

# “TIRED OF WINNING”: JUDICIAL REVIEW OF REGULATORY POLICY IN THE TRUMP ERA

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*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 agency actions. The findings are striking. While prior administrations prevailed in approximately 70% of legal challenges to agency actions, the Trump Administration’s success rate was 23%.*

*To better understand that top-line finding, this 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 consistently violated statutory limits on agency policymaking and failed to comply with procedural requirements governing agency regulations. Several arguments 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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## INTRODUCTION

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

—Candidate Donald Trump, 2016<sup>1</sup>

Faced with congressional gridlock, presidents have increasingly turned to their administrative agencies to make policy.<sup>2</sup> President Bill Clinton used the strategy to pursue policies designed to combat youth smoking and to provide leave to new parents through the unemployment insurance system.<sup>3</sup> President George W. Bush reportedly made efforts to influence his agencies' scientific decisions.<sup>4</sup> And after the attempt to cut carbon emissions through congressional action failed,<sup>5</sup> President Barack Obama turned to agencies to make climate change policy.<sup>6</sup>

President Donald Trump followed that trend, using agencies to make immigration policy<sup>7</sup> and attack the overall level of federal regulation.<sup>8</sup> And after the attempt to repeal the Affordable Care Act failed in Congress, the Trump Administration used rule after rule to cut back on the statute's coverage.<sup>9</sup>

1. *Trump: We're Going to Win So Much (2016)*, CNN, <https://www.cnn.com/videos/politics/2017/08/18/trump-albany-rally-winning-sot.cnn> (last visited May 18, 2021).

2. Richard E. Levy, *Presidential Power in the Obama and Trump Administrations*, J. KAN. BAR ASS'N, Sept. 2018, at 46, 47; *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248–50 (2001) (discussing the expansion of the president's role in policymaking through involvement in administrative actions).

3. Kagan, *supra* note 2, at 2283–84.

4. *See* Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 697 (2016).

5. 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>].

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

7. *See infra* note 54 and accompanying text.

8. *See* Pub. Citizen, Inc. v. Trump, 435 F. Supp. 3d 144, 147–148 (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* Section I.B (discussing the Trump Administration's attempts at deregulation).

9. *See* Abbe R. Gluck et al., *The Affordable Care Act's Litigation Decade*, 108 GEO. L.J. 1471, 1509, 1511, 1513–14, 1516–17 (2020) (discussing various Trump-era rules aimed at limiting the reaches and effects of the Affordable Care Act).

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<sup>10</sup> have led to a legal framework that allows presidents to use agencies to implement policies consistent with their political preferences.<sup>11</sup>

Scholars have sought to test this prediction by analyzing the rates at which courts uphold agency policies (known as agency “validation rates”). In their studies, which cover different time periods going back several decades, all told, they find that agencies prevail in approximately 70% of the legal challenges to their actions.<sup>12</sup> Moreover, scholars find that agencies generally win under almost any standard of review.<sup>13</sup> That success in court tends to

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10. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (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.”).

11. See generally PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 152–153 (2009) (describing President George H. W. Bush’s Council on Competitiveness as “involv[ing] itself not just in the name of neutral-sounding administrative values, but also on the basis of straight-out political preference”); Peter L. Strauss, *The Trump Administration and the Rule of Law*, 170 *REVUE FRANÇAISE D’ADMINISTRATION PUBLIQUE* 433, 440 (2019) (discussing research on the trend “toward essentially unchecked presidential exercise of authority”); see also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (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 & Telecomms. 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”).

12. 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, finding an “overall agency validation rate” of 69%).

13. See Kent Barnett & Christopher J. Walker, *Chevron Step Two’s Domain*, 93 *NOTRE DAME L. REV.* 1441, 1444–45 (2018) (finding that agencies win 77.4% of cases under *Chevron* review); Barnett & Walker, *supra* note 12, at 30 (finding that agencies have an overall win rate of 71.4%, and that agencies won 77.4% of the time under *Chevron* review and 56% of the time under *Skidmore* review); 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) (finding that agencies won 73.5% of cases under *Skidmore* review, 76.2% of cases under *Chevron* review, and 66.0% of cases with no deference); 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) (finding that agencies won 69.55% of

support the theory that presidents have a large amount of discretion to make policy through their agencies.

This Article presents original empirical research on whether the Trump Administration maintained a similar win rate when defending legal challenges to its uses of agencies to make policy.<sup>14</sup> It shows a marked statistic. Using data gathered since the beginning of the term, it finds that rather than winning most legal challenges to agency actions, as was the historical norm, the Trump Administration's win rate was 23% on aggregate.

This finding upsets the conventional wisdom that presidents have significant leeway to make policy through agency rulemaking, at least when it comes to the Trump presidency. The Article goes further to analyze what

cases under *Chevron* review); Kiki 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 LAW & POL'Y 347, 360 (2004) (finding that agencies won 54% of the time under all analyzed judicial standards of review).

14. 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. *Roundup: Trump Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY, <https://policyintegrity.org/trump-court-roundup> (Apr. 1, 2021). The statistics have been cited repeatedly by scholars and in the media. *E.g.*, Lee Epstein & Eric Posner, *Trump Has the Worst Record at the Supreme Court of Any Modern President*, WASH. POST (July 20, 2020, 11:39 AM), <https://www.washingtonpost.com/outlook/2020/07/20/trump-has-worst-record-supreme-court-any-modern-president/>; Elliot Spagat, *Asylum Rules Test Trump's Legal Skills to Make New Policy*, ASSOCIATED PRESS (July 16, 2020), <https://apnews.com/656c7e5442cf2917363af40c2cc4253e>; Lawrence Hurley, *Trump Administration's 'Sloppy' Work Has Led to Supreme Court Losses*, REUTERS, <https://www.reuters.com/article/us-usa-court-immigration-trump-analysis/trump-administrations-sloppy-work-has-led-to-supreme-court-losses-idUSKBN23P3M2> (June 18, 2020, 5:10 PM); Michael Hiltzik, *Trump's Response to Legal Defeats Suggests He's a Paper Tiger*, L.A. TIMES (Feb. 28, 2020, 6:00 AM), <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*, WASH. POST (June 17, 2019, 6:00 AM), <https://www.washingtonpost.com/politics/2019/06/17/heres-how-federal-agencies-can-write-more-effective-regulations-win-regulatory-battles-court/>; Alex Leary, *Trump Administration Pushes to Deregulate With Less Enforcement*, WALL ST. J., <https://www.wsj.com/articles/trump-administration-pushes-to-deregulate-with-less-enforcement-11561291201> (June 23, 2019, 7:12 PM); 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 INST. (Oct. 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/>. For a further description of the methodology, see *infra* Coding the Issues.

could explain that low win rate. The data provide several insights into what 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 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 cases where agencies withdrew the challenged action after a lawsuit was filed.<sup>15</sup>

The Administration also repeatedly tripped up when providing analyses to support agency rules. The Administration sought to roll back several Obama-era rules that were accompanied by analyses that showed the policies' promised benefits far outweighed their costs. To roll these rules back, an agency is not permitted to ignore the underlying record.<sup>16</sup> And without a significant change, rolling back a rule that promised net benefits generally means that the agency will forgo those benefits, thus causing net harms. Justifying a net-harmful rule can be difficult. As a result, the Administration met reversal in cases where it ignored the forgone benefits<sup>17</sup> or where its new numbers did not make even a "modicum of sense."<sup>18</sup>

Another series of losses involved agencies that violated a clear-cut statutory or regulatory duty. For example, the Environmental Protection Agency (EPA) unreasonably delayed a pesticide regulation that is required by statute<sup>19</sup> and conceded that it violated its duty under the Clean Air Act to regulate coke ovens, which convert coal into a component used in steel production.<sup>20</sup>

The largest category of losses by far involved agencies taking actions that fell clearly outside of their statutory authority. Agencies must have specific statutory authority to act.<sup>21</sup> And, in case after case, courts found that Trump-

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15. See BETHANY A. DAVIS NOLL & ALEC DAWSON, INST. FOR POL'Y INTEGRITY, DEREGULATION RUN AMOK 3–6 (2018), [https://policyintegrity.org/files/publications/Deregulation\\_Run\\_Amok\\_Report.pdf](https://policyintegrity.org/files/publications/Deregulation_Run_Amok_Report.pdf).

16. See *Fox Television 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.”).

17. See, e.g., *California v. U.S. Bureau of Land Mgmt.*, 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.”).

18. *Mayor of Baltimore v. Azar*, 973 F.3d 258, 282 (4th Cir. 2020).

19. *Nat. Res. Def. Council, Inc. v. EPA*, 956 F.3d 1134, 1136 (9th Cir. 2020) (finding that the Environmental Protection Agency (EPA) unreasonably delayed regulating tetrachlorvinphos, a pesticide found in household pet products that poses a serious risk to the neurodevelopmental health of children, in violation of the Federal Insecticide, Fungicide, and Rodenticide Act).

20. *Citizens for Pa.’s Future v. Wheeler*, 469 F. Supp. 3d 920, 924, 932 (N.D. Cal. 2020).

21. See, e.g., *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (rejecting the

era agencies either lacked statutory authority for a particular rule<sup>22</sup> or violated the governing statute.<sup>23</sup>

This Article also addresses some of the typical arguments that the Trump Administration and its supporters made to excuse the low win rate. First, while the Administration’s supporters argued that the success rate could change on appeal, that was not the case.<sup>24</sup> Even the U.S. Supreme Court did not deliver as the Trump Administration may have hoped,<sup>25</sup> holding that the Administration failed to justify its decision to add a citizenship question to the census<sup>26</sup> and failed to adequately explain its decision to rescind an immigration policy that allowed young immigrants, who were brought to the United States when they were children, to avoid deportation.<sup>27</sup>

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 aggregate win rate during the Trump Administration was 23%.<sup>28</sup> 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 instead continued to lose on that front, as well as all the others.<sup>29</sup>

Third, the data do not support the charge that the low win rate is due to

EPA’s argument that it had “inherent authority” to stay implementation of a properly promulgated final rule, and holding that it must point to either the Clean Air Act or the Administrative Procedure Act for authority to act).

22. See, e.g., *New York v. Nat’l Highway Traffic Safety Admin.*, 974 F.3d 87, 100–01 (2d Cir. 2020) (finding that the National Highway Traffic Safety Administration exceeded its statutory authority when it reconsidered and reversed a rule outside the timeframe prescribed by Congress).

23. See, e.g., *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of the Interior*, 478 F. Supp. 3d 469, 487–88 (S.D.N.Y. 2020) (finding a Department of the Interior (Interior) memorandum attempting to narrow the scope of the Migratory Bird Treaty Act violated that statute); see also *infra* IV.A.1 (discussing the number of challenges the Trump Administration has lost in the courts for statutory reasons).

24. See *infra* III.B. (explaining that the Trump Administration appealed few cases and lost many of those appeals).

25. Lisa Friedman & John Schwartz, *Election and Supreme Court Fight Will Decide Trump’s Environmental Legacy*, N.Y. TIMES (Sept. 25, 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”).

26. *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019).

27. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913, 1916 (2020).

28. See *infra* Section III.A.

29. See *infra* Section III.D.

“activist judicial rulings.”<sup>30</sup> Traditionally, presidents can expect to win most of the time and especially in front of judges that were appointed by presidents of the same party.<sup>31</sup> But while the Trump Administration did have a higher win rate in front of partisan-aligned judges, its win rate in front of those judges was much lower than the average norm, suggesting that judicial ideology does not explain the overall loss rate.

To be sure, judicial review does not provide a remedy against all extralegal actions by a president.<sup>32</sup> In addition, it is possible that with more Trump-appointed judges deciding legal challenges to the Administration’s regulatory actions, the President could have begun to win more often if he had won reelection.<sup>33</sup>

This Article’s findings nonetheless demonstrate that procedural and statutory rules limited the Trump 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 constrained President Trump’s ability to make policy through presidential administration.

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

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30. *Contra Activist Judicial Rulings Block the Administration from Enforcing Our Nation’s Immigration Laws*, TRUMP WHITE HOUSE (Oct. 11, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/activist-judicial-rulings-block-administration-enforcing-nations-immigration-laws/> (stating that activist judges limit the Trump Administration’s ability to enforce immigration law).

31. See *infra* Section III.E.

32. See Christopher Walker, *Constraining Bureaucracy Beyond Judicial Review*, 150 DÆDALUS (forthcoming 2021), <https://ssrn.com/abstract=3713541>; Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2276–77 (2018) (discussing the lack of accountability in presidential norms, such as the public expectation that presidential decisionmaking will be fact-based, informed, and responsive to public will); *infra* Section IV.B (identifying ways agencies can avoid judicial reversals).

33. See Carl Tobias, *Filling the Federal District Court Vacancies*, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 421, 421 (2020) (identifying the record number of judicial appointments Trump made during his presidency).



## I. INCREASING PRESIDENTIAL CONTROL AND DOCTRINAL CHECKS

Presidents have moved toward more and more use of executive power over the last three decades. And scholars have long debated whether there are appropriate checks on the use of that power.

The rule of law is one possible check, but that generally presumes that those in charge will want to act according to the law. Of course, there are many definitions for the term “rule of law.”<sup>34</sup> Here, I am using the term in the common-sense way of referring to an executive that complies with constitutional, statutory, and common law limits on executive power. The question remains though: what tools exist to stem the actions of an executive that is not interested in abiding by existing law?

Congress is another possible check, but a current congress is unlikely to forcefully enforce the policies of a prior congress.<sup>35</sup> Turning to judicial review 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 toward more presidential administration, concerns with that move, the Trump Administration’s aggressive use of 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 toward agency action to serve their political agendas.<sup>36</sup> In today’s political environment, presidential policymaking through agencies is considered more significant than congressional action.<sup>37</sup>

In a 2001 article, then-Professor Justice Elena Kagan coined the term “presidential administration” to describe this trend toward increased presidential power over executive agency actions.<sup>38</sup> In Kagan’s view, presidents had begun to view agencies more and more as “theirs” and to use

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

35. Kagan, *supra* note 2, at 2350.

36. Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 270 (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) (noting that presidents turn to agencies to enact “partisan policy agendas stymied by congressional stalemate”).

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

38. Kagan, *supra* note 2, at 2246.

them to supplement working with Congress.<sup>39</sup> She theorized that these changes would likely be long lasting and would change our understanding of presidential power.<sup>40</sup>

As Kagan predicted, presidents have used 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.<sup>41</sup> In addition to unilateral directives, the Obama Administration “exercised budgetary control in order to secure compliance with presidential 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.”<sup>42</sup> In fact, some scholars believe that the Obama Administration exercised more control over regulatory activity than any prior administration.<sup>43</sup>

Since Kagan’s strong endorsement of presidential administration, a robust debate has grown 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.”<sup>44</sup> 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. Thomas W. Merrill 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.”<sup>45</sup>

In addition, scholars worry that presidential administration can impede the public’s ability to engage fruitfully in the agency rulemaking process. In Peter Strauss’s view, the president should operate more as an overseer rather than use agencies to make affirmative policy, which Merrill summarized as

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39. *Id.* at 2247.

40. *Id.* at 2250.

41. See Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 701 (2016) (describing President Obama’s use of memoranda to push agencies to address vehicle emissions and energy efficiency).

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. Kagan, *supra* note 2, at 2384.

45. Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1980 (2015).

“recommending budgetary appropriations, 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.”<sup>46</sup> When a president instead exerts excessive control over agencies, there is less room for interested individuals to affect the outcome of the regulatory rulemaking.<sup>47</sup> 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.<sup>48</sup> Because of this, presidential administration may not have achieved “Kagan’s purported benefits of enhanced democratic accountability and effective administration.”<sup>49</sup> Daniel Farber similarly argues that overt presidential influence over agencies may pose risks to agency integrity and the rule of law.<sup>50</sup> Similarly, as Strauss pointed out, exerting more control over agencies may undermine the “legal constraints on administrative action.”<sup>51</sup>

In the midst of this ongoing debate, presidential administration continues to play a significant role in executive policymaking.

### B. *Presidential Administration and the Trump Presidency*

The Trump Administration, initially so antiregulatory that President Trump asserted staffing agencies was “totally unnecessary,”<sup>52</sup> far outpaced even the Obama Administration in its zeal to use presidential administration

46. *Id.* at 1979; see also Peter L. Strauss, *Overseer, or “The Decider”?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 753–54 (2007) (explaining that actions are rarely taken by the president himself but by appointed officials).

47. Merrill, *supra* note 45, at 1979–80; see also Strauss, *supra* note 46, at 753–54 (describing the limited public input in the Bush and Clinton Administrations).

48. See Hoshijima, *supra* note 42, at 179–80 (noting that the Office of Information and Regulatory Affairs’s oversight of rulemaking has been “criticized as opaque, preclusive of congressional oversight, vulnerable to politicization, insufficiently deferential to agency expertise, and sporadic”).

49. *Id.*

50. Daniel A. Farber, *Presidential Administration Under Trump* 5 (U.C. Berkeley L., Public Law Research Paper, 2017), <https://ssrn.com/abstract=3015591>.

51. Merrill, *supra* note 45, at 1979–80.

52. Randall Lane, *Inside Trump’s Head: An Exclusive Interview with the President, and the Single Theory that Explains Everything*, FORBES (Oct. 10, 2017, 5:30 AM), <https://www.forbes.com/donald-trump/exclusive-interview/#7efe027bdeca> [<https://perma.cc/52TY-FKQK#6fb8042cbdec>].

to make policy.<sup>53</sup> With the issuance of two executive orders, Trump hired tens of thousands of border patrol agents, reprioritized deportation of undocumented individuals, and strengthened immigration enforcement initiatives nationwide.<sup>54</sup> Because these efforts can be characterized as operational or managerial decisions, they have been less susceptible to judicial review.<sup>55</sup>

Trump used his varied presidential powers to achieve his deregulatory goals as well.<sup>56</sup> 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.<sup>57</sup> Trump Administration agencies also significantly reduced the estimate of the social cost of carbon—a monetary estimate for the damages that each additional ton of carbon emissions poses to society.<sup>58</sup> The Administration then used that change to

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53. See Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1768–69 (2019) (discussing the expanding presidential control over the regulatory state through use of presidential orders); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549, 563–588 (2018) (examining the expansion of presidential administration from the Obama Administration to the Trump Administration through case studies concerning immigration policy and climate change). In Strauss's own words:

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.

Strauss, *supra* note 11, at 436.

54. See Mashaw & Berke, *supra* note 53, at 568, 574–75 (outlining Trump's use of executive orders for national immigration developments); see also Michelle Hackman, *How Trump Has Worked to Restrict Immigration*, WALL ST. J. (June 18, 2020, 10:41 AM), <https://www.wsj.com/articles/how-trump-has-worked-to-restrict-immigration-11592491276> (discussing executive actions that restricted immigration policy); *President Trump's Bold Immigration Plan for the 21st Century*, TRUMP WHITE HOUSE (May 21, 2019), <https://trumpwhitehouse.archives.gov/articles/president-trumps-bold-immigration-plan-21st-century/> (setting out the Trump Administration's plan to secure the border and establish a new system for immigration).

55. Mashaw & Berke, *supra* note 53, at 575–76.

56. See *id.* at 584–85 (discussing President Trump's use of appointments, directive authority, and appropriations to achieve his deregulatory goals in domestic climate policy).

57. Exec. Order No. 13,711, 82 Fed. Reg. 9,339, 9,339 (Feb. 3, 2017); see also Manheim & Watts, *supra* note 53, at 1786 (describing the executive order and comparing it to previous orders by President Reagan and President Clinton); *Pub. Citizen, Inc. v. Trump*, 435 F. Supp. 3d 144, 147 (D.D.C. 2019) (dismissing a plaintiff's challenge of Executive Order 13,771 for lack of standing).

58. 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>.

claim that rolling back Obama-era rules that relied on those estimates was not as harmful as prior estimates would have shown.<sup>59</sup>

Spurred by industry requests to roll back specific Obama-era policies,<sup>60</sup> the Trump Administration began its deregulation push by issuing a series of executive orders<sup>61</sup> and demanding that agencies review and revise those policies.<sup>62</sup> 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.<sup>63</sup>

The executive orders were followed by public statements promising to “suspend, revise, or rescind”<sup>64</sup> the rules and claiming that the rules had

59. 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. U.S. BUREAU OF LAND MGMT., REGULATORY IMPACT ANALYSIS, REVISIONS TO 43 CFR 3100 (ONSHORE OIL AND GAS LEASING) AND 43 CFR 3600 (ONSHORE OIL AND GAS OPERATIONS) ADDITIONS OF 43 CFR 3178 (ROYALTY-FREE USE OF LEASE PRODUCTION) AND 43 CFR 3179 (WASTE PREVENTION AND RESOURCE CONSERVATION) 111 (2016) [hereinafter BLM 2016 REGULATORY IMPACT ANALYSIS], [https://www.blm.gov/sites/blm.gov/files/document/s/files/oilandgas\\_WastePreventionRegulatoryImpactAnalysis.pdf](https://www.blm.gov/sites/blm.gov/files/document/s/files/oilandgas_WastePreventionRegulatoryImpactAnalysis.pdf). 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 (projecting \$1,300 as the 3% average social cost per metric ton by 2020), *with* U.S. BUREAU OF LAND MGMT., REGULATORY IMPACT ANALYSIS FOR THE FINAL RULE TO RESCIND OR REVISE CERTAIN REQUIREMENTS OF THE 2016 WASTE PREVENTION RULE 42 tbl.3.2, 52 (2018) [hereinafter BLM 2018 REGULATORY IMPACT ANALYSIS], <https://downloads.regulations.gov/BLM-2018-0001-223607/content.pdf> (projecting the cost as \$176 per metric ton for year 2020 emissions, at a 3% discount rate); *see also* California v. Bernhardt, 472 F. Supp. 3d 573, 613 (N.D. Cal. 2020) (holding that reliance on the “interim” estimate was arbitrary and capricious).

60. WILLIAM H. RODGERS, JR. & ELIZABETH BURLESON, RODGERS ENVIRONMENTAL LAW § 45:2 (2d ed. 2017) (providing a list of action items sent by Murray Energy Corporation for the Trump Administration).

61. *See* Lee Epstein & Eric A. Posner, *The Decline of Supreme Court Deference to the President*, 166 U. PA. L. REV. 829, 851 (2018) (using the prevalence of executive orders to help measure “executive overreach”).

62. Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,095 (Mar. 28, 2017) (directing the EPA and the 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).

63. *See, e.g., EPA Administrator Andrew Wheeler on the Policies Behind Environmental Progress*, AM. ENTER. INST. (Sept. 21, 2020), <https://www.aei.org/events/a-conversation-with-environmental-protection-agency-administrator-andrew-wheeler/> (providing an example of the Trump Administration’s use of executive orders to direct the EPA’s business).

64. Press Release, U.S. Dep’t of the Interior, Statement on Venting and Flaring Rule

already been repealed (which was false at the time).<sup>65</sup> That deregulation effort<sup>66</sup> focused on policies in the areas of environmental protection,<sup>67</sup> with rollbacks of regulations that were meant to cut toxic metal discharges from power plants,<sup>68</sup> to cut methane leaks at oil and gas facilities,<sup>69</sup> and to govern conservation on public lands,<sup>70</sup> among many others. The Trump Administration's deregulation efforts also focused on housing, with rollbacks of policies meant to address racial segregation.<sup>71</sup> And the effort targeted

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Vote (May 10, 2017), <https://www.doi.gov/pressreleases/interior-statement-venting-and-flaring-rule-vote>.

65. EPA Administrator Scott Pruitt, for example, publicly stated:

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

Press Release, EPA, EPA Administrator Scott Pruitt Statement on President Donald J. Trump's State of the Union Address (Jan. 1, 2018), <https://archive.epa.gov/epa/newsreleases/epa-administrator-scott-pruitt-statement-president-donald-j-trumps-state-union-address.html>.

66. See Keith B. Belton & John D. Graham, *Trump's Deregulation Record: Is It Working?*, 71 ADMIN. L. REV. 803, 803–04, 815 (2019) (“Donald Trump . . . has declared that his tenure will be marked by deregulation”); see also *Tracking Deregulation in the Trump Era*, BROOKINGS INST. <https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/> (Jan. 19, 2021) (explaining that the Trump Administration “has major deregulatory ambitions” and tracking deregulatory efforts across eight major categories); Council of Econ. Advisers, Exec. Off. of the President, *How Deregulation Can Increase Economic Growth*, TRUMP WHITE HOUSE (Oct. 2, 2017), <https://trumpwhitehouse.archives.gov/articles/deregulation-can-increase-economic-growth/>.

67. Nadja Popovich et al., *The Trump Administration Is Reversing Nearly 100 Environmental Rules. Here's the Full List*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks.html> (Jan. 20, 2021).

68. 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, 19,005 (Apr. 25, 2017) (to be codified at 40 C.F.R. pt. 423).

69. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49,184 (Sept. 28, 2018) (to be codified at 43 C.F.R. pts. 3160, 3170).

70. See *W. Watersheds Project v. Schneider*, 417 F. Supp. 3d 1319, 1328, 1335 (D. Idaho 2019), *dismissing appeal*, No. 19-36065, 2020 WL 3256842 (9th Cir. Mar. 27, 2020) (discussing the reductions in regulations encouraging conservation on public lands).

71. JASON A. SCHWARTZ, INST. FOR POL'Y INTEGRITY, WEAKENING OUR DEFENSES: HOW THE TRUMP ADMINISTRATION'S DEREGULATORY PUSH HAS EXACERBATED THE

public assistance programs<sup>72</sup> and programs meant to protect students from the harmful effects of fraudulent for-profit schools.<sup>73</sup> As tools to pursue this agenda, the Administration used a series of aggressive regulatory maneuvers, including regulatory delays,<sup>74</sup> repeals,<sup>75</sup> new guidance documents, memoranda,<sup>76</sup> and foot-dragging.<sup>77</sup> Many of the rollbacks cited the Administration's executive orders as the basis.<sup>78</sup>

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

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COVID-19 PANDEMIC 19 (2020), [https://policyintegrity.org/files/publications/Weakening\\_Our\\_Defenses\\_Covid\\_Deregulation\\_Report.pdf](https://policyintegrity.org/files/publications/Weakening_Our_Defenses_Covid_Deregulation_Report.pdf) (collecting examples of ways that the Trump Administration has created obstacles to safe, affordable, and fair housing); *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 the Trump Administration's plan to eliminate a rule requiring state and local governments to gather patterns of integration to assess whether community housing was fair).

72. *See, e.g.*, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,292, 41,295 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248) (denying lawful permanent residency to immigrants who have participated in public assistance programs like Medicaid and Supplemental Nutrition Assistance Program); Schwartz, *supra* note 71, at 23 (listing other restrictions on Medicare, Medicaid, and the Affordable Care Act).

73. Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 84 Fed. Reg. 49,788, 49,788 (Sept. 23, 2019) (to be codified at 34 C.F.R. pts. 668, 682, 685).

74. *See, e.g.*, *Bauer v. DeVos*, 325 F. Supp. 3d 74, 78, 88–89 (D.D.C. 2018) (vacating three successive delays of the Borrower Defense Rule); *Becerra v. U.S. Dep't of the Interior*, 276 F. Supp. 3d 953, 966–67 (N.D. Cal. 2017) (vacating delay of rule meant to provide clarity for royalty payments for mining on public lands).

75. *See, e.g.*, *California ex rel. Becerra v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1169 (N.D. Cal. 2019) (detailing challenges to Interior's repeal of regulations governing natural resources extracted from federal lands).

76. Memorandum from Susan Parker Bodine, Assistant Administrator, Off. of Enf't & Compliance Assurance, EPA, to Bill Wehrum, Assistant Administrator, Off. of Air & Radiation, EPA (July 6, 2018), <https://www.epa.gov/sites/production/files/2018-07/documents/glidernoactionassurance070618.pdf>.

77. *See California v. EPA*, 385 F. Supp. 3d 903, 908, 916 (N.D. Cal. 2019) (ordering the agency to stop delaying implementation of a rule designed to limit methane emissions at landfills).

78. *See, e.g.*, *California v. Bernhardt*, 472 F. Supp. 3d 573, 586–87 (N.D. Cal. 2020) (discussing the agency's reliance on Executive Order 13,783 to justify Waste Prevention Rule repeal); *Becerra*, 381 F. Supp. 3d at 1169 (discussing the agency's reliance on Executive Order 13,783 to justify repeal of the Valuation Rule).

the White House.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup>

### 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 highlighted the importance of presidents respecting the limits of congressional delegation,<sup>82</sup> 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 presidents would “tend to push the envelope when interpreting statutes.”<sup>83</sup> 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 the prior enacting . . . Congress” in this way.<sup>84</sup>

In general, in its actions to aggrandize presidential power, the Trump Administration did not win accolades on the rule of law front.<sup>85</sup> The Trump

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79. See Mashaw & Berke, *supra* note 53, at 604 (describing “Trump’s installation of administration loyalists at various agencies to monitor political appointees’ compliance with administration priorities”).

80. *Id.*

81. *Id.* at 605.

82. See Kagan, *supra* note 2, at 2319–20 (“I acknowledge that Congress generally may grant discretion to agency officials alone and that when Congress has done so, the President must respect the limits of this delegation.”).

83. *Id.* at 2349.

84. *Id.* at 2350–51.

85. See RICHARD W. PAINTER & PETER GOLENBOCK, *AMERICAN NERO: THE HISTORY OF THE DESTRUCTION OF THE RULE OF LAW, AND WHY TRUMP IS THE WORST OFFENDER 6* (2020) (questioning if “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 Kruzal, *Democrats Fear Rule of Law Crumbling Under Trump*, HILL (Feb. 16, 2020, 10:30 AM), <https://thehill.com/regulation/court-battles/483206-democrats-fear-rule-of-law-crumbling-under-trump> (describing how President Trump has been attacking the rule of law); 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> (illustrating how the actions of Attorney General Barr reflect Trump’s undermining of the rule of law);



Administration drew sharp criticism for undermining trust in the “institutions that implement the law” and, in this way, “destabiliz[ing] the law itself.”<sup>86</sup>

President Trump was criticized for seeking to “deconstruct” the administrative state through nonlegislative actions such as hiring freezes, encouraging resignations, censorship, and efforts to “deliberately . . . undermine” the goals at the root of statutory legislation.<sup>87</sup> Moreover, in court, the Trump Administration was seen as bypassing longstanding legal norms.<sup>88</sup> Scholars have concluded that the Trump Administration did not follow basic principles governing agency rulemaking,<sup>89</sup> and that we cannot expect agencies to consider the threat of judicial review when promulgating rules in the Trump era.<sup>90</sup> The “regulatory slop,” as two scholars named this phenomenon, 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.”<sup>91</sup> 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.<sup>92</sup> All of these possibilities may “suggest a lack of respect for the legitimacy of our institutional structure.”<sup>93</sup>

Combined with President Trump’s unilateral directives, such as using the president’s secret emergency powers,<sup>94</sup> and the increase of presidential

Paul Rosenzweig, *Trump’s Defiance of the Rule of Law*, ATLANTIC (June 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/trumps-unique-assault-rule-law/590875/> (reporting on how President Trump has gone farther than prior presidents to avoid oversight and scrutiny into his actions).

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

87. David M. Driesen, *President Trump’s Executive Orders and the Rule of Law*, 87 UMKC L. REV. 489, 514–17 (2019).

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

89. See 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 [A]dministration has not obeyed these basic rules.”).

90. See Glicksman & Hammond, *supra* note 88, at 1653 (noting how up “[u]ntil now,” agencies would follow the procedural requirements of the law due to “judges demand[ing] compliance with the basic, black-letter procedural requirements of administrative law”).

91. *Id.* at 1653–55.

92. *Id.* at 1654–55.

93. *Id.* at 1655.

94. See generally 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> (chronicling the development of presidential emergency powers).

interventions in areas like prosecution decisions and government science,<sup>95</sup> these measures demonstrate how much closer we are now to a presidential administration that has gone too far.

Courts are “inescapably limited players.”<sup>96</sup> This fact was highlighted all the way back when Alexander Hamilton called the judiciary “beyond comparison, the weakest” of all three branches of government.<sup>97</sup> 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.”<sup>98</sup> 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.”<sup>99</sup>

The Administrative Procedure Act (APA), passed and signed in 1946 by President Truman, provides for that judicial review.<sup>100</sup> The purpose of the statute was to make agency decisionmaking fairer and more uniform, while at the same time preserving the ability of agencies to do their jobs efficiently and economically.<sup>101</sup>

The APA contains a set of requirements that govern agency decisionmaking, regardless of political party.<sup>102</sup> Those requirements leave room for agencies to make reasoned judgments about the impacts of their policies<sup>103</sup> and to resolve

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95. Mashaw & Berke, *supra* note 53, at 606; *see also* Farber, *supra* note 50, at 13–14, 28–29 (noting the Trump Administration’s disregard of scientific expertise surrounding climate change).

96. Renan, *supra* note 32, at 2193.

97. THE FEDERALIST NO. 78, at 576 (Alexander Hamilton) (John C. Hamilton, ed. 1864).

98. Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT’L L. 361, 377 (2018).

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.

*Id.*

99. Glicksman & Hammond, *supra* note 88, at 1653, 1655.

100. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 561–570a, 701–706.

101. U.S. DEP’T OF JUST., ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT app. B at 124 (1947).

102. *See generally id.* at 126–39 (summarizing the content of the Administrative Procedure Act).

103. *See, e.g.,* Nat’l Ass’n of Regul. Util. Comm’rs v. Fed. Energy Regul. Comm’n, 964 F.3d 1177, 1190 (D.C. Cir. 2020) (noting that agency action is not arbitrary and capricious if it is based in a “reasonable . . . prediction about the future impact of its own policies” (quoting *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 370 (D.C. Cir. 1998))).

technical and fact-specific questions.<sup>104</sup> Under the APA, agencies also must comply with several uniform procedures when resolving those questions.<sup>105</sup> In this way, the requirements help curb quick and frequent agency vacillation<sup>106</sup> because shepherding a rule through full notice-and-comment rulemaking in order to satisfy these requirements can take several years.<sup>107</sup>

This “ossification” carries with it some benefits. Studies 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.<sup>108</sup> For example, in an annual survey of utility executives, executives listed regulatory uncertainty as the single greatest challenge to preparing for an inevitable market shift toward renewable energy.<sup>109</sup> Moreover, from the perspective of political scientists, 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.<sup>110</sup> 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

104. See, e.g., *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1370 (D.C. Cir. 1985) (explaining that an absence of rational support warrants reversal of agency decisions).

105. U.S. DEP’T OF JUST., *supra* note 101.

106. See Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 116–17 (2018) (explaining how the rules governing regulatory change make such change more difficult and thus promote regulatory certainty, innovation, and investment).

107. See Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 55–56 (2019) (summarizing research on rulemaking timing and noting that rulemaking at the FDA takes, on average, forty-two months).

108. 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).

109. David Roberts, *The Power Sector Craves Stability. Trump Has Brought It Chaos*, VOX (Mar. 9, 2018, 2:10 PM), <https://www.vox.com/energy-and-environment/2018/3/9/17099240/power-sector-trump-regulatory-certainty>.

110. See ADAM PRZEWORSKI, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* 19, 26, 51 (1991) (explaining that a stable democracy is one where “conflicts are processed through democratic institutions”); Noam Lupu & Rachel Beatty Riedl, *Political Parties and Uncertainty in Developing Democracies*, 46 COMP. POL. STUD. 1339, 1347 (2012) (explaining that uncertainty about the rules of the game can negatively affect democratic processes).

an opportunity to comment on it.<sup>111</sup> 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.<sup>112</sup> In the final rule, the agency must then respond to any significant comments,<sup>113</sup> 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.”<sup>114</sup>

## 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.<sup>115</sup> This requirement keeps agency “officials from cowering behind bureaucratic mumbo-jumbo”<sup>116</sup> and finds its roots in the oft-cited case, *Motor Vehicles Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*<sup>117</sup>

In *State Farm*, the Court held that the National Highway Traffic and Safety Administration (NHTSA) failed to provide an adequate explanation for rescinding an airbag requirement.<sup>118</sup> The agency previously found that

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111. Administrative Procedure Act, 5 U.S.C. § 553; *see also* DEP’T OF JUST., *supra* note 101, at 130 (explaining requirements to provide the public with notice of proposed rules and allow the public to comment on such proposals); ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77–8, at 103 (1941) (providing that notice and comment is “essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests”).

112. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020); *see also* *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015).

113. *Cigar Ass’n of Am. v. FDA*, 964 F.3d 56, 64 (D.C. Cir. 2020).

114. *Nat’l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013); *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 Regul. Comm’n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (“[A]n agency must respond to comments ‘that can be thought to challenge a fundamental premise’ underlying the proposed agency decision.” (quoting *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000))); *Del. Dep’t of Nat. Res. & Env’t Control v. EPA*, 785 F.3d 1, 15 (D.C. Cir. 2015) (explaining 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” (quoting *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 335 (D.C. Cir. 1968))).

115. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

116. *Competitive Enter. Inst. v. Nat’l Highway Traffic Safety Admin.*, 956 F.2d 321, 327 (D.C. Cir. 1992).

117. 463 U.S. 29 (1983).

118. *Id.* at 40.

“airbags are an effective and cost-beneficial life-saving technology.”<sup>119</sup> Given that record, rescinding the requirement without explanation was arbitrary and capricious.<sup>120</sup> The Court explained that under the APA, an agency is required to “examine the relevant data and articulate a satisfactory explanation for its action.”<sup>121</sup> As such, it is arbitrary and capricious for an agency to ignore “an important aspect of the problem,” or to offer “an explanation for its decision that runs counter to the evidence before the agency.”<sup>122</sup>

When agencies are changing course, under this “reasoned explanation” requirement, they 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.<sup>123</sup> Agencies are “free within the limits of reasoned interpretation to change course,” but they must “adequately justif[y] the change.”<sup>124</sup> This “reasoned explanation” requirement is procedural, and a regulation that fails to comply with this requirement is unlawful and “receives no *Chevron* deference.”<sup>125</sup>

The Supreme Court decisively reaffirmed these principles in decisions on 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.”<sup>126</sup> Additionally, in *Department of Homeland Security v. Regents of the University of California*,<sup>127</sup> addressing the Trump Administration’s rescission 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 to address reliance interests in the program.

### 3. *Statutory Constraints and Deference Doctrines*

Agencies are also bound by their governing statutes. Agencies need

119. *Id.* at 51.

120. *See id.* at 46, 51–52 (“We hold only that given the judgment made in 1977 that airbags are an effective and cost-beneficial life-saving technology, the mandatory passive restraint rule may not be abandoned without any consideration whatsoever of an airbags-only requirement.”).

121. *Id.* at 43.

122. *Id.*

123. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

124. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005).

125. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

126. *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019).

127. 140 S. Ct. 1891, 1913 (2020).

specific statutory authority to take any particular action<sup>128</sup> and must act “within defined statutory limits.”<sup>129</sup> Similarly, an agency’s regulations operate as a constraint; agencies must comply with the plain and unambiguous meaning of their regulations.<sup>130</sup>

Regulatory action often 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 U.S.A., Inc. v. National Resources Defense Council, Inc.*<sup>131</sup> These standards of review afford agencies significant “wobble room,”<sup>132</sup> but there are limits.

Under *Chevron*, the question is whether Congress delegated to the agency the responsibility for filling gaps in the regulatory structure envisioned and whether the agency invoked its delegated lawmaking authority.<sup>133</sup> 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.”<sup>134</sup> An unambiguous statute limits the agency’s wobble 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.<sup>135</sup>

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128. See *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017).

129. *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007).

130. See *Nat. Res. Def. Council, Inc. v. Perry*, 940 F.3d 1072, 1079 (9th Cir. 2019).

131. 467 U.S. 837, 843–44 (1984); see, e.g., Barnett & Walker, *supra* note 12, at 5–6 (looking at *Chevron*, *Mead*, *Skidmore*, and *de novo* review); Eskridge & Baer, *supra* note 13, at 1098–1100 (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, 329 (1936), the president (and—by extension—the agencies he controls), receives the greatest level of discretion when he operates in the realm of foreign affairs.

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

133. *Chevron*, 467 U.S. at 843–44; 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) (describing the *Chevron* standard).

134. *Chevron*, 467 U.S. at 842–43.

135. *Nat’l 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

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.”<sup>136</sup> This standard of review applies to an agency’s interpretation of its statutory authority as well.<sup>137</sup> And if an agency has chosen a permissible construction, it has significant leeway to advance executive goals.<sup>138</sup>

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.”<sup>139</sup> Instead of looking at whether Congress delegated authority to the agency to interpret a particular statute and the provision in question,<sup>140</sup> the court asks whether the question at issue is *too big* to defer altogether.<sup>141</sup> In limiting

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”).

136. *Chevron*, 467 U.S. at 843.

137. *City of Arlington v. FCC*, 569 U.S. 290, 301 (2013).

138. Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive’s Power to Make and Interpret Law*, 44 LOY. 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”).

139. *Id.* at 180–81.

140. *See* *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (holding that an agency action qualifies for *Chevron* deference when it appears that Congress delegated the authority to the agency in general); *see also* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (stating the means of statutory interpretation that a court should use in reviewing whether Congress addressed the question at issue).

141. *See* *King v. Burwell*, 135 S. Ct. 2480, 2483 (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 Telecomms. Corp. v. Am. Tel. & Tel. 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

*Chevron's* applicability, scholars argue that “the Court has come full circle by expanding executive power and then dramatically contracting it.”<sup>142</sup>

Another standard applies when agencies are interpreting one of their own regulations. Under *Auer v. Robbins*<sup>143</sup> and *Bowles v. Seminole Rock & Sand Co.*,<sup>144</sup> now reinvigorated in *Kisor v. Wilkie*,<sup>145</sup> when a regulation is “genuinely ambiguous,”<sup>146</sup> the question is whether a court should defer to an agency’s interpretation of its own regulations.<sup>147</sup> The Court explained that there is a “presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities.”<sup>148</sup> An agency’s power to interpret its own regulations is part of the “agency’s delegated lawmaking powers.”<sup>149</sup> But if an interpretation “does not reflect an agency’s authoritative, expertise-based, ‘fair, or considered judgment,’” then that presumption will not be warranted.<sup>150</sup> 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.”<sup>151</sup>

And yet another set of rules applies when an agency has acted outside of rulemaking, through a guidance document or similar action. In those instances, the court applies the standard from *Skidmore v. Swift & Co.*<sup>152</sup> Under *Skidmore*, when an agency’s decision lacks formality—for example, if it appears in a guidance document that was not subject to notice-and-comment rulemaking—the interpretation is not controlling. However, 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.”<sup>153</sup>

Of course, while agencies enjoy different levels of discretion when interpreting their statutes, the reasoned explanation requirement applies

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Doctrine.” See, e.g., Josh Blackman, Comment, *Gridlock*, 130 HARV. L. REV. 241, 261 (2016) (summarizing cases that have used this *Chevron* carveout exception).

142. Jellum, *supra* note 138, at 142.

143. 519 U.S. 452 (1997).

144. 325 U.S. 410 (1945)

145. 139 S. Ct. 2400 (2019).

146. *Id.* at 2414–15.

147. See *Auer*, 519 U.S. at 461 (holding that the agency’s interpretation of its own regulation is controlling); *Seminole Rock*, 325 U.S. at 413–14 (stating that the administrative interpretation of a regulation is controlling “unless it is plainly erroneous or inconsistent with the regulation”).

148. *Kisor*, 139 S. Ct. at 2412.

149. *Id.*

150. *Id.* at 2414–18 (quoting *Auer*, 519 U.S. at 462).

151. *Id.* at 2416.

152. 323 U.S. 134, 139–140 (1944).

153. *Id.* at 140.



regardless, and when an agency fails to comply with this requirement, its regulation is unlawful and receives “no *Chevron* deference.”<sup>154</sup>

## II. STUDY DESIGN

With doctrinal background in mind, this Part provides an overview of prior empirical studies that looked at agency validation rates in court—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 the Trump Administration’s validation rate in court.

### A. Prior Studies of Agency Validation

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

All these studies 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 appellate courts, Jason Czarnezki found that when courts reviewed agency action under *Chevron*, “they likely affirmed agency action (69.55%).”<sup>158</sup>

Eskridge and Baer studied all Supreme Court decisions reviewing an agency’s interpretation of a statute issued between 1983 and 2005.<sup>159</sup> Across all of the standards of review that Eskridge and Baer identified, they found that agencies prevailed 68.3% of the time.<sup>160</sup> In another study, looking at the

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

155. *See, e.g.*, Barnett & Walker, *supra* note 13, at 1444–45 (finding that from 2003 through 2013, agencies prevailed under the *Chevron* framework 77.4% of the time).

156. *See, e.g.*, Barnett & Walker, *Chevron in the Circuit Courts*, *supra* note 12, at 5 (focusing on agency cases in the court of appeals); 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, 1733 (2010) (analyzing cases decided by the Supreme Court); Eskridge & Baer, *supra* note 13, at 1099 tbl.1 (focusing on Supreme Court decisions).

157. *See, e.g.*, Czarnezki, *supra* note 13, at 769 (emphasizing agency cases interpreting environmental statutes in the courts of appeals).

158. *Id.* at 795–96.

159. Eskridge & Baer, *supra* note 13, at 1094 (reviewing 1,014 decisions in all).

160. *Id.* at 1100.

same dataset,<sup>161</sup> 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.<sup>162</sup> When no deference or “anti-deference” applied, the Court voted to uphold agency actions 60.76% of the time.<sup>163</sup> When “consultative deference” under *Skidmore* applied, the Court voted to uphold agency actions 78.21% of the time.<sup>164</sup> In Eskridge and Baer’s study, when *Chevron* deference applied, the Court voted to uphold agency actions 76.2% of the time.<sup>165</sup>

In a 2011 study by Pierce and Weiss, the authors looked at which district courts *and* circuit courts applied *Auer/Seminole Rock* deference in cases 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).<sup>166</sup> The authors found that courts “upheld agency interpretations in 76.26% of the cases” they studied.<sup>167</sup>

Two other authors compiled data across multiple studies and came to similar conclusions. In 2010, Zaring compiled eleven previous studies and gathered his own data set to conduct an additional study.<sup>168</sup> Combining results from all these studies showed that agencies had prevailed in approximately 70% of the cases.<sup>169</sup> In 2011, 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 toward “more or less deference over time.”<sup>170</sup>

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

162. *Id.* at 1767 tbl.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 13, at 1099 tbl.1. 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. Raso & Eskridge, *supra* note 156, at 1767 tbl.6.

165. Eskridge & Baer, *supra* note 13, at 1099 tbl.1.

166. Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 519 (2011).

167. *Id.*

168. Zaring, *supra* note 12.

169. *Id.* at 170.

170. Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 78, 84 (2011).

These findings held up when the datasets began to include Obama-era cases. Barnett and Walker studied a time period that included President Obama’s first term.<sup>171</sup> In that study, Barnett and Walker found that agencies prevail under the *Chevron* framework 77.4% of the time.<sup>172</sup> In addition, the authors found that agencies succeeded in 71.4% of the statutory interpretation cases “under any scope of review.”<sup>173</sup>

### 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.

#### 1. *Building the Dataset*

The study includes decisions or agency withdrawals in challenges to Trump-era agency actions, whether brought in a court of appeals or in a district court,<sup>174</sup> across all executive agencies.<sup>175</sup> Independent agencies, such as the Federal Energy Regulatory Commission, are excluded (those decisions are including in Policy Integrity’s online tracker).

The study looks at agency actions, including new regulations or decisions that either change a regulation or are deregulatory. The term “deregulation” can have a variety of meanings, such as reducing the volume of federal regulations in a purely numerical sense (such as with the Trump Administration’s two-for-one order),<sup>176</sup> scaling back regulatory requirements, or providing easier access to permits and relaxing enforcement.<sup>177</sup> This Article uses the term “deregulation” in the second sense—to include any

171. Kent Barnett et al., *Administrative Law’s Political Dynamics*, 71 VAND. L. REV. 1463, 1467 (2018).

172. Barnett & Walker, *supra* note 12, at 6.

173. *Id.* at 28. These numbers do not necessarily prove that the standard of review mattered. Rather, the applied standard of review could reflect how the judge felt 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.

174. For a further description of the methodology, see *infra* Coding the Issues.

175. See Barnett & Walker, *supra* note 12, at 56 n.248 (categorizing independent agencies).

176. Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (Feb. 3, 2017).

177. See Belton & Graham, *supra* note 66, at 812; Cayli Baker et al., *Explaining the Brookings Deregulatory Tracker*, BROOKINGS INST. (Oct. 18, 2018), <https://www.brookings.edu/blog/up-front/2018/10/18/explaining-the-brookings-deregulatory-tracker/>.

action that reduces regulatory restrictions or requirements.

Starting in early 2017, I continually monitored the trade presses and press releases<sup>178</sup> to find cases to track. I then tracked the cases using Bloomberg Law and included them in the dataset when a court either decided the case or the agency withdrew the challenged action.

I used several methods to make sure I had a substantially representative set of cases. The data has been listed in Policy Integrity's public tracker since early 2018, and I included a note on the tracker to send me any updates. Many members of the public, including journalists and litigants, suggested updates. I also repeatedly checked the dataset against other public lists, including the State Litigation and AG Activity Database,<sup>179</sup> the list of environmental rule rollbacks tracked by the New York Times,<sup>180</sup> Brookings Institution's tracker focused on deregulation,<sup>181</sup> as well as internal lists at advocacy organizations. In addition, I ran multiple searches in Westlaw to capture missing cases. The method and search terms are included *infra* in Appendix Part C.

While Policy Integrity's tracker continues to be updated, I cut off the dataset in this paper on January 20, 2021.

## 2. Exclusions

Because the study is specifically interested in *agency* regulation and deregulation, the study does not include litigation over self-executing executive orders. Although these were significant routes that President Trump used to pursue the part of his agenda pertaining to deregulation,<sup>182</sup> the study does not include deregulation through the Congressional Review Act<sup>183</sup> or individual decisions to forgo enforcement in ways that are unreviewable.<sup>184</sup>

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178. I monitored press releases from places like the Attorney General's Offices for the States of California and New York, and Democracy Forward (<https://democracyforward.org/>), among others.

179. *Multistate Litigation Database*, STATE LITIG. & AG ACTIVITY DATABASE, <https://attorneysgeneral.org/multistate-lawsuits-vs-the-federal-government/list-of-lawsuits-1980-present/> (Feb. 27, 2021).

180. Nadja Popovich et al., *supra* note 67.

181. *Tracking Deregulation in the Trump Era*, *supra* note 66.

182. See Davis Noll & Revesz, *supra* note 107, at 14–19 (discussing the Trump Administration's use of the Congressional Review Act).

183. *Congressional Review Act Resolutions in the 115th Congress*, COAL. FOR SENSIBLE SAFEGUARDS, <https://sensiblesafeguards.org/cra> [<https://perma.cc/T6JQ-B69S>] (last visited May 18, 2021) (providing a full list of rules that were disapproved during the Trump Administration).

184. For more on nonenforcement, see generally Cary Coglianese et al., *Unrules*, 73

Consistent with the literature on agency validation rates,<sup>185</sup> lawsuits that were dismissed for reasons other than a finding that the agency had complied with the law are not included in the dataset.<sup>186</sup>

In addition, as the study is interested in the Trump Administration's success rate at making policy through agencies, the study does not include run-of-the-mill lawsuits, such as individual immigration decisions,<sup>187</sup> minor project-level decisions,<sup>188</sup> and contract disputes (such as a dispute over a court reporter contract).<sup>189</sup>

### 3. Coding

Similar to the Eskridge and Baer study,<sup>190</sup> and the Barnett and Walker study,<sup>191</sup> every case is coded for a variety of different variables for purposes of providing the observational analyses in this Article. The variables include

STAN. L. REV. (forthcoming 2021) (discussing methods that agencies provide to limit regulatory obligations); Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455 (2020) (focusing on agencies' underreach or failure to undertake action where their statutory authority to act is clear).

185. See, e.g., Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 766 (2008) [hereinafter Miles & Sunstein, *Arbitrariness Review*] (surveying cases reviewing EPA and NLRB decisions for arbitrariness or lack of substantial evidence); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1032–33 (including “(1) remands for errors of substantive law; (2) remands for errors of procedural law; (3) remands for lack of adequate factual support; (4) remands for lack of adequate explanation; and (5) remands for which no basis is given for the court's action (e.g., table decisions)”).

186. See, e.g., *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 618 (D.C. Cir. 2020) (finding decision unreviewable because it was committed to the agency's sole discretion); *Cal. Cmty. Against Toxics v. EPA*, 934 F.3d 627, 640 (D.C. Cir. 2019) (finding decision unreviewable because it was not a final agency action); *Organic Trade Ass'n v. U.S. Dep't of Agric.*, 370 F. Supp. 3d 98, 101 (D.D.C. 2019) (holding that challenge to rule was moot because the rule had been replaced); *Sierra Club v. EPA*, 926 F.3d 844, 846 (D.C. Cir. 2019) (finding that plaintiffs had filed in the wrong venue).

187. See, e.g., *AB Disc. Depot LLC v. U.S. Citizenship & Immigr. Servs.*, No. 19-CV-02818, 2020 WL 4381776, at \*1 (E.D.N.Y. July 31, 2020) (denying Administrative Procedure Act review for a U.S. Citizenship and Immigration Services decision rejecting plaintiff's Form 140 Petition for Alien Worker).

188. See, e.g., *Native Vill. of Nuiqsut v. Bureau of Land Mgmt.*, 432 F. Supp. 3d 1003, 1015 (D. Alaska 2020) (reviewing the Bureau of Land Management's environmental analysis of ConocoPhillips's 2018–2019 winter exploration plan).

189. *Ace-Fed. Reps., Inc. v. United States*, 150 Fed. Cl. 94, 98 (2020).

190. Eskridge & Baer *supra* note 13, at 1094.

191. See Barnett & Walker, *supra* note 12, at 24.

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 case, whether the decision was a split decision, standard of review applied in statutory cases, legal issues that formed the basis for the court's decision, and the political party of the president who appointed the deciding judge or panel majority. Details about some of these variables are provided *infra*, Appendix Part A.

The dataset also includes information about all the appeals related to the cases in the set, as of mid-March 2021, in order to track the impact of appeals. Results 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 case that is currently available.<sup>192</sup>

### C. Makeup of the Dataset

The cases in the dataset were decided between the beginning of the Trump administration and January 2021 and number 278 total.

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.

The cases have spanned several nonexclusive topic areas, with most cases in the environmental, energy, and natural resources area:

- ❖ The largest category of cases, “Environment, Energy, and Natural Resources,” (at 139 total) includes rules rolling back numerous emissions rules,<sup>193</sup> rules delaying limits on harmful pesticide use,<sup>194</sup> and repeals of rules meant to clarify royalties for mining on public lands,<sup>195</sup> among many other actions.
- ❖ The second largest category of cases (which overlaps with the other categories) is “Deregulation” (at 79 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 48 total), includes rules designed to restrict Medicaid,<sup>196</sup> decisions to terminate teen

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192. See also *infra* section III.B (discussing appeals).

193. *California v. Bernhardt*, 472 F. Supp. 3d 573, 632 (N.D. Cal. 2020) (vacating the repeal of the Waste Prevention Rule); *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1061 (N.D. Cal. 2018) (vacating the stay of the formaldehyde emissions rules).

194. *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062, 1063 (N.D. Cal. 2018).

195. *California ex rel. Becerra v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153 (N.D. Cal. 2019).

196. *Stewart v. Azar*, 313 F. Supp. 3d 237, 242 (D.D.C. 2018).

pregnancy programs early,<sup>197</sup> rules governing drug advertisements,<sup>198</sup> rules changing contraception coverage requirements under the Affordable Care Act,<sup>199</sup> and other similar health-related rules.

- ❖ The “Immigration” category (also 48 total) includes rules restricting work visas,<sup>200</sup> limiting asylum for certain categories of immigrants,<sup>201</sup> and requiring asylum seekers to remain in Mexico during the duration of their immigration proceedings,<sup>202</sup> among other rules.
- ❖ In the “Consumer Protection & Education” category (at 21 total), agencies had delayed rules that were supposed to aid student borrowers who had fallen into debt at fraudulent for-profit schools,<sup>203</sup> or were intended to make air travel safer and easier for passengers with disabilities,<sup>204</sup> among other rules.
- ❖ The “Housing & Public Assistance” category (at 18 total) includes cases involving rules seeking to decrease access to low-income housing,<sup>205</sup> changes to Medicaid eligibility,<sup>206</sup> and changes to the Supplemental Nutrition Assistance Program,<sup>207</sup> among other rules.
- ❖ The “Worker Protection and Discrimination” category (at 16 total)

197. *Healthy Teen Network v. Azar*, 322 F. Supp. 3d 647, 661 (D. Md. 2018).

198. *Merck & Co. v. U.S. Dep’t of Health & Hum. Servs.*, 962 F.3d 531, 533 (D.C. Cir. 2020).

199. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2372–73 (2020).

200. *Nat’l Venture Cap. Ass’n v. Duke*, 291 F. Supp. 3d 5, 8 (D.D.C. 2017).

201. *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 760–61, 781 (9th Cir. 2018) (enjoining rule that barred asylum for immigrants who entered the country outside of a designated port of entry); *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 929–30 (N.D. Cal.) (enjoining rule that denied asylum to those who had not applied first in another country), *stay granted*, 140 S. Ct. 3 (2019), *aff’d*, 964 F.3d 832 (9th Cir. 2020).

202. *Innovation L. Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1114 (N.D. Cal. 2019), *stay granted*, *Wolf v. Innovation L. Lab*, 140 S. Ct. 1564 (2020).

203. *Bauer v. DeVos*, 325 F. Supp. 3d 74, 78–79 (D.D.C. 2018).

204. *See Paralyzed Veterans of Am. v. U.S. Dep’t of Transp.*, 909 F.3d 438, 440–41 (D.C. Cir. 2018) (considering a delay on a rule requiring airlines to report the number of mishandled wheelchairs and scooters).

205. *See Open Cmty. All. v. Carson*, 286 F. Supp. 3d 148, 152 (D.D.C. 2017) (considering a delay in the implementation of a final rule that required certain metropolitan areas to calculate the value of housing vouchers “based on local, rather than metropolitan-wide, prevailing market rents”).

206. *See Gresham v. Azar*, 950 F.3d 93, 95–96 (D.C. Cir. 2020) (considering a decision by the Department of Health and Human Services (HHS) to approve a new work requirement to receive Medicaid in Arkansas).

207. *See District of Columbia v. U.S. Dep’t of Agric.*, 444 F. Supp. 3d 1, 6 (D.D.C. 2020) (considering a rule that would cause nearly 700,000 people to lose Supplemental Nutrition Assistance Program benefits).

includes a case striking a rule that had loosened mine safety rules,<sup>208</sup> and a case involving a rule that governed the collection of wage discrimination data at the Equal Employment Opportunity Commission (EEOC),<sup>209</sup> among other cases.

- ❖ The “Public Safety” category is a small category (at 8 cases), which includes cases about 3D-printed gun rules,<sup>210</sup> and multiple cases concerning a new regulation of bump-stock devices,<sup>211</sup> among other cases.

At times, agency actions fell into more than one topic area. For example, the case involving funding for the border wall<sup>212</sup> falls into the immigration category because the wall was being built to “secure the southern border,” but it also falls into the environmental category because plaintiffs’ challenge was based on their allegations of environmental harm.<sup>213</sup>

All “deregulation” cases fall into at least one other substantive area.

### III. THE TRUMP ADMINISTRATION’S RECORD

An analysis of the cases in the dataset 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 and 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 agency decisionmaking under prior administrations have consistently found a validation rate of “around 70%.”<sup>214</sup> The Trump

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208. *See, e.g.*, *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (vacating the 2017 amendment to safety standards).

209. *Nat’l Women’s L. Ctr. v. Off. of Mgmt. & Budget*, 358 F. Supp. 3d 66, 74–76 (D.D.C. 2019).

210. *See, e.g.*, *Washington v. U.S. Dep’t of State*, 420 F. Supp. 3d 1130, 1135–36, 1148 (W.D. Wash. 2019) (vacating the State Department’s decision to modify the U.S. Munitions List to permit the online publication of computer aided design files detailing 3D-printable weapons).

211. *See, e.g.*, *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020).

212. *California v. Trump*, 963 F.3d 926, 931–32 (9th Cir. 2020) (challenging the Department of Defense’s decision to transfer funds appropriated by Congress for other purposes to fund the construction of a wall on the southern border of the United States).

213. *Id.* at 940, 947.

214. *See supra* Section II.A (discussing agency win rate in court when regulations are challenged).



Administration came into office promising aggressive deregulatory work along with other new policies,<sup>215</sup> all of which required agency rulemaking. He was met with significant resistance.<sup>216</sup> Given that agencies typically have success in court, the question is whether that win-loss rate held up for the Trump Administration.

### 1. Outcomes

The data includes 278 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. This count includes cases where multiple parallel courts ruled on the same agency rule (mixed decisions are discussed below). When looking at all those cases, the Trump Administration was successful in 65 cases, for a win rate of 23%. The count does not include lower court decisions when there is an appeals court decision that supersedes the lower court decision.<sup>217</sup>

The data can also be assessed by looking at the success rate for agency rules at issue, grouping decisions from parallel courts together. Policy Integrity's tracker, which continues to be updated, reports the data in that way.<sup>218</sup>

### 2. When Agencies Withdrew the Action

Of the agency losses, the Administration withdrew the action or gave up the position after being sued in 9% of the cases in the dataset. That happened repeatedly across agencies in the beginning of the Administration's term. For example, in May 2017, the Department of Energy abandoned a delay of conservation standards for ceiling fans after being sued.<sup>219</sup> In June 2017, the EPA published a final rule setting limits on mercury discharges after being

215. See, e.g., Belton & Graham, *supra* note 66, at 815 (discussing Trump's December 15, 2017 public remarks on deregulation).

216. See William P. 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").

217. For more on appeals, see discussion *supra* Section III.B.

218. See *Roundup: Trump-Era Agency Policy in the Courts*, *supra* note 14.

219. Energy Conservation Program: Energy Conservation Standards for Ceiling Fans, 82 Fed. Reg. 23,723, 23,723 (May 24, 2017) (to be codified at 10 C.F.R. pt. 430) (putting the final rule into effect); Energy Conservation Program: Energy Conservation Standards for Ceiling Fans, 82 Fed. Reg. 14,427, 14,427 (Mar. 21, 2017) (to be codified at 10 C.F.R. pt. 430) (delaying the final rule); Petition for Review, Nat. Res. Def. Council, Inc. v. Perry, No. 17-916 (2d Cir. Mar. 31, 2017) (filing suit requesting that the court set aside the rules delaying the effective date); Order, Nat. Res. Def. Council, Inc., No. 17-916 (Oct. 20, 2017) (withdrawing appeal).

sued for unlawfully rescinding the rule.<sup>220</sup> In August 2017, the Food and Drug Administration agreed to allow a calorie-counting rule to come into effect after being sued for illegally delaying the rule.<sup>221</sup> 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, the EPA announced that it would be terminating its COVID-19 nonenforcement policy.<sup>222</sup>

Prior studies did not include cases where agencies withdrew an action after being challenged.<sup>223</sup> They pulled data from judicial decision databases and by necessity could not include those types of cases. In addition, there is no public record of exactly why the agency withdrew the policy.<sup>224</sup> Nonetheless, 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. When looking only at adjudicated cases, the win rate is 26%, 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,<sup>225</sup> and when

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220. Mercury; Reporting Requirements for the TSCA Mercury Inventory, 83 Fed. Reg. 30,054, 30,055 (June 27, 2018) (to be codified at 40 C.F.R. pt. 713); Nat. Res. Def. Council, Inc. v. EPA, 961 F.3d 160, 164–65 (2d Cir. 2020).

221. Complaint at 1–3, Ctr. for Sci. in the Pub. Int. v. Price, No. 1:17-cv-01085 (D.D.C. June 7, 2017) (filing suit over delays in a nutrition labeling rule); Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date; Request for Comments, 82 Fed. Reg. 20,825, 20,826–27 (May 4, 2017) (to be codified at 21 C.F.R. pts. 11, 101) (issuing the final rule for nutrition labeling).

222. Complaint at 3, New York v. EPA, No. 20-CV-3714 (S.D.N.Y. May 23, 2020) (filing suit over the promulgation of a nonenforcement policy); Memorandum from Susan Parker Bodine, Assistant Administrator, Off. of Enft & Compliance Assurance, EPA regarding 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/covid19addendumtermination.pdf> (terminating the nonenforcement policy).

223. See, e.g., Barnett & Walker, *supra* note 12, at 25 (analyzing published cases).

224. Ellen M. Gilmer, *EPA Touts Winning Record, but Some Attorneys Dispute Its Numbers*, BLOOMBERG L. (Aug. 26, 2020, 6:00 AM), <https://news.bloombergtax.com/environment-and-energy/epa-touts-winning-record-but-some-attorneys-dispute-its-numbers?context=search&index=0> (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”).

225. See Jennifer Nou, *Agency Lumping and Splitting*, U. CHI. L. REV. ONLINE (Mar. 30,

addressing challenges to those rules, courts sometimes issue split or “mixed” decisions. In 17 of the cases in the dataset (6%), the courts upheld a portion of the challenged rule and struck down another portion. When mixed cases are removed from the dataset, the win rate is still 23%.

For reporting results with those cases *in* the dataset, 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 action passed muster.

### B. Appeals

Some observers have noted that the Trump Administration’s low win rate may turn around on appeal.<sup>226</sup> 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.”<sup>227</sup> But the data does not support that hope.

In March 2021, the last time that the dataset was updated for appeal status, out of the 252 cases that agencies lost in a lower court, agencies appealed only 38% of the losses. The government did not appeal 50% of the losses.<sup>228</sup> And in another 12% of the government’s losses, there was no appeal because the agency withdrew the challenged actions (marked as “not litigated”).

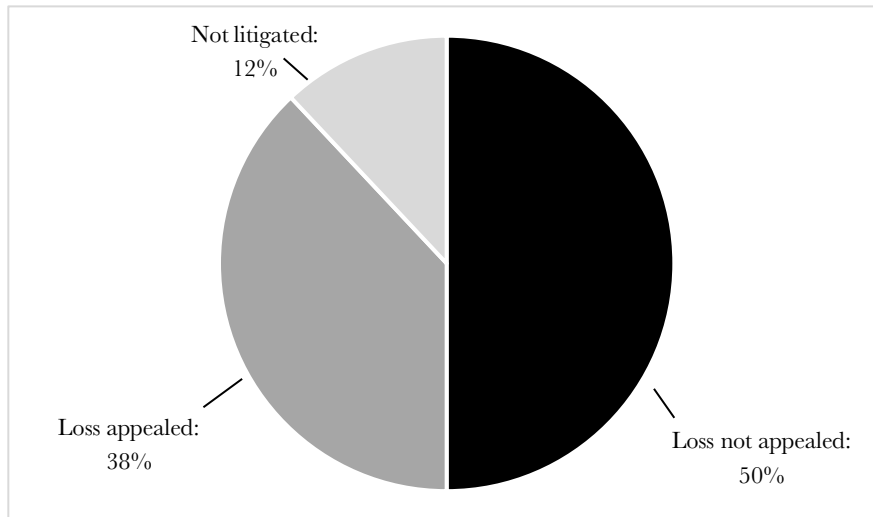
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2020), <https://lawreviewblog.uchicago.edu/2020/03/30/agency-lumping-and-splitting-by-jennifer-nou/> (describing the phenomenon).

226. Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019, 12:05 PM), [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](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) (“Many of the cases are in early stages and subject to reversal.”).

227. *Id.*; see also Damian Paletta et al., *Trump Declares National Emergency on Southern Border in Bid to Build Wall*, WASH. POST (Feb. 15, 2019, 8:28 PM), [https://www.washingtonpost.com/politics/trumps-border-emergency-the-president-plans-a-10-am-announcement-in-the-rose-garden/2019/02/15/f0310e62-3110-11e9-86ab-5d02109aeb01\\_story.html](https://www.washingtonpost.com/politics/trumps-border-emergency-the-president-plans-a-10-am-announcement-in-the-rose-garden/2019/02/15/f0310e62-3110-11e9-86ab-5d02109aeb01_story.html) (quoting Trump as saying: “then we’ll end up in the Supreme Court, and hopefully we will get a fair shake”).

228. That number includes cases where the government filed an appeal but then dropped the appeal. In one case, intervenors appealed, as opposed to the government. See *Am. Acad. of Pediatrics v. FDA*, 379 F. Supp. 3d 461, 497 (D. Md. 2019), *aff’d in part, dismissed in part sub nom. In re Cigar Ass’n of Am.*, 812 F. App’x 128 (4th Cir. 2020) (intervenor appeal).

**FIGURE 1: AFFIRMATIVE APPEALS IN CASES THAT AGENCIES LOST**

Of the appeals that the government took, agencies lost on appeal 38% of the time. That number includes three significant losses in the Supreme Court<sup>229</sup> (which naturally led to a presidential tweet calling for new Justices).<sup>230</sup>

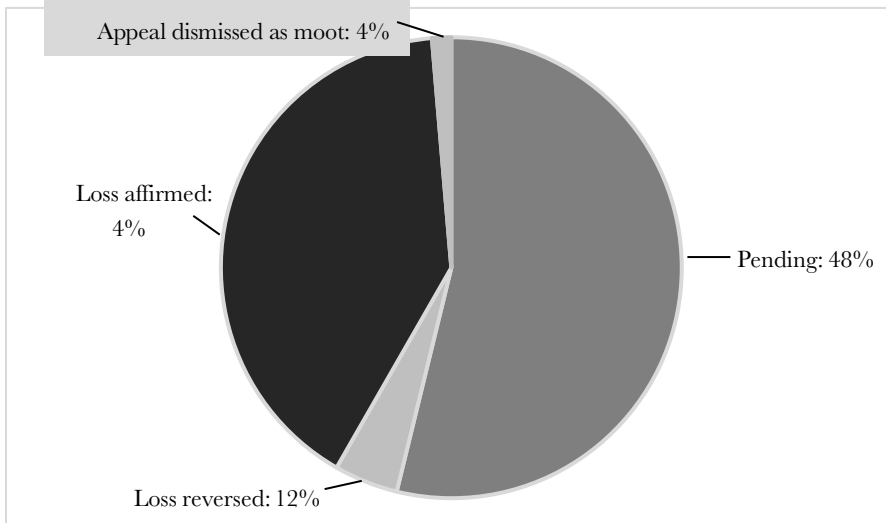
Figure 2 shows the success rate that the Trump Administration had in appeals. Agencies won reversal on appeal in 12% of the cases that they lost in a lower court, one of which was in the Supreme Court.<sup>231</sup> As of March 2021, another 48% of the appeals were pending.

229. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912–13 (2020) (holding that the Administration's rescission of Deferred Action for Childhood Arrivals had not addressed "important aspects of the problem" before the agency including the legitimate reliance interests of the program's participants); *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019) (holding that the agency's rationale for adding a citizenship question to the Census was contrived); *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1478 (2020) (rejecting the Trump Administration's interpretation of the Clean Water Act).

230. Brett Samuels, *Trump Calls for 'New Justices' on Supreme Court After Unfavorable Rulings*, HILL (June 18, 2020, 1:33 PM), <https://thehill.com/homenews/administration/503413-trump-calls-for-new-justices-on-supreme-court-after-unfavorable>.

231. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373 (2020) (reversing orders enjoining a rule that allowed more employers to claim exemptions from contraception requirements under the Affordable Care Act); *California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1105 (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 predicted, once the Trump Administration turned over the Department of Justice (DOJ) to the Biden Administration, the Biden Administration began to make use of all available regulatory rollback strategies to undo Trump-era policies.<sup>232</sup> One of those strategies has been to decline to appeal or to ask for abeyances in all pending litigation.<sup>233</sup> As a result, the appeals of those cases will not change the win rate.

### C. Categories of Cases

In prior studies, the subject matter and agency had a significant impact on the agency's win rate.<sup>234</sup> Barnett and Walker found, for example, that some agencies, like the Federal Communications Commission (FCC), had a very high win rate (82.5%), whereas other agencies, like the EEOC, had a significantly lower win rate (42.9%).<sup>235</sup>

As Figure 3 shows, in the Trump-era dataset, the win rates have all been low regardless of the topic area, ranging between 10% to 28% depending on

232. Davis Noll & Revesz, *supra* note 107, at 47–48.

233. *Id.* at 24; see, e.g., Brad Kutner, *High Court Grants Biden Request to Drop Trump-Era Immigration Cases*, COURTHOUSE NEWS SERV. (Feb. 3, 2021), <https://www.courthousenews.com/high-court-grants-biden-request-to-drop-trump-era-immigration-cases/>.

234. Barnett & Walker, *supra* note 12, at 7; see also Pierce, *supra* note 170, at 87 (explaining that different affirmance rates should be expected for different substantive contexts).

235. Barnett & Walker, *supra* note 12, at 7.

the category. The win rates hover around the 20% mark even when analyzed for the specific agencies. The agencies with the most cases were the EPA, the Department of Homeland Security (DHS), the Department of Health and Human Services (HHS), and the Department of the Interior (Interior). The EPA and the HHS both had win rates below the aggregate rate, at 20% and 19% respectively. The DHS's win rate was 29% and the Interior's was 26%.

**FIGURE 3: WIN RATES BY CATEGORY**

Category	Win Rate
Immigration	10% win rate (5 out of 48)
Deregulation	16% win rate (13 out of 79)
Health	19% win rate (9 out of 48)
Environment, Energy, and Natural Resources	24% win rate (34 out of 139)
Consumer Protection & Education	24% win rate (5 out of 21)
Housing & Public Assistance, Public Safety, Worker Protection, and Discrimination	28% win rate (12 out of 42)

#### D. Time Trends

Another theory floated to explain the Trump Administration's losses in court was that early on, the President relied on less experienced agency heads who incompetently cut corners in an effort to rush out rollbacks; something that could be called the "Scott Pruitt effect."<sup>236</sup> As the Attorney General of Oklahoma, Pruitt had made a name for himself as one of the EPA's

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236. See Richard L. Revesz, *Institutional Pathologies in the Regulatory State: What Scott Pruitt Taught Us About Regulatory Policy*, 34 J. LAND USE & ENVTL. L. 211, 212–16 (2019) (exploring how Scott Pruitt's political ideology, extremism, and isolation from career staff at the EPA partially contributed to the EPA's legal vulnerability); Barbash & Paul, *supra* note 226 (explaining that "some observers attributed the EPA's woes to its former administrator, Scott Pruitt, a skeptic of federal environmental policy who installed inexperienced officials and moved rapidly to roll back Obama-era regulations"); see also 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> (stating that Pruitt has been "less than rigorous in following important procedures, leading to poorly crafted legal efforts that risk being struck down in court"); Bethany A. Davis Noll & Richard L. Revesz, *Pruitt's Deregulation Spree Has Cut Corners*, SLATE (July 31, 2017, 5:27 PM), <https://slate.com/technology/2017/07/pruitts-deregulations-wont-hold-up-in-court.html> (analyzing how Scott Pruitt "cut[] corners and ignor[ed] fundamental legal requirements").

staunchest foes, suing the agency fourteen times during the Obama years.<sup>237</sup> That experience did not set him up to run the agency competently though. When he resigned in the summer of 2018, Pruitt had already racked up a string of court defeats for the EPA<sup>238</sup>—along with spurring multiple ethics investigations.<sup>239</sup> But the win-loss rate did not get progressively better as agencies issued rules. Instead, when looking at the date each rule came out compared to the success rate in court, the data shows that after climbing to 25% in the spring of 2019, the aggregate win rate had dropped down again by the end of the term to 23%. Moreover, if rushed decisionmaking 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 those violations continued throughout the term, suggesting that even now that agencies have had time to prepare rules, agencies were not doing significantly better.

It is true that there are many losses involving rules that were issued in the early days of the Administration. And it is also true that when it comes to delay rules, many of which were rushed out in the early days of the Administration, the win rate is much lower than average: 6%.

But all in all, though the pace of challenged rules slowed down, losses on all fronts continued throughout the Trump Administration.

### *E. 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

237. *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>.

238. See Margaret Talbot, *Scott Pruitt's Dirty Politics*, NEW YORKER (Mar. 26, 2018), <https://www.newyorker.com/magazine/2018/04/02/scott-pruitts-dirty-politics> (discussing various deregulation efforts led by Pruitt and the response in court by states); e.g., *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1061 (N.D. Cal. 2018) (“[F]ind[ing] the Delay Rule is beyond the scope of the EPA’s authority [and] . . . vacat[ing] and set[ting] aside the year-long extension . . . set out by the EPA.”); *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062, 1066–67 (N.D. Cal. 2018) (finding that the EPA’s delay of a pesticide rule’s effective date violated the Administrative Procedure Act); *Clean Air Council v. Pruitt*, 862 F.3d 1, 14 (D.C. Cir. 2017) (vacating an EPA decision to stay a final rule because the EPA’s decision was arbitrary and capricious).

239. Coral Davenport et al., *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>.

blame.<sup>240</sup> To support that theory, past studies have consistently found that judicial partisan affiliation has a significant impact on case outcomes in judicial review over agency decisions.<sup>241</sup> 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.”<sup>242</sup>

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240. Priscilla Alvarez & 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> (Apr 9, 2019, 10:29 AM).

241. See Pierce, *supra* note 170, 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”); see also Raso & Eskridge, *supra* note 156, at 1793 (“[T]he 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 13, 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”); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy?—An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 827 (2006) [hereinafter Miles & Sunstein, *Investigation*] (“[T]he role of political judgments in judicial review of agency interpretations of law, at both levels of appellate review, is unmistakable.”); Caruson & Bitzer, *supra* note 13, 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 Federal Administrative Agencies*, 61 J. 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. See James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 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”); see also 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 REGUL. 1, 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”).

242. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) (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 170,



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.<sup>243</sup> 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.<sup>244</sup>

The results show that the standard expectation that agencies will win in front of a partisan-affiliated judge did not hold. Prior studies showed a high agency validation rate when the agency decision matches the judge’s partisan affiliation: more than 70% in one study finding an overall validation rate of 64%,<sup>245</sup> more than 80% in another study,<sup>246</sup> and 68% in yet another study.<sup>247</sup>

But with the Trump Administration dataset, that validation rate was much lower: 45% (measured by looking at all cases regardless of how many parallel courts ruled on the same rule or action).<sup>248</sup> No study has ever found that a presidential administration loses at this high of a rate in front of judges that are partisan-aligned with the president.

**FIGURE 4: JUDICIAL IDEOLOGY IN ADJUDICATED CASES**

	Win rate %
Republican-appointed judges	45% (40 out of 89)
Democratic-appointed judges	16% (24 out of 151)

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at 89 (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); Miles & Sunstein, *Investigation*, *supra* note 241, at 852; Miles & Sunstein, *Arbitrariness Review*, *supra* note 185, at 767; *see also* Caruson & Bitzer, *supra* note 13, at 352–53 (finding support for Revesz’s hypothesis and discussing constraints on the influences of ideology in judicial decisionmaking).

243. This is consistent with the literature. *See* Eskridge & Baer, *supra* note 13, at 1153 (determining that “liberal judges were more likely to agree with liberal agency interpretations”); Revesz, *supra* note 242, at 1718 (using “as a proxy the views generally held by the party of the appointing President” to examine the impact of a judge’s ideology).

244. 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.

245. Miles & Sunstein, *Arbitrariness Review*, *supra* note 185, at 767.

246. Kerr, *supra* note 241, at 38–39.

247. Caruson & Bitzer, *supra* note 13, at 361; *see also* Miles & Sunstein, *Investigation*, *supra* note 241, at 850 (discussing different validation rates for Democratic and Republican appointees).

248. *See supra* Section III.A.1 (describing the two different ways that the cases can be divided).

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 had a win rate of 16% in front of Democratic-appointed judges and a win rate of 45% 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 small study looking at data between 1986 and 1996 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.”<sup>249</sup> In contrast, absent such policy convergence, judicial deference was expected in only 32% of cases.<sup>250</sup> 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 10 percentage points lower.”<sup>251</sup> But none of those studies found such a low win rate for a president’s policies in front of partisan-aligned judges.

Of course, President Trump appointed a large number of federal judges<sup>252</sup> at an unprecedented speed<sup>253</sup> and filled three Supreme Court seats.<sup>254</sup>

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249. Caruson & Bitzer, *supra* note 13, at 361. The average win rate in the Caruson & Bitzer study is lower than the average of 70% found across studies, but when David Zaring pooled those results with the other studies, the average of 70% still held. See Zaring, *supra* note 12, at 171.

250. Caruson & Bitzer, *supra* note 13, at 361.

251. Miles & Sunstein, *Investigation*, *supra* note 241, at 849.

252. Jennifer Bendery, *Trump Notches His 200th Lifetime Federal Judge*, HUFFPOST, [https://www.huffpost.com/entry/trump-courts-judges-mitch-mcconnell-senate-white-male-ideologues\\_n\\_5ef15626c5b6af94211185b5?ukf](https://www.huffpost.com/entry/trump-courts-judges-mitch-mcconnell-senate-white-male-ideologues_n_5ef15626c5b6af94211185b5?ukf) (June 24, 2020, 12:38 PM).

253. Tobias, *supra* note 33, at 422. Tobias clarifies:

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.

*Id.*

254. Lena Zwarenstejn, *Trump’s Takeover of the Courts*, 16 U. ST. THOMAS L.J. 146, 149 (2020) (appointing two justices in two-and-a-half years); Press Release, Senate Comm. on the Judiciary, Senate Confirms Amy Coney Barrett to the Supreme Court (Oct. 26, 2020), <https://www.judiciary.senate.gov/press/rep/releases/senate-confirms-amy-coney-barrett-to-the-supreme-court>. (appointing a third Justice to the Supreme Court in late October 2020).

Observers 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.”<sup>255</sup>

But agencies were not guaranteed to win cases even when there were 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 was appointed by Trump, agencies won 23 cases and lost 23, a win rate of 50%.

There may be other implications of these appointments. Trump’s nominees are largely chosen based on a “demonstrated commitment to the conservative legal movement,”<sup>256</sup> and they “proudly tout their loyalty to the conservative agenda.”<sup>257</sup> Scholars have found that President Trump “implemented only nominal efforts to pursue, identify and seat ethnic minorities or lesbian, gay, bisexual, transgender or queer (LGBTQ) judicial prospects.”<sup>258</sup> Moreover, scholars 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.”<sup>259</sup> These judges’ rulings could have a marked impact on the future of these issues. But given the election results and the fact that the Trump administration ran out of time to defend many of its rules in court,<sup>260</sup> those judges will not affect the win-loss rate of the Trump Administration significantly.

#### 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.<sup>261</sup> Prior studies

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255. Charles Cameron, *Courts to the Rescue?*, BOS. REV. (Aug. 20, 2018), <http://bostonreview.net/law-justice/charles-cameron-courts-rescue>.

256. Zwarenstejn, *supra* note 254, at 162.

257. *Id.* at 164.

258. Tobias, *supra* note 33, at 435.

259. Zwarenstejn, *supra* note 254, at 167; *see also* Carl Tobias, *President Donald Trump’s War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531, 566 (2019) (explaining that the “Trump presidency has devoted minuscule resources to expanding diversity” in the judiciary).

260. *See* Davis Noll & Revesz, *supra* note 107, at 63 (predicting that there would not be enough time for the Justice Department to complete litigation related to Trump’s environmental protection rollbacks unless he was reelected).

261. *Cf.* *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)

showing that agencies win most of the time might support that theory.<sup>262</sup> 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 follow the law.

My findings shed new light on this debate and show that, under the unique circumstances of the Trump Administration, the Trump Administration was significantly constrained by the law governing agency action in challenges that made it to the merits. In a time when the economy almost collapsed due to a global pandemic and the President sent federal agents into states that did not want them,<sup>263</sup> 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 do not block all extra-legal action. 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.

#### A. Constraints at Work

As the data show, the Trump Administration faced constraints in its attempt to use agencies to make policy. The Administration won 23% of the time, a rate far outside the range found in previous studies. The data further show that the low win rate cannot be explained by the fact that the cases still have to go through appellate review.<sup>264</sup> It cannot be explained fully by early corner-cutting by incompetent political appointees.<sup>265</sup> And though judicial ideology had an impact on case outcomes, the Trump Administration lost at

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(explaining that “courts shy away” from voiding administrative decisions, yet “refus[e] to reject administrative acts unless they are so appalling as to be ‘arbitrary and capricious’ or without ‘substantial evidence,’ . . . treat[ing] 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).

262. See *supra* at Section II.A (summarizing studies finding that “agencies tend to win around 70% of cases challenging regulations”).

263. Kristofer Rios et al., *Legality of Federal Agents in Portland Scrutinized as Protests Become More Violent*, ABC NEWS (July 22, 2020, 4:18 PM), <https://abcnews.go.com/US/legality-federal-agents-portland-scrutinized-protests-violent/story?id=71908246>.

264. See *supra* Section III.B (describing why Trump’s lack of success will not be resolved through the appellate process).

265. See *supra* Section III.D (noting that unexperienced heads of agencies choosing to push through Trump Administration rollbacks did not alone cause the win rate).

an unprecedented rate in front of *both* Republican-appointed and Democratic-appointed judges.<sup>266</sup>

Instead, the findings show the Administration violated clear legal requirements in multiple ways. Agencies repeatedly flouted standard procedural rules, including notice-and-comment requirements. They ignored clear-cut statutory and regulatory duties. And they consistently had a hard time explaining their choices to roll back beneficial rules and thus cause harm.

Moreover, partisan-aligned judges ruled against the agencies on these issues in unprecedented ways. In adjudicated cases involving statutory interpretation claims, Republican-appointed judges ruled for the Administration only 52% of the time, while Democratic-appointed judges ruled for the Administration on statutory claims 19% of the time. And in cases involving reasoned explanation claims, Republican-appointed judges ruled for the Administration 49% of the time, while Democratic-appointed judges ruled for the Administration 18% of the time.

There is still a stark difference on both fronts, But these findings show that with an especially aggressive president seemingly bent on displacing “the clear preferences of the prior enacting . . . Congress,”<sup>267</sup> courts have placed a check on the behavior.<sup>268</sup>

### 1. *Statutory Constraints*

The sheer number of statutory losses casts doubt on claims that Congress has given agencies a blank check to make policy consistent with the preferences of the incumbent administration. In adjudicated cases, agencies lost on a statutory issue 117 times (the issue appearing in 63% of the total losses), whereas they lost on a reasoned explanation claim 78 times (the issue appearing in 30% of the total losses) and on a notice-and-comment claim 26 times (the issue appearing in 14% of the total losses). As Figure 5 shows, the win rate was lowest for notice-and-comment claims.

**FIGURE 5: ISSUES IN THE CASES WHEN ADJUDICATED**

<b>Issue</b>	<b>Cases Lost</b>	<b>Win Rate when Adjudicated</b>
Statutory interpretation/authority	117	30%

266. *Supra* Section III.E.

267. Kagan, *supra* note 2, at 2351.

268. *See also* Cary Coglianese et al., *The Deregulation Deception*, FAC. SCHOLARSHIP PENN L., Feb. 19, 2021, [https://scholarship.law.upenn.edu/faculty\\_scholarship/2229](https://scholarship.law.upenn.edu/faculty_scholarship/2229) (proposing a series of additional explanations for the Trump administration’s low win rate).

Reasoned explanation	78	29%
Notice-and-comment	26	24%

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, as Christopher Walker found in his research.<sup>269</sup> Walker found that agencies were “more likely to prevail under *Chevron* (77.4%) than *Skidmore* (56.0%) or, especially, de novo review (38.5%).”<sup>270</sup>

But while Trump-era agencies succeeded at times on statutory claims,<sup>271</sup> they also met a significant number of defeats. Over the course of the past year, 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 skirt a statute’s force or act outside of their statutory authority.

For example, in a case decided by a panel of three Trump appointees, the U.S. Court of Appeals for the Second Circuit held that the NHTSA acted outside of its statutory authority in reconsidering the penalty amount for vehicle manufacturers that violate fuel economy standards.<sup>272</sup> In *County of Maui v. Hawaii Wildlife Fund*,<sup>273</sup> the Supreme Court rejected the EPA’s

269. Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103, 121 (2018).

270. *Id.* Walker further concludes:

*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).

*Id.*

271. *See, e.g.*, Ass’n for Cmty. Affiliated Plans v. U.S. Dep’t of the Treasury, 966 F.3d 782, 784–785 (D.C. Cir. 2020) (holding that the Departments of Treasury, Labor, and HHS’s decision to reverse the cap for STDLI premiums was permissible); Clean Water Action v. EPA, 936 F.3d 308, 316 (5th Cir. 2019) (“[U]nder these circumstances, EPA violated no statutory command by revising a small portion of the 2015 Rule pursuant to transparent, careful and targeted study.”); Org. for Competitive Mkts. v. U.S. Dep’t of Agric., 912 F.3d 455, 461 (8th Cir. 2018) (“We cannot say that the USDA actions at issue were arbitrary and capricious.”).

272. *New York v. Nat’l Highway Traffic Safety, Admin.*, 974 F.3d 87, 90, 101 (2d Cir. 2020).

273. 140 S. Ct. 1462 (2020).

interpretation of a provision of the Clean Water Act.<sup>274</sup> The Court noted that neither party asked the Court to grant *Chevron* deference to the EPA's interpretation of the statute, but went on to emphasize that *Chevron* deference would not be warranted because following the "EPA's reading would open a loophole allowing easy evasion of the statutory provision's basic purposes" and the interpretation was "neither persuasive nor reasonable."<sup>275</sup> Similarly, in *Merck & Co. v. Department of Health & Human Services*,<sup>276</sup> the U.S. Court of Appeals for the District of Columbia held that a HHS rule requiring drug manufacturers to post drug prices in television advertisements was not statutorily authorized.<sup>277</sup> The court rejected the agency's rule as "untethered" to the agency's regulatory authority.<sup>278</sup> The court ultimately held that "no reasonable reading" of the agency's authority allowed the rule.<sup>279</sup>

A closer look at the statutory claims also helps tell a story. Many of the statutory interpretation cases were lost because the agency had acted outside of the bounds of its authority or had adopted an interpretation that blatantly contradicted the statute at issue. But many cases were also lost on *Chevron* Step Two, when courts are generally thought to be deferential.<sup>280</sup>

There was a total of 117 adjudicated cases finding that agencies had violated their governing statutes or lacked statutory authority for the decision. Of those cases, agencies lost at *Chevron* Step Two 17 times (15% of the statutory losses). For example, in a recent case, the U.S. Court of Appeals for the Seventh Circuit held that the agency's new definition for the term "public charge," in a rule that denies lawful permanent residency to immigrants who are likely to become "public charges," did "violence to the English language."<sup>281</sup> The court held that the ambiguity did not give the agency "unfettered discretion" and that the agency's interpretation fell outside of the bounds of reasonableness.<sup>282</sup> Likewise, in one of the early repeal cases, the U.S. District Court for the Northern District of California vacated the Interior's delay of a rule meant to clarify royalties procedures for companies mining on public lands, after finding that the agency's reliance on 5 U.S.C. § 705 as authority for the delay failed at both *Chevron* Step One and

274. *Id.* at 1468.

275. *Id.* at 1474.

276. 962 F.3d 531 (D.C. Cir. 2020).

277. *Id.* at 533.

278. *Id.*

279. *Id.* at 541.

280. *See Hemel & Nielson, supra* note 132, at 760 (explaining that Step Two only requires that the agency's answer is permissible).

281. *Cook Cnty. v. Wolf*, 962 F.3d 208, 229 (7th Cir. 2020).

282. *Id.*

Two.<sup>283</sup> The court explained that the statute only provides authority to delay effective dates and that the Interior’s argument—that it could also use the statute to delay “compliance dates”—violated the plain language of the statute.<sup>284</sup> The court went on to explain that even if it could “ignore the plain language of the statute,” the agency’s “policy argument” that the agency could construe the statute to allow delays of compliance dates was unpersuasive because the argument “undercuts regulatory predictability and consistency.”<sup>285</sup>

Agencies lost at *Chevron* Step One 27 times (23% of the statutory losses). And those cases often involved an obvious lack of statutory authority. For example, in two cases, courts found that the plain language of § 307 of the Clean Air Act did not allow the EPA to delay rules for anything other than a reconsideration proceeding that was properly launched under that provision. In both cases, the courts vacated the delays given that the agency could not show that the required circumstances were present.<sup>286</sup>

And in another large set of statutory cases (n=54), the courts did not say one way or another whether they were applying *Chevron* Step One or Two, but instead explained that the agency’s interpretation was inconsistent with the relevant statute or that the agency had strayed beyond the bounds authorized by statute (coded as “no deference” case).<sup>287</sup> This was the case in *American Lung Ass’n v. EPA*,<sup>288</sup> where the U.S. Court of Appeals for the District of Columbia struck down the Trump Administration’s attempt to repeal and replace the Clean Power Plan. The EPA had rested its rollback on the conclusion that the Clean Power Plan was foreclosed under the plain language of the Clean Air Act,<sup>289</sup> but

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283. *Becerra v. U.S. Dep’t of the Interior*, 276 F. Supp. 3d 953, 964 (N.D. Cal. 2017).

284. *Id.*

285. *Id.*

286. *Air All. Hous. v. EPA*, 906 F.3d 1049, 1061 (D.C. Cir. 2018); *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017); *Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2d Cir. 2018) (holding that “because the text, purpose, and history of the Improvements Act are all unambiguous regarding the mandatory nature of the penalty deadlines, NHTSA’s indefinite delay was issued ‘in excess of statutory . . . authority,’” (citing 5 U.S.C. § 706(2)(C)); *see also* *Bauer v. DeVos*, 325 F. Supp. 3d 74, 95–96 (D.D.C. 2018) (holding that the agency’s reading was precluded by the plain and unambiguous meaning of the statute’s Master Calendar Provision).

287. *See, e.g., Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1059 (N.D. Cal. 2018) (holding that the agency’s interpretation was “beyond the valid grant of authority bestowed upon the agency by Congress”).

288. 985 F.3d 914 (D.C. Cir. 2021).

289. *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, 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).



the court held that this was erroneous and vacated the rollback.<sup>290</sup>

In their study analyzing Supreme Court decisions, Raso and Eskridge found that the Supreme Court voted to uphold the agency decision 60.76% of the time in no deference or “antideference” cases.<sup>291</sup> But in the dataset here, agencies won only 11% of those cases.

For example, in a case about the EPA’s delay of a formaldehyde emissions standard, the court explained that although deference was owed to the agency’s interpretation of the statute, the court was compelled to “give meaning to the statutory provisions,” and explained that it could not endorse an interpretation that permitted the EPA to exercise its authority “in a manner that is inconsistent with the administrative structure that Congress enacted into law.”<sup>292</sup> The court went on to vacate the delay, as it was “beyond the valid grant of authority bestowed upon the agency by Congress in the Formaldehyde Act.”<sup>293</sup>

In sum, as the cases show, courts frequently saw 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 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.

## 2. *Procedural Requirements and the Role of Costs and Benefits*

When combined and considered together as procedural violations, the biggest stumbling block for Trump-era agencies was the failure to either follow notice-and-comment procedures or provide a reasoned explanation for the agency’s decision.<sup>294</sup> To roll back a rule or change an immigration policy, an 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.<sup>295</sup> The requirements together are an important part of our system of checks and balances. As mentioned above, 42% 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

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290. *Am. Lung Ass’n*, 985 F.3d at 995.

291. Raso & Eskridge, *supra* note 156, at 1767 tbl.6.

292. *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1059 (N.D. Cal. 2018) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000)).

293. *Id.*

294. *See supra* Part IV (discussing the constraints that administrative law placed on the Trump Administration).

295. *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019).

of the decision, Republican-appointed judges ruled against the Administration more than 48% of the time.

One surprising driver of these reasoned explanation losses was 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 little more than a quarter of the reasoned explanation losses involved agencies that failed to adequately address the costs and benefits of the action.

Some scholars have argued that a 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.<sup>296</sup> Others make the progressive case for cost-benefit analysis, arguing that a balanced assessment of the costs and benefits of many regulations would demonstrate that more stringent limits are justified.<sup>297</sup> Some even argue that a cost-benefit analysis is completely subject to manipulation.<sup>298</sup>

My findings show that, contrary to the view that the Trump Administration succeeded in making "a mockery" of good cost-benefit analysis,<sup>299</sup> 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.<sup>300</sup> One court recently described this as an "extreme degree of deference" for the "evaluation of scientific data" within the agencies' "technical expertise."<sup>301</sup> But agencies are required under a longstanding executive order to "propose or adopt" a regulation only when the "benefits of the intended regulation justify its

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296. See RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 31–45 (2008) (describing the debate surrounding cost-benefit analysis as anti-regulatory).

297. *Id.* at 16–17 (demonstrating that cost-benefit analysis does not have to be in opposition to regulations when the need for regulation is a moral and economic problem).

298. Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENV'T. & ADMIN. L. 209, 216 (2012); Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 COLUM. J. ENV'T. L. 191, 194 (2004) (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, 1556–57 (2002).

299. REVESZ & LIVERMORE, *supra* note 296, at 107 ("The Trump Administration's approach makes a mockery of the notion of cost-benefit analysis."); Stuart Shapiro, *Opinion, OIRA and the Future of Cost-Benefit Analysis*, REGUL. REV. (May 19, 2020), <https://www.thereview.org/2020/05/19/shapiro-oira-future-cost-benefit-analysis/> ("[T]he battle between politics and analysis at OIRA has in the current Administration turned into a rout by politics.").

300. *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).

301. *Maryland v. EPA*, 958 F.3d 1185, 1196 (D.C. Cir. 2020).

costs”<sup>302</sup> and, when choosing between different alternatives, to select the regulatory alternative that maximizes net benefits unless a statute requires otherwise.<sup>303</sup> 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 of loosening the restrictions will be.<sup>304</sup> 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, the rollback 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 of cutting emissions from residential wood heaters in the form of reduced asthma cases or premature death.<sup>305</sup> That analysis showed that the rule promised net benefits of between three and seven billion dollars.<sup>306</sup> The EPA had been seeking to roll this rule back, as evidenced by two proposals to delay implementation of the rule,<sup>307</sup> 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 would cause millions of dollars in quantifiable harm.<sup>308</sup> Because that is the net of the cost savings, it is hard to imagine an

302. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,736 (Oct. 4, 1993).

303. *Id.* at 51,735.

304. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (“[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”).

305. *See, e.g.*, Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 80 Fed. Reg. 13,672, 13,673–74 (Mar. 16, 2015) (to be codified at 40 C.F.R. pt. 60) (explaining that cleaner stoves will result in fewer negative health impacts).

306. EPA, EPA-452/R-15-001, REGULATORY IMPACT ANALYSIS (RIA) FOR RESIDENTIAL WOOD HEATERS NSPS REVISION: FINAL REPORT 1–4 (2015), <https://downloads.regulations.gov/EPA-HQ-OAR-2018-0195-0011/content.pdf>.

307. Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 85 Fed. Reg. 31,124, 31,124 (proposed May 22, 2020) (to be codified at 40 C.F.R. pt. 60); Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 83 Fed. Reg. 61,574, 61,574 (proposed Nov. 30, 2018) (to be codified at 40 C.F.R. pt. 60).

308. *See, e.g.*, EPA, Memorandum on Supplemental Regulatory Impact Analysis (RIA) for “Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces” Introduction (Nov. 20, 2018), <https://downloads.regulations.gov/EPA-HQ-OAR-2018-0195-0008/content.pdf> (calculating forgone benefits for a

explanation that would justify that kind of harm, and so the Administration never finalized that rule.<sup>309</sup>

To avoid having to address that type of harm, the Trump Administration tried several strategies. First, the Administration cited cost savings as a reason for the rollback—without giving equal consideration to the forgone benefits on the other side of the equation.<sup>310</sup> But judicial scrutiny of cost-benefit analyses had been increasing,<sup>311</sup> 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 APA—as agencies must grapple with and explain their decision to forgo the benefits of a rule they seek to roll back.<sup>312</sup> Several of the cases addressed these obvious errors, vacating both a deregulatory rule that looked “at only one side of the scales, whether solely the costs or solely the benefits”<sup>313</sup> and a rule that failed to provide a “bottom-line estimate” about the rule’s impact.<sup>314</sup>

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delay of the rule); Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 83 Fed. Reg. at 61,574.

309. Sean Reilly, *EPA Flip-Flops on Wood Stove Standards Reprieve*, E&E NEWS (Nov. 18, 2020), <https://www.eenews.net/eenewspm/stories/1063718833>.

310. *See, e.g.*, Civil Penalties, 84 Fed. Reg. 36,007, 36,007 (July 26, 2019) (to be codified at 49 C.F.R. pt. 578) (reversing penalties adjustment and claiming that raising the penalties would cause substantial harm); Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401) (ignoring the harms of suspending the Clean Water Rule); Civil Penalties, 82 Fed. Reg. 32,139 (July 12, 2017) (to be codified at 49 C.F.R. pt. 578) (same for suspension of penalties provision); Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430 (June 15, 2017) (to be codified at 43 C.F.R. pt. 3170) (same for suspension of “Waste Prevention Rule”); Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 27,133, 27,139 (June 14, 2017) (to be codified at 40 C.F.R. pt. 68) (claiming that forgone benefits of suspension of Chemical Disaster Rule were speculative); 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) (to be codified at 40 C.F.R. pt. 423) (ignoring harms in suspension of wastewater limits).

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

312. *See, e.g.*, *Air All. Hous. v. EPA*, 906 F.3d 1049, 1068 (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, 1123 (N.D. Cal. 2017) (holding that failure to consider forgone benefits was arbitrary and capricious).

313. *See California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d at 1122.

314. *Stewart v. Azar*, 313 F. Supp. 3d 237, 262 (D.D.C. 2018).

A second option was to provide a more nuanced analysis and address the forgone benefits, but to do it in a way that changed the math so that the forgone benefits did not outweigh the cost savings. Some of these attempts were also met with defeat in court. In a recent case, the Interior attempted to redo the math of a rule that was meant to cut back on natural gas leaks at oil and gas facilities to look more beneficial in order to make the rollback.<sup>315</sup> Cutting natural gas leaks helps cut back on methane, a byproduct of natural gas, which helps cut a significant contributor to climate change pollution.<sup>316</sup> To support the Obama-era rule, the agency prepared an economic analysis that showed the rule would yield between \$209 to \$403 million per year in societal benefits, including industry profits.<sup>317</sup> In addition, the rule promised to provide significant unquantified benefits in the form of reduced emissions of volatile organic compounds and hazardous air pollutants.<sup>318</sup>

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.<sup>319</sup> 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.<sup>320</sup> 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.”<sup>321</sup> A district court judge in Wyoming later struck down the Waste Prevention rule on a direct challenge, but that case is on appeal.<sup>322</sup> 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.

315. Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008, 83,009 (Nov. 18, 2016) (to be codified at 43 C.F.R. pts. 3100, 3160, 3170).

316. See Benjamin Storrow, E&E NEWS, *Methane Leaks Erase Some of the Climate Benefits of Natural Gas*, SCI. AM. (May 5, 2020), <https://www.scientificamerican.com/article/methane-leaks-erase-some-of-the-climate-benefits-of-natural-gas/> (explaining how leaks undo the benefits achieved by shifts toward natural gas).

317. BLM 2016 REGULATORY IMPACT ANALYSIS, *supra* note 59, at 5.

318. *Id.* at 6.

319. BLM 2018 REGULATORY IMPACT ANALYSIS, *supra* note 59, at 7, 78.

320. *California v. Bernhardt*, 472 F. Supp. 3d 573, 613 (N.D. Cal. 2020) (faulting the agency for relying on an estimate that ignores the “important spillover effects given the global nature of climate change”).

321. *Id.*

322. *Wyoming v. Dep’t of the Interior*, 493 F. Supp. 3d 1046 (D. Wyo. 2020), *appeal docketed*, No. 20-8072 (10th Cir. Dec. 22, 2020).

Trump-era agencies have not experienced complete failure in court. A district court upheld the 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 weighing the costs and benefits of the Repeal."<sup>323</sup> In reviewing a HHS rule that drastically changed a program designed to provide family planning and reproductive healthcare for low-income patients, the U.S. Court of Appeals for the Ninth Circuit deferred to the HHS's "predictive judgment" that "the harms flowing from a gap in care would not develop."<sup>324</sup>

Even if the Trump Administration's actions have undermined the use of cost-benefit analysis as a system for objectively analyzing the different routes an agency can take,<sup>325</sup> the analysis 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 prove more resilient in the face of rollback efforts,<sup>326</sup> 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 lost.

### 3. *Regulatory Constraints*

A small but significant number of cases also show agencies failing to abide by clear-cut regulatory duties. For example, the U.S. Court of Appeals for the Ninth Circuit found that the Department of Energy failed to comply with its own regulation governing publication of a new energy efficiency rule.<sup>327</sup> In several cases, the EPA admitted error under standards showing they did not comply with clear-cut duties. For example, the EPA admitted liability in a case alleging that the agency failed to promulgate plans to cut upwind emissions that affect air quality in downwind states.<sup>328</sup> The EPA conceded

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323. *California v. Bureau of Land Mgmt.*, No. 18-cv-00521-HSG, 2020 U.S. Dist. LEXIS 53958, at \*40–42 (N.D. Cal. Mar. 27, 2020).

324. *California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1096, 1101 (9th Cir. 2020).

325. See REVESZ & LIVERMORE, *supra* note 296, at 107.

326. See Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593, 1628 (2019) (noting the constraints on updating a cost-benefit analysis because the benefits of abandoning status quo policy are marginal).

327. *Nat. Res. Def. Council, Inc. v. Perry*, 940 F.3d 1072, 1079–80 (9th Cir. 2019).

328. *New Jersey v. Wheeler*, 475 F. Supp. 3d 308, 326 (S.D.N.Y. 2020).

liability again in a case about the agency's failure to regulate coke ovens.<sup>329</sup> The EPA also admitted liability in a case about the implementation of its regulations governing landfill methane.<sup>330</sup> 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.

### 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, well, challenging. Some decisions are committed to the agency's sole discretion and are thus unreviewable.<sup>331</sup> There may be times when plaintiffs do not have standing to challenge the decision<sup>332</sup> or have filed the case in the wrong place.<sup>333</sup>

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, the EPA undertook a series of actions to avoid complying with the deadlines in an Obama-era rule that required landfills to reduce their methane emissions.<sup>334</sup> On May 31, 2017, one day after the deadline for state compliance plans under the 2016 Rule, the EPA granted a petition for reconsideration on the rule and issued a 90-day stay.<sup>335</sup> Environmental

329. *See generally* *Citizens for Pa.'s Future v. Wheeler*, 469 F. Supp. 3d 920, 922 (N.D. Cal. 2020) (noting EPA's required adherence to technology-based standards for performing risk review).

330. *California v. EPA*, 385 F. Supp. 3d 903, 909 (N.D. Cal. 2019).

331. *See Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 618, 634 (D.C. Cir. 2020) (concluding that there was no need to create a record for judicial review, as the decision whether to subject certain undocumented individuals to expedited removal is in the sole discretion of the Secretary of Homeland Security).

332. *See Free Press v. FCC*, 735 F. App'x 731, 732 (D.C. Cir. 2018) (articulating petitioner's failure to demonstrate Article III standing to the court).

333. *Sierra Club v. EPA*, 926 F.3d 844, 850 (D.C. Cir. 2019) (dismissing a petition for review due to improper venue).

334. *Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills*, 81 Fed. Reg. 59,276, 59,280 (Aug. 29, 2016) (to be codified at 40 C.F.R. pt. 60).

335. *Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills*, 82 Fed. Reg. 24,825, 24,879 (May 31, 2017) (to be codified at 40 C.F.R. pt. 60).

nonprofit plaintiffs promptly filed a petition for review,<sup>336</sup> and the EPA then withdrew that delay rule.<sup>337</sup> Despite that withdrawal, the EPA continued to drag its feet in implementing the rule and, on February 26, 2018, the EPA stated its intention to not respond to state plans or issue federal plans.<sup>338</sup> A coalition of states challenged the EPA in court,<sup>339</sup> and the court set a deadline for the EPA to promulgate state and federal plans.<sup>340</sup> That deadline was, by necessity, later than the EPA's original deadline for promulgating those plans.

The EPA did not appeal that decision. Instead, the agency issued a new delay rule.<sup>341</sup> The 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,<sup>342</sup> and the Ninth Circuit reversed and remanded.<sup>343</sup> Plaintiffs have a challenge pending against the new delay rule in the U.S. Court of Appeals for the D.C. Circuit as well.<sup>344</sup> Meanwhile, implementation of the rule has remained on hold.

The landfill methane saga demonstrates that the agency faced significant risks of reversal in court, given that the agency gave up on delay after a lawsuit was filed<sup>345</sup> and was ordered by another court to implement the rule by a certain date.<sup>346</sup> Yet at the time of the transition, the EPA had avoided having to comply with deadlines in the 2016 Rule as well as with court-ordered deadlines.

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336. Petition for Review, Nat. Res. Def. Council v. Pruitt, No. 17-1157 (D.C. Cir. June 15, 2017).

337. Stipulation of Voluntary Dismissal Pursuant to Federal Rule of Appellate Procedure 42(b), Nat. Res. Def. Council v. Pruitt, No. 17-1157 (D.C. Cir. Jan. 31, 2018).

338. See States' Complaint for Declaratory and Injunctive Relief at 15, *California v. EPA*, 385 F. Supp. 3d 903 (N.D. Cal. 2019) (No. 4:18-cv-03237) (stating that the EPA wrote that it was "not plan[ning] to prioritize the review of submitted state plans" or "working to issue a Federal [implementation] Plan for states that failed to submit a state plan").

339. *Id.* at 4–7.

340. *California v. EPA*, 385 F. Supp. 3d at 913, 915.

341. Adopting Requirements in Emission Guidelines for Municipal Solid Waste Landfills, 84 Fed. Reg. 44,547, 44,549 (Aug. 26, 2019) (to be codified at 40 C.F.R. pt. 60).

342. *California v. EPA*, Case No. 18-cv-03237, 2019 WL 5722571, at \*1 (N.D. Cal. Nov. 5, 2019).

343. *California v. EPA*, 978 F.3d 708 (9th Cir. 2020).

344. Petition for Review, *Env't Def. Fund v. EPA*, No. 19-1222 (D.C. Cir. Oct. 23, 2019).

345. LINDA TSANG, CONG. RSCH. SERV., R44615, EPA'S METHANE REGULATIONS: LEGAL OVERVIEW 18 (2018), <https://crsreports.congress.gov/product/pdf/download/R/R44615/R44615.pdf> ("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.").

346. *California v. EPA*, 385 F. Supp. 3d 903, 916 (N.D. Cal. 2019).



The 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."<sup>347</sup> Despite the losses in the dataset, there are also examples of rules where agencies were able to avoid a challenge. For example, after a lawsuit<sup>348</sup> caused the Federal Highway Administration to announce that it would end a delay of a greenhouse gas measurement rule,<sup>349</sup> the agency repealed the rule and was never sued.<sup>350</sup>

Besides the problem that courts are an imperfect solution, as Renan 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."<sup>351</sup>

Becoming overly dependent on courts may also take the onus off Congress in a way that is counterproductive and harmful. As Mashaw and Berke have argued, increasing polarization and the resulting gridlock can lead to long-term inefficiencies between administrations.<sup>352</sup> 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.<sup>353</sup> This power can be clearly seen through Trump's reversal of numerous Obama-era regulations.<sup>354</sup> In this sense, "presidential administration is also quite fragile," with its policies "immediately contested and readily subject to reversal" with each new election.<sup>355</sup> In sum, these pressures and concerns demonstrate that judicial review cannot be the only answer to an administration run amok.

347. See Bethany Davis Noll, *Trump's Regulatory 'Whack-a-Mole,'* POLITICO (Apr. 10, 2019, 5:13 AM), <https://www.politico.com/agenda/story/2019/04/10/trump-federal-regulations-000890/> (describing the practice); see also Davis Noll & Revesz, *supra* note 107, at 42–43 (collecting examples).

348. *Clean Air Carolina v. U.S. Dep't of Transp.*, No. 17-5779, 2017 WL 5157469 (S.D.N.Y. Sept. 14, 2017).

349. National Performance Management Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation an Air Quality Improvement Program, 82 Fed. Reg. 45,179, 45,179–80 (Sept. 28, 2017) (to be codified at 23 C.F.R. pt. 490).

350. National Performance Management Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation an Air Quality Improvement Program, 83 Fed. Reg. 24,920, 24,920 (May 31, 2018) (to be codified at 23 C.F.R. pt. 490).

351. Renan, *supra* note 32, at 2273.

352. Mashaw & Berke, *supra* note 53, at 561–62.

353. *Id.* at 607.

354. *Id.*

355. Bulman-Pozen, *supra* note 36, at 270.

### C. *Unfinished Business*

At the end of the Trump Administration, many challenges to the latest and biggest rollbacks and other regulations were still pending.<sup>356</sup> In some cases, the Administration already lost and was hoping to reverse that loss on appeal. In other cases, there is no decision at all. Given the circumstances and the Trump Administration's election loss, it was unlikely at the time of Biden's inauguration that those pending appeals or challenges would be decided.

#### 1. *Pending Litigation*

When President Biden was inaugurated, there were many pending challenges to big-ticket, Trump-era rules.<sup>357</sup> After spending the first several years on quick and dirty suspension rules, the Trump Administration finalized its signature rollbacks in the last year.<sup>358</sup> All of these rollbacks took years to finalize and thus were still in litigation at the end of the term. For example, the EPA first announced that it was reconsidering its vehicle emissions standards in August 2017.<sup>359</sup> In October 2018, the EPA and the NHTSA proposed flatlining the standards.<sup>360</sup> The two agencies then took until April 2020 to publish the final rollback.<sup>361</sup> Litigation challenging that

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356. See *infra* Section IV.C.1 (discussing outstanding litigation prompted by rulemaking efforts of the Trump Administration).

357. See generally *Tracking Deregulation in the Trump Era*, *supra* note 66 (tracking the ongoing status of deregulatory efforts by the Trump Administration).

358. See Juliet Eilperin & Darla Cameron, *How Trump Is Rolling Back Obama's Legacy*, WASH. POST, [https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm\\_term=.976ec944ccfa](https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm_term=.976ec944ccfa) (Jan. 20, 2018) (tracking all of the executive actions, cabinet-level agency decisions, Congressional Review Acts, and new legislation imposed in the first year of the Trump Administration that worked to reverse Obama-era rules and regulations); *Roundup: Trump-Era Agency Policy in the Courts*, *supra* note 15 (reporting the outcome of litigation over agency actions during the Trump Administration).

359. Request for Comment on Reconsideration of the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles; Request for Comment on Model Year 2021 Greenhouse Gas Emissions Standards, 82 Fed. Reg. 39,551, 39,551–52 (Aug. 21, 2017).

360. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986, 42,986 (proposed Aug. 24, 2018) (to be codified at 40 C.F.R. pts. 85, 86).

361. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174, 24,174 (Apr. 30, 2020) (to be codified at 40 C.F.R. pts. 86, 600).

rollback was in the early stages when Biden was inaugurated.<sup>362</sup>

Similarly, in July 2017, the 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.<sup>363</sup> In 2018, the agencies delayed the rule,<sup>364</sup> but that delay was struck down in court.<sup>365</sup> In February 2019, the agencies then proposed a replacement for the rule.<sup>366</sup> Then, in October 2019, the agencies managed to finalize the repeal,<sup>367</sup> but they did not finalize their replacement rule, known as the Navigable Waters Rule, until April 2020.<sup>368</sup> Litigation on that rule was pending in more than ten district courts at the time of the transition.<sup>369</sup> And after an unsuccessful effort to suspend its methane emissions rule in mid-2017, the EPA only finalized a rollback in September 2020.<sup>370</sup> The lawsuit was pending in the D.C. Circuit when Biden was inaugurated.

Had President Trump won reelection, it was not a sure bet that the Administration would have won the pending cases. In January, a district court held that the EPA had illegally made its so-called “secret science” rule effective immediately, paving the way for a later holding that the agency had

362. See Agency Docketing Statement at 1, *California v. Wheeler*, No. 20-1167 (D.C. Cir. June 29, 2020) (showing the initiation of administrative agency review proceedings in the dispute discussed above).

363. Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 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).

364. Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5,200, 5,200 (Feb. 6, 2018) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401).

365. *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 969–70 (D.S.C. 2018) (enjoining the delay).

366. Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4,154, 4,154 (proposed Feb. 14, 2019) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401).

367. Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626, 56,626 (Oct. 22, 2019) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401).

368. The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250, 22,250 (Apr. 21, 2020) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, 401).

369. See, e.g., *California v. Wheeler*, 467 F. Supp. 3d 864, 890 (N.D. Cal. 2020) (denying motion for a preliminary injunction); *Colorado v. EPA*, 989 F.3d 874, 880 (10th Cir. 2021) (reversing lower court’s order granting a preliminary injunction).

370. Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 85 Fed. Reg. 57,018, 57,018 (Sept. 14, 2020) (to be codified at 40 C.F.R. pt. 60).

also acted outside of its authority in issuing the rule.<sup>371</sup> In addition, 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.<sup>372</sup> It is highly possible that the Trump Administration would have lost in a case defending that rule.

But as he did not win reelection, the new Administration is likely to seek to convince courts to put off deciding the cases. The DOJ generally cannot switch sides in an agency case until the agency changes its rule.<sup>373</sup> Even if the DOJ did so, its positions in court cannot stand in as agency decisions until an agency actually promulgates a new regulation.<sup>374</sup> But rulemaking can take significant time,<sup>375</sup> which leaves the DOJ 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—that gives agencies time to rescind or modify a rule, render the litigation moot, and avoid an unfavorable court decision.<sup>376</sup> Better still, if the regulation is 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 DOJ 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.<sup>377</sup> In contrast, the DOJ sought and received an abeyance in the D.C. Circuit

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371. See *Env’t Def. Fund v. EPA*, No. 4:21-CV-03-BMM, 2021 WL 270246 (D. Mont. Jan. 27, 2021).

372. INST. FOR POL’Y INTEGRITY, KEY ECONOMIC ERRORS IN THE CLEAN CAR STANDARDS ROLLBACK, (2020), [https://policyintegrity.org/files/media/Vehicles\\_Emissions\\_Rollback\\_-\\_Key\\_Economic\\_Errors.pdf](https://policyintegrity.org/files/media/Vehicles_Emissions_Rollback_-_Key_Economic_Errors.pdf).

373. Jody Freeman, 2017 Roscoe Pound Lecture, *The Limits of Executive Power: The Obama-Trump Transition*, 96 NEB. L. REV. 545, 551 (2018) (explaining the DOJ’s practice of not changing position until the agency announces a new position through notice-and-comment).

374. See *SEC 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) (requiring the agency to make a new decision before considering its new reasons).

375. See Davis Noll & Revesz, *supra* note 107, at 55–57 (collecting studies that have analyzed the typical timeframe for issuing new rules).

376. See, e.g., Order at 3, *West Virginia v. EPA*, 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).

377. *Chamber of Com. v. U.S. Dep’t of Lab.*, 885 F.3d 360, 368 (5th Cir. 2018).

litigation of the Clean Power Plan.<sup>378</sup> 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,<sup>379</sup> 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.<sup>380</sup> Ultimately, once the EPA repealed the Clean Power Plan under President Trump, the litigation over the rule was dismissed as moot.<sup>381</sup> In sum, because of the election, the Trump Administration will be unable to defend many of its most significant rules. As many of these challenges are likely to go into abeyance, outcomes in these cases are unlikely to affect the win-loss rate.

## 2. Cases Pending in the Supreme Court

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 on the injunction from the Supreme Court. For example, the Court granted stays on injunctions in a case involving a rule denying applications for lawful permanent residency to immigrants it deemed likely to become public charges,<sup>382</sup> a case about whether the DOJ can deny asylum eligibility to those entering at the southern border who did not first apply for asylum in a third country they traveled through;<sup>383</sup> and a case about whether the DHS can lawfully require non-Mexican asylum seekers to remain in Mexico for the duration of their immigration proceedings.<sup>384</sup>

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378. Order Granting Abeyance at 2, *West Virginia*, No. 15-1363 (D.C. Cir. Apr. 28, 2017).

379. 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) (to be codified at 40 C.F.R. pt. 60) (claiming Clean Power Plan was illegal and, thus, repealing it).

380. See Order Extending Abeyance at 2, *West Virginia*, No. 15-1363 (D.C. Cir. Aug. 8, 2017); Davis Noll & Revesz, *supra* note 107, at 25.

381. Order, *supra* note 376; Petitioners and Petitioner-Intervenors' Motion for Dismissal of Petitions for Review as Moot at 1, *West Virginia*, No. 15-1363 (D.C. Cir. filed July 15, 2019) (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. filed July 17, 2018) (supporting dismissal and agreeing case was now moot).

382. *New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 340 (S.D.N.Y. 2019), *stay granted*, 140 S. Ct. 599 (2020), *aff'd as modified*, 969 F.3d 42 (2d Cir. 2020), *cert. granted*, No. 20-449 (U.S. Feb. 22, 2021).

383. *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 929–31 (N.D. Cal.), *stay granted*, 140 S. Ct. 3 (2019), *aff'd*, 964 F.3d 832 (9th Cir. 2020).

384. *Innovation L. Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1114 (N.D. Cal. 2019), *stay granted*, 140 S. Ct. 1564 (2020).

With those stay decisions, the Supreme Court signaled both that it would grant certiorari and that it may be willing to reverse the decisions on the merits. Indeed, it granted certiorari in the remain-in-Mexico case<sup>385</sup> and in the case challenging the rule requiring those entering at the southern border to first apply for asylum in a third country.<sup>386</sup> But in February 2021, on the request of the Biden Administration, the Court placed the remain-in-Mexico case into abeyance and removed the argument date from its calendar.<sup>387</sup> And in March, the Court dismissed the southern border asylum petition on the parties' joint request.<sup>388</sup>

#### CONCLUSION

This Article examines the outcome of Trump's agency rulemaking efforts in court. In doing so, the Article examines and tests the power of judicial review to serve as a bulwark against agencies seeking to push the limits. The Trump Administration lost in court at an astonishing rate. The results from the study conducted in this Article demonstrate that the Trump Administration's record did not turn around with appeals and that judicial ideology is not all to blame. Instead, what the study shows is that Trump Administration agencies acted in ways that were contrary to law, both by failing to provide a reasoned explanation for their actions and by ignoring their statutory mandates. That courts have kept these violations in check is a powerful rejoinder to those who would say that judicial review of agency action is toothless.

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385. *Wolf v. Innovation L. Lab*, 141 S. Ct. 617 (2020).

386. *Dep't of Homeland Sec. v. New York*, No. 20-449 (U.S. Feb. 22, 2021).

387. *Order, Mayorkas v. Innovation L. Lab*, No. 19-1212 (U.S. Feb. 3, 2021) (placing the remain-in-Mexico case in abeyance).

388. *Order, U.S. Dep't of Homeland Sec. v. New York*, No. 20-449 (U.S. Mar. 9, 2021).

## APPENDIX

## A. Coding the Issues

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,<sup>389</sup> or failed to provide adequate notice.<sup>390</sup>

I categorized the case as a “**reasoned explanation**” case if the issue that formed a basis for the court’s ruling arose under the line of cases beginning with *State Farm*,<sup>391</sup> for example, if the court found that the agency failed to address significant reliance interests<sup>392</sup> or failed to offer an explanation for the rule that is contradicted by the agency’s own record.<sup>393</sup> 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

389. *See, e.g.*, Nat. Res. Def. Council, Inc. v. Nat’l Highway Traffic Safety Admin., 894 F.3d 95, 115 (2d Cir. 2018) (vacating the delay rule where no notice was given at all); *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062, 1067 (N.D. Cal. 2018) (holding that the agency failed to prove it had good cause to forgo providing notice, and holding that four-day notice period was insufficient).

390. *See, e.g.*, S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 967 (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 the Interior*, 276 F. Supp. 3d 953, 966 (N.D. Cal. 2017) (rejecting argument that notice on subsequent proposed repeal was sufficient to satisfy notice requirement for delay rule).

391. *See supra* notes 115–127 and accompanying text (explaining that agencies must provide a factual basis to reason and support their decisions).

392. *See, e.g.*, Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020) (concluding that a violation of the Administrative Procedure Act occurred after the Acting Secretary failed to address reliance factors related to termination of the Deferred Action for Childhood Arrivals program).

393. *See, e.g.*, *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1284 (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); *California ex rel. Becerra v. U.S. Dep’t of the Interior*, 381 F. Supp. 3d 1153, 1168, 1168 n.12 (N.D. Cal. 2019) (holding that the agency failed to “reconcile” its decision with the findings in the rule it was repealing).

or not adequately explained the decision by, for example, providing a faulty analytical basis for the rule,<sup>394</sup> arbitrarily ignoring significant issues when addressing the harm of the decision,<sup>395</sup> or failing to acknowledge the forgone benefits of the decision.<sup>396</sup>

I categorized a case as a “**statutory violation**” case if a statutory claim formed a basis for the decision for or against the agency, either because—for example—the agency had acted with or without specific statutory authority<sup>397</sup> or had adopted (or not) an “unreasonable construction of the statute.”<sup>398</sup>

I categorized a case as a “**regulatory claim**” if a regulatory violation formed the basis for the decision; for example, if an agency had failed to perform a nondiscretionary duty imposed by the agency’s own regulations<sup>399</sup> or had not shown how the agency’s regulations permitted the challenged action.<sup>400</sup> In these cases, *Auer/Kisor* deference<sup>401</sup> was implicated and I looked to see if the court applied that level of deference.<sup>402</sup>

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394. *Stewart v. Azar*, 313 F. Supp. 3d 237, 243 (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).

395. *California v. Bernhardt*, 472 F. Supp. 3d 573, 610 (N.D. Cal. 2020).

396. *Id.*; *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1125 (N.D. Cal. 2017).

397. *Clean Air Council v. Pruitt*, 862 F.3d 1, 4 (D.C. Cir. 2017).

398. *District of Columbia v. U.S. Dep’t of Agric.*, 444 F. Supp. 3d 1, 25 (D.D.C. 2020).

399. *California v. EPA*, 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).

400. *See, e.g., Nat’l Women’s L. Ctr. v. Off. of Mgmt. & Budget*, 358 F. Supp. 3d 66, 87 (D.D.C. 2019) (vacating stay on data collection, as it was not supported by the agencies’ regulations).

401. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–16 (2019) (deferring to an agency’s interpretation of its own ambiguous regulation when the interpretation is reasonable); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (“Because 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.”); *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (stating that the administrative interpretation of a regulation is controlling unless it is plainly erroneous or inconsistent with the statute).

402. *See Eskridge & Baer, supra* note 13, at 1217–21 (discussing different deference regimes). 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) (granting vast deference to the president in matters of foreign affairs); so-called “Anti-Deference,” Eskridge & Baer, *supra* note 13, at 1220 (defining anti-deference as a presumption against deference to the agency); Consultative Deference, *id.* at 1219 (considering cases where the court was influenced by the agency’s materials or interpretation, but where they did not speak to deference or interpretive weight);



For all of these issues, the issue is coded only if it supports 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.

### B. Deference Regimes

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 the statute,” without invoking any kind of deference regime.<sup>403</sup> 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.).”<sup>404</sup>
- ❖ **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.”<sup>405</sup> If the court found that the statute was unambiguous 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 similar to the approach that Barnett and Walker as well as Czarneski took.<sup>406</sup>
- ❖ **Chevron Step Two:** If the court determined that Congress did not speak clearly and that 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

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*Beth Israel* Deference, *id.* at 1218 (analyzing cases where the court used a framework similar to *Chevron*, but cited subject area-specific case law that predated *Chevron*); and *Skidmore* Deference, *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding that the interpretation of agency opinion letters is entitled to respect under *Skidmore* only to the extent the letters have the power to persuade).

403. Eskridge & Baer, *supra* note 13, at 1086.

404. *Id.* at 1216, 1221.

405. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

406. *See generally* Barnett & Walker, *supra* note 12, at 6; Czarneski, *supra* note 13, at 796–97 (determining how frequently courts found a statute to be ambiguous, coding this determination as Step One).

statute,”<sup>407</sup> the case was coded as a *Chevron* Step Two case. This is similar to Barnett and Walker’s approach, as well as Czarneski’s methodology.<sup>408</sup>

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.

### C. Search Terms

Using Westlaw Edge, I ran several search phrases in order to compile a representative dataset. I started by going to Westlaw Edge’s homepage and clicking on “Cases” under “Content types.” Then, I narrowed the search to “All Federal Cases.” Within these parameters, I tested the search phrases listed below. After entering the search phrase, I further narrowed the large pool of results by using the “Search within results” feature to hone in on the specific time period of interest to this study: January 20, 2017 (President Trump’s inauguration day) to January 20, 2021.

I chose these search phrases because they appear frequently in cases included in the existing Policy Integrity Tracker or because prior authors used them in prior studies.

Once I downloaded the results from these searches, I created a master dataset that combined all of the search results and weeded out any duplicate cases. I did this once in October 2020 to test the search results. And on January 20, 2021, I did it again to make sure I had a search that included as many cases as possible from the Trump era. That list of cases included more than 1000 entries, some of which were duplicates and many of which were already in my dataset. I then reviewed a random selection of almost 900 of those entries to select cases that satisfied the criteria of this study, as described *supra* Section II.B, to include in the dataset.

<b>Search Phrases</b>
“Administrative Procedure Act” and “s 706” and “State Farm” and “arbitrary and capricious”
“5 U.S.C.” and “s 706” and “State Farm” and “arbitrary and capricious”
“Administrative Procedure Act” and “s 706” and “Chevron”
“5 U.S.C. s 706” and “Chevron”
“Administrative Procedure Act” and “s 706” and “Chevron” and “Mead”
“5 U.S.C. s 706” and “Chevron” and “Mead”

407. *Chevron*, 467 U.S. at 843.

408. *See generally id.*; Barnett & Walker, *supra* note 13, at 6; Czarneski, *supra* note 13, at 796–97 (considering the frequency at which agency deference was granted or denied by a court, coding this determination as Step Two).

"42 U.S.C. s 7606" and "Clean Air Act"
"42 U.S.C. s 7606" and "Clean Air Act" and "549 U.S. 497"
*note: 549 U.S. 497 is the citation for <i>Massachusetts v. EPA</i>
"Administrative Procedure Act" and "s 706" and "Auer"
"5 U.S.C. s 706" and "Auer"
"Administrative Procedure Act" and "s 706" and "Curtiss-Wright"
"5 U.S.C. s 706" and "Curtiss-Wright"
"Administrative Procedure Act" and "s 706" and "Beth Israel"
"5 U.S.C. s 706" and "Beth Israel"