequent judicial review and believe an agency's rule is more likely to survive judicial review under Chevron than under the less-deferential Skidmore standard or de novo review. To a somewhat lesser extent, they also indicated that their agency is more aggressive in its interpretive efforts if it believes the reviewing court will apply Chevron deference (as opposed to Skidmore deference or de novo review).").

[305] *See, e.g.*, Ass'n for Community Affiliated Plans v. U.S. Dep't of the Treasury, 2020 WL 4032806 (D.C. Cir. 2020); Clean Water Action v. Envtl. Prot. Agency, 936 F.3d 308 (5th Cir. 2019); Org. for Competitive Markets v. U.S. Dep't of Agric., 912 F.3d 455 (8th Cir. 2018).

[306] Cty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462 (2020).

[307] *Id.* at 1474.

[308] Merck & Co. v. U.S. Dep't of Health & Human Servs., 962 F.3d 531, 533 (D.C. Cir. 2020).

rule as "untethered" to the agency's regulatory authority.[309] The court ultimately held that "no reasonable reading" of the agency's authority allowed the rule.[310]

In sum, as the cases show, courts frequently see the Trump administration as acting outside its statutory authority. When so much discretion is generally afforded to agencies in interpreting statutes, the number of times that Trump-era agencies have lost on statutory grounds is surprising. It also helps demonstrate that judicial review is meaningful when courts are confronted with agencies seeking to act outside the bounds of law.

B. Other Ways a President Can Win

What the win-loss rate does not make clear though is that, within administrative law, there are many routes that a president can use to avoid judicial reversals. There are doctrines that make challenging an agency, challenging. Some decisions are committed to the agencies' sole discretion and thus unreviewable.[311] And there may be times when plaintiffs do not have standing to challenge the decision[312] or have filed the case in the wrong place.[313]

Agencies can also use serial rules to evade judicial review. The Trump administration took advantage of this route on several occasions. For example, in 2017, EPA began taking a series of actions to avoid complying with the deadlines in an Obama-era rule that required landfills to reduce their methane emissions.[314] First, on May 31, 2017, one day after the deadline for state compliance plans under the 2016 Rule, EPA granted a petition for reconsideration on the rule and issued a 90-day stay.[315] Environmental plaintiffs promptly filed a petition for review,[316] and EPA then withdrew that delay rule.[317] But despite that withdrawal, EPA continued to drag its feet in implementing the rule and on February 26, 2018, EPA stated its intent not to respond to state plans or issue federal plan.[318] A coalition of states challenged EPA in court[319] and the court set a deadline for EPA to promulgate state & federal plans.[320] That deadline

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[309] *Id.*

[310] *Id.* at 541.

[311] Make The Road N.Y. v. Wolf, 2020 WL 3421904 (D.C. Cir. 2020) (decision was unreviewable because committed to the agency's sole discretion).

[312] Free Press, et al. v. Fed. Commc'ns Comm'n, et al., 735 Fed. Appx. 731 (D.C. Cir. 2018) (standing).

[313] Sierra Club v. Envtl. Prot. Agency, 926 F.3d 844 (D.C. Cir. 2019) (improper venue).

[314] Envtl. Prot. Agency, Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,276, 59,280 (Aug. 29, 2016).

[315] Envtl. Prot. Agency, Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 82 Fed. Reg. 24,878, 24,878

[316] Petition for Review, Nat. Res. Def. Council, Inc. v. Envtl. Prot. Agency, No. 17-01157 (D.C. Cir. June 15, 2017).

[317] Stipulation of Voluntary Dismissal Pursuant to Federal Rule of Appellate Procedure 42(b), Nat. Res. Def. Council, Inc. v. Envtl. Prot. Agency, No. 17-01157 (D.C. Cir. Jan. 31, 2018).

[318] *See* States' Complaint for Declaratory and Injunctive Relief at 15, California v. Envtl. Prot. Agency, 385 F. Supp. 3d 903 (N.D. Cal. 2019) (No. 18-cv-03237-HSG).

[319] *Id.*

[320] Cal. v. Envtl. Prot. Agency, 385 F. Supp. 3d 903 (N.D. Cal. 2019).

was, by necessity, later than EPA's original deadline for promulgating those plans.

EPA did not appeal that decision. Instead, the agency issued a new delay rule.[321] EPA then returned to district court and filed a motion under Federal Rule of Civil Procedure Rule 60(b) asking the court to reopen the judgment given the change in the regulations. The court denied that motion[322] and an appeal of the case is now pending before the Ninth Circuit.[323] Plaintiffs have a challenge pending against the new delay rule in the U.S. Court of Appeals for the D.C. Circuit as well.[324] Meanwhile, implementation of the rule remains on hold as EPA has not complied with any of the original rule's deadlines.

All told, the landfill methane saga demonstrates that the agency faced significant risks of reversal in court, given that the agency gave up one delay after a lawsuit was filed[325] and was ordered by another court to implement the rule by a date certain.[326] Yet EPA has thus far avoided having to comply with deadlines in the 2016 rule and court-ordered deadlines.

EPA's successful efforts to evade the deadlines of the landfill methane rule despite significant court risks is not the only example of regulatory "whack-a-mole."[327] Despite the losses in the dataset, there are also examples of rules where agencies were ultimately able to repeal or put off the regulatory requirement. For example, after a lawsuit[328] caused the Federal Highway Administration to announce that it would end a delay of a greenhouse-gas measurement rule,[329] the agency repealed the rule[330] and was never sued.

And besides the problem that courts are just an imperfect solution, as Daphna Renan has explained, "the more society depends on courts to check norm breaching by political actors, the more fragile judicial norms (such as norms of judicial independence) may become."[331]

Mashaw and Berke have said that becoming overly dependent on courts also then tends to take the onus off Congress in a way that is counterproductive

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[321] EPA, Adopting Requirements in Emission Guidelines for Municipal Solid Waste Landfills, 84 Fed. Reg. 44,547, 44,549 (Aug. 26, 2019).

[322] Cal. v. Envtl. Prot. Agency, 18-cv-03237, 2019 WL 5722571, at *1 (N.D. Cal. Nov. 5, 2019).

[323] Cal. v. Envtl. Prot. Agency, No. 19-17480 (9th Cir. filed Dec. 11, 2019).

[324] Envtl. Defense Fund v. EPA, No. 19-01222 (D.C. Cir. filed Oct. 23, 2019).

[325] EPA's Methane Regulations: Legal Overview at 21, Congressional Research Service, No. R44615 (Jan. 24, 2018) ("Because this three-month stay expired on August 29, 2017, the 2016 rules are currently in effect during the reconsideration process. At this time, EPA has not formally proposed a longer stay of the rules or initiated the public comment period for issues under reconsideration."), https://crsreports.congress.gov/product/pdf/R/R44615.

[326] Cal. v. Envtl. Prot. Agency, 385 F. Supp. 3d 903 (N.D. Cal. 2019).

[327] Bethany Davis Noll, Trump's Regulatory 'Whack-a-Mole,' POLITICO (Apr. 10, 2019), https://www.politico.com/agenda/story/2019/04/10/trump-federal-regulations-000890/ (describing the practice); *See also* Davis Noll & Revesz, *supra* note 109, at 42-43 (collecting examples).

[328] Clean Air Carolina v. U.S. Dept. of Transp., No. 17-5779 (S.D.N.Y.).

[329] National Performance Management Measures, 82 Fed. Reg. 45179 (Sept. 28, 2017).

[330] National Performance Management Measures, 83 Fed. Reg. 24,920 (May 31, 2018).

[331] Renan, *supra* note 32, at 2273

and harmful.[332] They argue that increasing polarization and the resulting gridlock can lead to long-term inefficiencies between administrations. For example, when presidents pursue their policy agendas through agency rulemaking, those presidents leave the door open for the next administration to easily reverse these accomplishments.[333] This power can be clearly seen through Trump's reversal of numerous Obama-era regulations.[334] In this sense, "presidential administration is also quite fragile," with its policies "immediately contested and readily subject to reversal" with each new election.[335]

In sum, these pressures and concerns demonstrate that judicial review cannot be the only answer to an administration run amok.

C. Unfinished Business

The November 2020 election is coming. Challenges to the latest and perhaps biggest rollbacks are still pending. And many other regulatory rollbacks are still waiting in the wings. For example, after an unsuccessful effort to suspend its methane emissions rule in mid-2017, EPA has been working on rewriting the rule ever since. The proposal was released in September 2019 and was only finalized in September 2020.[336]

If President Trump wins reelection, it is not a sure bet that the administration will win the pending cases. The Navigable Waters Protection Rule has already been enjoined in one court.[337] And the agencies were unable to come up with a solid justification for the rollback of the vehicle emissions rule; their own cost-benefit analysis shows that the rule is net harmful to society.[338] A challenge to that rule is sure to present a big risk for the administration.

But on the other hand, if the president does not win reelection, there will be at least two notable categories of unfinished business that will likely never see decision: cases where the agencies lost in court but are hoping for a Supreme Court reversal and cases that are already pending but are far from decision. This section discusses these two categories of pending cases.

1. *Possibility of Supreme Court Wins*

On the Supreme Court front, there are a few significant immigration cases where the Trump administration lost in the lower courts, but then obtained a stay from the Supreme Court. These cases are about whether the Department of

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[332] Mashaw & Berke, *supra* note 53, at 607.

[333] *Id.*

[334] *Id.*

[335] Bulman-Pozen, *supra* note 36, at 269–70.

[336] Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 84 Fed. Reg. 50,244 (proposed Sept. 24, 2019); Status Report, State of N.Y. v. U.S. Envtl. Prot. Agency, No. 18-773 (July 15, 2020 S.D.N.Y.) (explaining that the agency had submitted the rule to OMB and anticipated finalizing the rule by the end of July 2020).

[337] Colorado v. U.S. Envtl. Prot. Agency, No. 20-cv-1461, 2020 WL 3402325 (D. Colo. 2020).

[338] Institute for Policy Integrity at NYU School of Law, Key Economic Errors in the Clean Car Standards Rollback (April 1, 2020), https://policyintegrity.org/files/media/Vehicles_Emissions_Rollback_-_Key_Economic_Errors.pdf.

Homeland Security can lawfully deny applications for lawful permanent residency to immigrants it deems likely to become public charges,[339] about whether the Department of Justice can deny asylum to those entering at the southern border who did not first apply for asylum in another country,[340] and about whether the Department of Homeland Security can lawfully require non-Mexican asylum seekers to remain in Mexico for the duration of their immigration proceedings.[341]

With those stay decisions, the Supreme Court sent a signal both that it would grant certiorari and that it may be willing to reverse the decisions on the merits. But as with the ill-fated Clean Power Plan, a regulation curbing greenhouse emissions at existing power plants that had its litigation dismissed as moot after the Trump administration replaced it,[342] should the Trump administration not win reelection it is highly unlikely that those cases will ever reach the Supreme Court. Instead, a new administration would likely seek to redo the policy and then have the cases dismissed as moot.[343]

2. *Pending Litigation*

After spending the first several years on quick and dirty suspension rules, the Trump administration has only recently finalized its signature rollbacks. These rollbacks all took years to finalize. For example, EPA first announced that it was reconsidering its vehicle emissions standards in October 2017.[344] In October 2018, EPA and NHTSA then together proposed flatlining the standards.[345] The two agencies then took until April 2020 to publish the final rollback.[346] Litigation challenging that rollback is in the early stages.[347]

In October 2017, EPA proposed to repeal the Clean Power Plan.[348] In August 2018, the agency then proposed to replace the Clean Power Plan.[349] It

[339] New York v. U.S. Dep't of Homeland Security, 408 F. Supp. 3d 334 (S.D.N.Y. 2019), stayed (U.S.S.C. Jan. 27, 2020), appeal filed (2d Cir. 19-03591).

[340] East Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922 (N.D. Cal. 2019), stayed Barr v. East Bay Sanctuary Covenant, 140 S. Ct. 3 (2019), aff'd East Bay Sanctuary Covenant v. Trump, 950 F.3d 1242 (9th Cir. 2020), 2020 WL 3637585 (9th Cir. July 6, 2020).

[341] Innovation Law Lab v. Nielsen, 366 F. Supp. 3d 1110, 1114 (N.D. Cal. 2019), stayed (U.S.S.C. March 11, 2020).

[342] Order at 3, *West Virginia*, No. 15-1363 (D.C. Cir. Sept. 17, 2019) (dismissing the litigation over the Clean Power Plan as moot after the agency finalized a replacement rule).

[343] *See* Davis Noll & Revesz, *supra* note 109, at 33 (predicting that future presidents will use abeyances to put off court decisions after an inter-party transition).

[344] 82 Fed. Reg. 39,551, 39,553 (Aug. 21, 2017).

[345] 83 Fed. Reg. 42,986 (proposed Aug. 24, 2018) (to be codified at 40 C.F.R. pts. 85–86).

[346] The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020).

[347] *See* Docket, California v. Wheeler, No. 20-1167 (D.C. Cir.).

[348] 82 Fed. Reg. 48,035 (Oct. 16, 2017)

[349] Revisions to Emission Guideline Regulations, 83 Fed. Reg. 44,746 (proposed Aug. 31, 2018) (to be codified at 40 C.F.R. pts. 51, 52, 60).

took until July 2019 before the agency was able to finalize either proposal.[350] Briefs have recently been filed in the litigation.[351]

Similarly, in July 2017, EPA and the Army Corps of Engineers proposed to repeal the Clean Water Rule, a rule meant to clarify jurisdictional limits and incrementally increase protection for wetlands and other bodies of water that have a significant impact on navigable waters.[352] In 2018, the agencies delayed the rule[353] but that delay was struck down in court.[354] In February 2019, the agencies then proposed a replacement for the rule in February 2019.[355] Then in October 2019, the agencies managed to finalize the repeal,[356] but they did not finalize their replacement rule, known as the Navigable Waters Rule, until April 2020.[357] Litigation on that rule is now pending in more than ten district courts.[358]

For all those rules, if there is an inter-party transition, an incoming administration is likely to seek to convince courts to put off deciding the cases. The Department of Justice generally does not just switch sides in an agency case.[359] Even if the Department did so, until an agency has actually promulgated a new regulation, the Department's positions in court cannot stand in as agency decisions.[360] But rulemaking can take significant time,[361] which leaves the Department in a quandary. A solution to this is to halt litigation by requesting court-ordered abeyances that put off briefing, arguments, or decisions in litigation, giving agencies time to rescind or modify a rule, render the litigation moot, and avoid an unfavorable court decision.[362] Better still, if the regulation is

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[350] 84 Fed. Reg. 32,520 (July 8, 2019).

[351] *See* EDF, Clean Power Plan case resources, https://www.edf.org/climate/clean-power-plan-case-resources (compiling briefing filed in the case).

[352] Definition of "Waters of the United States," 82 Fed. Reg. 34,899 (proposed July 27, 2017) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401).

[353] 83 Fed. Reg. 5200 (Feb. 6, 2018).

[354] South Carolina Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959 (D.S.C. 2018) (enjoining the delay).

[355] Revised Definition of "Waters of the United States," 84 Fed. Reg. 4,154 (proposed Feb. 14, 2019).

[356] Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019).

[357] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020).

[358] *See, e.g.*, California v. Wheeler, No. 20-3005, 2020 WL 3403072 (N.D. Cal. June 19, 2020) (denying motion for a preliminary injunction); Colorado v. U.S. Envtl. Prot. Agency, No. 20-cv-1461, 2020 WL 3402325 (D. Colo. 2020) (granting motion for a preliminary injunction in State of Colorado), appeal filed (10th Cir. No. 20-01238).

[359] Jody Freeman, *The Limits of Executive Power: The Obama- Trump Transition*, 96 NEB. L. REV. 545, 551 (2018) (explaining Justice Department practice of not changing position until agency announces new position through notice and comment).

[360] Sec. Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947) (explaining that the court "must judge the propriety" of an agency's action based on the agency's reasoning); *accord* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S.Ct. 1891, 1909 (2020).

[361] *See* Davis Noll & Revesz, *supra* note 109, at 55–57 (collecting studies that have analyzed the typical timeframe for issuing new rules).

[362] *See, e.g.*, Order Dismissing Case as Moot, West Virginia v. Envtl. Prot. Agency, No. 15-1363 (D.C. Cir. Sept. 17, 2019) (dismissing case defending Clean Power Plan as moot in light of repeal by Trump administration during abeyances).

stayed by a court prior to litigation, an abeyance further delays the rule from taking effect.

The prudence of invoking an abeyance may depend on whether the incoming administration anticipates a judicial decision that aligns with its new agenda. Under the Trump administration, the Justice Department allowed a challenge to a Department of Labor rule to proceed in the Fifth Circuit, perhaps anticipating that the court would agree with the Trump administration's own interpretation and strike down the Obama-era rule.[363] By contrast, the Department sought and received an abeyance in the D.C. Circuit litigation of the Clean Power Plan.[364] This abeyance helped the Trump administration avoid a possible judicial decision that could have upheld the regulation—which in turn would have prevented the Trump-era agency from claiming, as it eventually did,[365] that the Clean Power Plan was illegal. In addition, because the Supreme Court had issued a stay, the abeyance kept the Clean Power Plan from going into effect and bought the agency time to repeal the rule.[366] Ultimately, once EPA repealed the Clean Power Plan under President Trump, the litigation over the rule was dismissed as moot.[367]

In sum, all these pending cases may or may not ever reach decision. As such, this is an important time to take stock.

CONCLUSION

This study examines the outcome of Trump's agency rulemaking efforts in court during his first (and possibly only) term. In doing so, the study examines and tests the power of judicial review to serve as a bulwark against agencies seeking to push the limits. The Trump administration has lost in court at an astonishing rate. The study's results demonstrate that it is unlikely this record will turn around once more appeals reach their final stages and they demonstrate that judicial ideology is not all to blame. Instead, what the study shows is that Trump administration agencies have acted in ways that are contrary to law, both by failing to provide a reasoned explanation for their actions and by ignoring their statutory mandates. The fact that courts have kept these violations in check is a powerful rejoinder to those who would say that judicial review of agency action has become toothless.

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[363] Chamber of Commerce v. Dep't of Labor, 885 F.3d 360, 368 (5th Cir. 2018).

[364] Order Granting Abeyance, West Virginia v. Envtl. Prot. Agency, No. 15-1363 (D.C. Cir. Apr. 28, 2017).

[365] *See* Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,523 (July 8, 2019) (claiming Clean Power Plan was illegal and thus repealing it).

[366] *See* Order Extending Abeyance, No. 15-1363 (D.C. Cir. Aug. 8, 2017); Davis Noll & Revesz, *supra* note 109, at 25.

[367] Order at 3, *West Virginia*, No. 15-1363 (D.C. Cir. Sept. 17, 2019); Petitioners and Petitioner-Intervenors' Motion for Dismissal of Petitions for Review as Moot, *West Virginia*, No. 15-1363 (D.C. Cir. July 15, 2019), No. 1797267 (requesting dismissal as case was now moot); EPA's Response in Support of Petitioners' Motion to Dismiss, *West Virginia*, No. 15-1363 (D.C. Cir. July 17, 2019), No. 1797703 (supporting dismissal and agreeing case was now moot).

APPENDIX

There were, generally speaking, four issues that came up consistently in all the challenges and decisions and each case was coded to reflect decisions where courts ruled for or against an agency on these grounds: (1) notice-and-comment claims, (2) claims that the agencies failed to provide a reasoned explanation, (3) statutory claims, and (4) claims that the agencies failed to comply with their own regulations.

For coding purposes, I categorized a case as a "**notice-and-comment"** case if the notice and comment claim formed a basis for the court's ruling, for example if the court ruled against the agency and found that the agency failed to provide notice at all[368] or failed to provide adequate notice.[369]

I categorized the case as a "**reasoned explanation**" case, where the issue that formed a basis for the court's ruling arose under the line of cases beginning with *State Farm*,[370] for example if the court found that the agency failed to address significant reliance interests[371] or failed to offer an explanation for the rule that is contradicted by the agency's own record.[372] As a subset of these cases, I categorized the case as an "analytical basis" case if the court found that the agency had either provided an adequate basis for the decision or not adequately explained the decision by for example providing a faulty analytical basis for the rule,[373] arbitrarily ignoring significant issues when addressing the harm of the decision,[374] or failing to acknowledge the forgone benefits of the decision.[375]

I categorized a case as a "**statutory violation**" case where the claim formed a basis for the decision for or against the agency, either because--for example—

[368] *See, e.g.*, Nat. Resources Def. Council, Inc. v. Nat'l Highway Traffic Safety Admin., 894 F.3d 95 (2d Cir. 2018) (vacating delay rule where no notice was given at all); Pineros y Campesinos Unidos del Noroeste v. Pruitt, 293 F. Supp. 3d 1062 (N.D. Cal. 2018) (holding that agency failed to prove it had good cause to forgo providing notice and holding that four-day notice period was insufficient).

[369] *See, e.g.*, S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959 (D.S.C. 2018) (holding that agency improperly failed to seek public comment on the full scope of the action); Becerra v. U.S. Dep't of Interior, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (rejecting argument that notice on subsequent proposed repeal was sufficient to satisfy notice requirement for delay rule).

[370] See *supra* notes 117-128 and accompanying text.

[371] *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S.Ct. 1891, 1901 (2020).

[372] *See, e.g.*, United Steel v. Mine Safety and Health Admin., 925 F.3d 1279, 1284, 441 (D.C. Cir. 2019) (holding that the explanation was arbitrary and capricious because it could not be "reconciled with the factual findings" that the agency had made in the Obama-era rule); Becerra v. U.S. Dep't of the Interior, 381 F. Supp. 3d 1153, 1168 (N.D. Cal. 2019) (holding that the agency had failed to "reconcile" its decision with the findings in the rule it was repealing).

[373] Stewart v. Azar, 313 F. Supp. 3d 237 (D.D.C. 2018) (holding that the decision was arbitrary and capricious for failure to address the lost coverage that would occur under the decision and for failure to consider the health harms as compared to the benefits of the rollback).

[374] California v. Bernhardt, No. 18-5712, 2020 WL 4001480, at *27 (N.D. Cal. July 15, 2020).

[375] *Id.*; California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106 (N.D. Cal. 2017).

the agency had acted with or without specific statutory authority[376] or had adopted (or not) an "unreasonable construction of the statute."[377]

Issues are coded only as they support the outcome in the case. For example, if the agency lost the case because of a notice-and-comment violation, but the court rejected a separate claim that the agency violated a governing statute, that finding regarding the statute would not be coded.

For all cases where courts decided a statutory claim, the study tracks the deference applied.

- **No deference regime**: Cases fell under this category when the court found that the agency's action was "contrary to law" or "contrary to the statute," without invoking any kind of deference regime. Like Eskridge and Baer's "no regime indicated" category, this category applies to cases where a court applied a "traditional source[] of statutory meaning, without citation to any deference regime and without any apparent reliance on the special facts or arguments advanced by the agency (in an amicus brief, etc.)."[378]

- ***Chevron* Step One**: Cases were coded as *Chevron* Step One if the court held that the plain language of the statute compelled the result without mentioning *Chevron* or invoked the *Chevron* analysis and considered "whether Congress has directly spoken to the precise question at issue."[379] If the court found that the statute was unambiguous and/or Congress's intent was clear, and decided the case at this step of the analysis, then the case was coded as a Step One case. This is akin to the approach that Barnett & Walker as well as Czarneski took.[380]

- ***Chevron* Step Two**: If the court determined that Congress did not speak clearly and the "statute is silent or ambiguous with respect to the specific issue," and asked "whether the agency's answer is based on a permissible [i.e., "reasonable"] construction of the statute,"[381] the case was coded as a *Chevron* Step Two case. This is similar to

[376] Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017).

[377] District of Columbia v. U.S. Dep't of Agric., No. 20-119, 2020 U.S. Dist. LEXIS 43853, *48 (March 13, 2020).

[378] Eskridge & Baer, *supra* note 12, at 1221.

[379] Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 842 (1984).

[380] *See generally* Barnett & Walker, *Chevron in the Circuit Courts*, *supra* note 11; Czarnezki, *supra* note 12, at 796-97.

[381] *Chevron*, 467 U.S. at 843.

Barnett and Walker's approach, as well as Czarneski's methodology.[382]

I categorized a case as a "**regulatory claim**" where a regulatory violation formed the basis for the decision, for example where an agency had failed to perform a nondiscretionary duty imposed by the agency's own regulations[383] or had or not shown how the agency's regulations permitted the challenged action.[384] In these cases, *Auer/Kisor* deference[385] was implicated and I looked to see if the court applied that level of deference.[386]

For all the cases where the agencies withdrew the action after a lawsuit was filed, I categorized them according to the claims that were brought.

[382] *See generally id.*; Barnett & Walker, *Chevron Step Two's Domain*, *supra* note 12.

[383] Cal. v. U.S. Envtl. Prot. Agency, 385 F. Supp. 3d 903, 916 (N.D. Cal. 2019); Nat. Res. Def. Council, Inc. v. Perry, 940 F.3d 1072, 1080 (9th Cir. 2019).

[384] *See, e.g.*, Nat'l Women's Law Ctr. v. Off. Mgmt. & Budget, 358 F. Supp. 3d 66, 87 (D.D.C. 2019).

[385] *See* Kisor v. Wilkie, 139 S.Ct. 2400, 2414-15 (2019); Auer v. Robbins, 519 U.S. 452 (1997) (noting that "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under [the Court's] jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation'") (internal quotations omitted); *see also* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

[386] Eskridge & Baer, *supra* note 12, at 1217-21. There were a number of other deference regimes that scholars have studied, but which did not come up in the dataset, including *Curtiss-Wright* Deference, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936), so-called "Anti-Deference," Eskridge & Baer, *supra* note 12, at 1220, Consultative Deference, *id.* at 1219, *Skidmore* Deference, see Christensen v. Harris County, 529 U.S. 576 (2000), and *Beth Israel* Deference, *id.*, at 1218.