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The Limits of Executive Power: The Obama-Trump Transition

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The 2017 Roscoe Pound Lecture†

Jody Freeman*

The Limits of Executive Power: The Obama–Trump Transition

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Good afternoon. Thank you so much for inviting me to deliver the Pound Lecture, which is an honor. I am aware of its special place in

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† Roscoe Pound, a native of Lincoln, Nebraska, is widely considered to be one of the early giants of American legal thought. He began his legal career practicing law in his hometown, later joining the faculty at the University of Nebraska College of Law. In 1903, Pound became dean, a role he would fill until 1910. While the dean at Nebraska Law, Pound delivered his famous address to the American Bar Association, “Causes of Popular Dissatisfaction with the Administration of Justice,” a speech that prompted a widespread reexamination of the nature of our legal system. Pound left Nebraska Law in 1910 to teach at Harvard Law, where he became dean in 1916. Scholars claim that Pound is one of the greatest legal minds of his time and still refer to his writings today. In 1949, the Nebraska State Bar Association funded a lectureship in Pound’s honor. “New Paths of Law,” the first Pound Lecture, was delivered in 1950 by Roscoe Pound himself.

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the tradition of the Nebraska Law School, and I know many of the distinguished professors who have delivered it in the past. I could not be more delighted to be here. I want to thank your dean in particular for hosting me.

I. INTRODUCTION

I thought I would talk today about the limits of executive power to rescind or weaken regulations. It is a particularly interesting time to think about this topic because we are in a moment of political transition following the 2016 presidential election.¹ We are less than two months into the new Trump Administration, and it appears that the new President has very different policies than the prior one. So it is an opportune time to think about the ways in which presidents make policy and to discuss the constraints on a new president who wishes to dramatically reverse course using the variety of instruments at his disposal. I will add some things about Congress too, because although Congress may not look especially productive at the moment, there is a great deal of activity behind the scenes. The most obvious instrument Congress has to effect policy change is, of course, legislation, but it also possesses some “superpowers” in the form of the Congressional Review Act,² a statute that most people have never heard of but which I want to discuss because it has special salience during presidential transitions. My intent today is to give you some understanding of all of the tools being used at the moment to undo or amend the policies of the prior Administration.

Now, how you feel about this shift is up to you. I have my views, which are not a mystery because they are publicly known,³ and I am happy to elaborate on them. But regardless of what one thinks about the underlying substantive policies—whether on immigration, the environment, or trade, for example—it is important to understand the

1. Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES, Nov. 9, 2016, at A1, <https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html>.

2. 5 U.S.C. §§ 801–808 (2012).

3. See, e.g., Jody Freeman, *Don't Roll Back the Vehicle Fuel Standards*, N.Y. TIMES (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/opinion/dont-roll-back-the-vehicle-fuel-standards.html>; Jody Freeman, *Implications of Trump's Victory and the Republican Congress for Environmental, Climate and Energy Regulation: Not as Bad as It Seems?*, HARV. ENVTL. L. PROGRAM (Nov. 10, 2016), <http://environment.law.harvard.edu/postelection> [<https://perma.unl.edu/5PTT-NFAD>]; Jody Freeman, *Professor Jody Freeman on Trump's "2 for 1" Executive Order*, HARV. ENVTL. L. PROGRAM (Jan. 30, 2017), <http://environment.law.harvard.edu/2017/01/freemanstatement> [<http://perma.unl.edu/S8DH-YXCK>]; Elias J. Groll, *Freeman Accepts Post with Obama*, HARV. CRIMSON (Feb. 2, 2009), <http://www.thecrimson.com/article/2009/2/2/freeman-accepts-post-with-obama-law> [<http://perma.unl.edu/A7NS-9XE6>].

way these regulatory instruments work and the extent to which they are constrained by law.

II. OVERVIEW OF PRESIDENTIAL TRANSITIONS

Let me begin by providing an overview of a typical transition. Many of you are familiar with what happens, but some of you may not be, and it is helpful to explain the normal order of operations when a new Administration takes over.

First of all, all political appointees resign.⁴ This includes the top-level appointees in the Executive Branch both in the White House and in the agencies.

Second, “acting” senior Executive Branch officials are put in place. These officials are often holdovers from the prior Administration, as we saw with Sally Yates at the Department of Justice.⁵ The acting leadership stays in place until the Senate confirms the President’s new nominees.⁶ This process is either slower or faster depending on the pace of the nominations offered by the President and the amount of opposition they encounter in the Senate.

By now, all of the agencies I study most closely because they have the lion’s share of authority over federal environmental, natural-resource, and energy policy have their leadership confirmed: Scott Pruitt at the Environmental Protection Agency (EPA),⁷ Ryan Zinke at the Department of the Interior,⁸ Rick Perry at the Department of Energy (DOE),⁹ and Rex Tillerson at the State Department.¹⁰ As we

4. *2016 Transition Activities*, PRESIDENTIAL TRANSITION DIRECTORY, <https://presidentialtransition.usa.gov/2016transitionactivities> [<http://perma.unl.edu/FU9E-VMXR>].

5. See Carrie Johnson & Jessica Taylor, *Trump Fires Acting Attorney General for Refusing to Defend Immigration Order*, NPR (Jan. 30, 2017), <http://www.npr.org/2017/01/30/512534805/justice-department-wont-defend-trumps-immigration-order>.

6. See *The Confirmation Process for Presidential Appointees*, HERITAGE FOUND., <http://www.heritage.org/political-process/heritage-explains/the-confirmation-process-presidential-appointees> [<http://perma.unl.edu/5QRD-F53X>].

7. Coral Davenport, *Senate Confirms Scott Pruitt as E.P.A. Head*, N.Y. TIMES, Feb. 18, 2017, at A14, <https://www.nytimes.com/2017/02/17/us/politics/scott-pruitt-environmental-protection-agency.html>.

8. Esther Whieldon & Annie Snider, *Senate Confirms Ryan Zinke as Interior Secretary*, POLITICO (Mar. 1, 2017), <http://www.politico.com/story/2017/03/ryan-zinke-confirmed-interior-secretary-235563> [<http://perma.unl.edu/P87M-ZWHK>].

9. Steven Mufson, *Senate Votes to Confirm Former Texas Governor Rick Perry as Energy Secretary*, WASH. POST (Mar. 2, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/03/02/senate-votes-to-confirm-former-texas-governor-rick-perry-as-energy-secretary/?utm_term=.2f5d5e800a76 [<http://perma.unl.edu/6H6Z-TN8U>].

10. Gardiner Harris, *Rex Tillerson Is Confirmed as Secretary of State Amid Record Opposition*, N.Y. TIMES, Feb. 2, 2017, at A12, <https://www.nytimes.com/2017/02/01/us/politics/rex-tillerson-secretary-of-state-confirmed.html>.

have seen, Mr. Pruitt faced the strongest opposition, based on concerns about his prior legal positions as Attorney General of Oklahoma, his questioning of the scientific consensus on climate change, and potential ethical conflicts.¹¹ The Federal Energy Regulatory Commission, which regulates the electricity sector and approves energy infrastructure like natural gas pipelines, currently lacks a quorum, so business at that independent regulatory agency has largely ground to a halt.¹² And many other agencies have yet to see their heads confirmed. We still do not have a Secretary of Agriculture,¹³ for example, a position of obvious importance here in Nebraska. The ranks below these top jobs are largely unfilled at the moment; the Trump Administration has moved very slowly to fill the thousands of government jobs it is entitled to fill.¹⁴ This could have serious repercussions if it goes on for much longer.

The third aspect of presidential transitions to note is that career staff in the agencies typically stay in place. These employees are civil servants with certain job-security protections, and they do not tend to leave unless there is a reason for them to do so. It is, by design, hard to fire these employees, although agency heads have significant flexibility to reassign them.¹⁵

In addition to personnel, a variety of other things change quite a bit during the transition. For example, websites are rebuilt to reflect the commitments of the new Administration. The White House website was updated almost immediately following the President's swear-

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11. See, e.g., Angela Anderson, *The First Three Reasons Senators Should Oppose Scott Pruitt for EPA*, UNION CONCERNED SCIENTISTS (Dec. 8, 2016), <http://blog.ucsusa.org/angela-anderson/the-first-three-reasons-senators-should-oppose-scott-pruitt-for-epa> [<http://perma.unl.edu/7YHC-DEVN>]; Jeremy Symons, *The Growing Case Against Scott Pruitt's Nomination to Lead the EPA*, HILL (Feb. 1, 2017), <http://thehill.com/blogs/pundits-blog/energy-environment/317400-scott-pruitt-cannot-be-trusted-to-lead-the-epa> [<http://perma.unl.edu/7XFK-FZTT>].
 12. See Lori Ann LaRocco, *Energy CEOs Say Investor Money and Jobs at Risk Because FERC Isn't Functional*, CNBC (July 10, 2017), <https://www.cnbc.com/2017/07/10/energy-ceos-threaten-to-withdraw-investments-if-ferc-isnt-functional.html> [<http://perma.unl.edu/Y62U-APZY>].
 13. Sonny Perdue has since been confirmed as the Secretary of Agriculture. Jose A. DelReal & Caitlin Dewey, *Senate Confirms Perdue as Agriculture Secretary*, WASH. POST (Apr. 24, 2017), https://www.washingtonpost.com/politics/senate-expected-to-confirm-perdue-as-agriculture-secretary/2017/04/24/82daf622-2468-11e7-a1b3-faff0034e2de_story.html?utm_term=.cd540ab0b822 [<http://perma.unl.edu/KKM9-Y9UK>].
 14. Karen Yourish & Gregor Aisch, *The Top Jobs in Trump's Administration Are Mostly Vacant: Who's to Blame?*, N.Y. TIMES, <https://www.nytimes.com/interactive/2017/07/17/us/politics/trump-appointments.html> (last updated July 20, 2017).
 15. *Federal Employee Termination Procedures*, MSPB.ORG, <https://www.mspb.org/federal-employee-termination-procedures.html> [<https://perma.unl.edu/JX6V-VMF5>].

ing in.¹⁶ So, unsurprisingly, President Obama’s “Climate Action Plan” is nowhere to be found, for example. And Executive Branch agencies are now following suit. That means if you care about material that appears on a website you visit frequently, you may want to save the relevant documents, because they can disappear or become harder to find. There is significant concern that this Administration will go further than simply making cosmetic changes; scientists are worried that much of the federal government’s scientific data on climate change will disappear.¹⁷

Sometimes, in addition to revising websites, the new Administration will put constraints in place to prevent career staff in the agencies from speaking to the press without supervision from political appointees to ensure message discipline. This is the first Administration I can think of that issued a broad “gag order” of this kind, essentially telling career staff to say nothing.¹⁸

This White House also went so far as to freeze contracts,¹⁹ which affects some of the basic day-to-day work of government. We are talking about everything from toxic-waste cleanups to a variety of operational contracts that need to be executed to do the business of government. If these are frozen for a period of time, it can be very disabling.

It is also typical for a new Administration to temporarily freeze regulations that have not been finalized in order to review the rules for consistency with the new Administration’s priorities.²⁰ Some of these rules may have been submitted for regulatory review to the Office of Information and Regulatory Affairs (OIRA)—which pursuant to Executive Order 12,866 requires agencies to submit significant regulations and detailed cost–benefit analyses to the White House.²¹ Some

16. Ashley Parker, *White House Website Changes Fast*, WASH. POST (Jan. 20, 2017), https://www.washingtonpost.com/local/2017/live-updates/politics/live-coverage-of-trumps-inauguration/white-house-website-changes-fast/?utm_term=.9aa672d6d621 [http://perma.unl.edu/3JH2-72WJ].

17. See Amy Harmon, *Activists Rush to Save Government Science Data—If They Can Find It*, N.Y. TIMES, Mar. 7, 2017, at D1, <https://www.nytimes.com/2017/03/06/science/donald-trump-data-rescue-science.html>.

18. Mathew Ingram, *Trump Administration Puts Gag Order on Several Government Agencies*, FORTUNE (Jan. 24, 2017), <http://fortune.com/2017/01/24/trump-gag-order> [http://perma.unl.edu/HZM3-9VPT].

19. See, e.g., Brady Dennis & Juliet Eilperin, *Trump Administration Tells EPA to Freeze All Grants, Contracts*, WASH. POST (Jan. 24, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/01/23/trump-administration-tells-epa-to-freeze-all-grants-contracts/?utm_term=.3a35b62107c4 [http://perma.unl.edu/C69Z-E9LZ].

20. See Memorandum from Reince Priebus, Assistant to the President & Chief of Staff, to the Heads of Exec. Dep’ts & Agencies (Jan. 20, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies> [http://perma.unl.edu/6VXY-99LV].

21. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

may have been proposed but not yet finalized by the responsible agency. While every outgoing Administration rushes to complete significant rulemakings before leaving office, several major rules typically get caught in these “regulatory freeze” orders.

Soon after a transition, the new Administration must prepare the President’s proposed budget. The budget document reflects the President’s priorities and speaks to his constituencies. It appears as if this budget seeks to dramatically cut funding for the agencies, signaling President Trump’s de-regulatory agenda.²² Some observers anticipate very deep cuts for the most disfavored agencies, like the EPA.²³ It is important to note, however, that the presidential budget is not self-executing. It is essentially a wish list. Congress ultimately decides which, if any, of the President’s proposals will be converted into law.

In addition to nominations, gag orders, regulatory freezes, and budget preparation, transitions naturally bring substantive policy shifts, many of which are announced with much fanfare via executive orders signed soon after a new President takes office. These orders are a highly visible way for an incoming President to signal that there is a new sheriff in town, and the Trump Administration has made profligate use of this mechanism. Here [showing PowerPoint slide] is a screen shot of the White House website with a number of new executive orders and presidential memoranda listed.²⁴ You see, for example, the immigration order that the courts have at least temporarily blocked and which the White House has said it will replace.²⁵ As a practical matter, there is not much difference between executive orders and presidential memoranda—both can be used to direct executive agencies to undertake certain regulatory or deregulatory efforts, or to reconsider certain policies.²⁶ Executive orders are considered to be more formal than presidential memos—they are required to be

22. See Gregory Krieg & Will Mullery, *Trump’s Budget by the Numbers: What Gets Cut and Why?*, CNN, <http://www.cnn.com/2017/05/23/politics/trump-budget-cuts-programs/index.html> [<http://perma.unl.edu/6LLR-UHXS>] (last updated May 23, 2017).

23. Brady Dennis & Juliet Eilperin, *EPA Remains Top Target with Trump Administration Proposing 31 Percent Budget Cut*, WASH. POST (May 23, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/05/22/epa-remains-top-target-with-trump-administration-proposing-31-percent-budget-cut/?utm_term=.b2969cac14ed [<http://perma.unl.edu/6JYF-H4TZ>].

24. See *Presidential Actions*, WHITE HOUSE, <https://www.whitehouse.gov/briefing-room/presidential-actions> (last visited Oct. 19, 2017).

25. The legal battle regarding this immigration order has continued. Meridith McGraw et al., *A Timeline of Trump’s Immigration Executive Order and Legal Challenges*, ABC NEWS (June 29, 2017), <http://abcnews.go.com/Politics/timeline-president-trumps-immigration-executive-order-legal-challenges/story?id=45332741> [<http://perma.unl.edu/RD3F-29NZ>].

26. See generally Phillip J. Cooper, *The Law: Presidential Memoranda and Executive Orders: Of Patchwork Quilts, Trump Cards, and Shell Games*, 31 PRESIDENTIAL STUD. Q. 126 (2001).

published in the Federal Register and given an identifying number, and are considered legally binding.²⁷ But neither type of action can contravene legislation, meaning that if there is a conflict with existing law, the law governs.

A new President faces the question whether to withdraw rules that have been proposed but not finalized and whether to rescind rules that have been finalized and may already have been implemented to some extent. President Trump has already indicated that he will withdraw and rescind a variety of environmental rules, especially those related to climate change, but also various regulations affecting the oil-and-gas industry and energy policy.²⁸

A new Administration must also decide what to do about pending litigation. After any presidential transition, but especially when the White House changes parties, the Department of Justice (DOJ) must reconsider the positions it has already taken on behalf of the prior Administration as those cases move through the federal courts. A new President may want the DOJ to abandon its defense of certain rules, but he cannot simply order the Department to do so. There is an established process to follow.²⁹ If the DOJ lawyers have already briefed a case, they typically do not change their position until the client agency has taken steps to reverse its position.³⁰ Once the DOJ can point to a concrete legal shift, like a notice of proposed rulemaking that the agency is reconsidering the rule, it will go into court and say, “Our client agency has reversed its position and we now must change ours.” It is not enough though for the White House to say, “We don’t like this rule anymore.”

III. CLIMATE CHANGE AS AN ILLUSTRATION OF POLICY CHANGE

With that background in mind, I thought I might offer an example of how policy can change from Administration to Administration, drawing on the example of climate change. I would like to illustrate how the regulatory system is “sticky,” meaning that there are many obstacles to dramatic policy shifts. I am sure there are differing opinions about this feature of government—some of you may be happy to learn this, and some of you might find it frustrating, but the fact is that the federal bureaucracy is something like a super tanker, and it

27. *See id.* at 127–28.

28. *See, e.g.,* Nadja Popovich & Tatiana Schlossberg, *23 Environmental Rules Rolled Back in Trump’s First 100 Days*, N.Y. TIMES (May 2, 2017), <https://www.nytimes.com/interactive/2017/05/02/climate/environmental-rules-reversed-trump-100-days.html>.

29. *See generally* James R. Harvey III, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569 (1996).

30. *Id.*

is hard to turn a super tanker on a dime. Now, it is not hard to *announce* that you are going to do many things. Already, we have seen a lot of announcements in the forms of the presidential memos and executive orders I cited, but there is a real difference between announcing plans and executing plans to revise or repeal regulations. And the chief constraint of relevance to us, in this room, is law. In our democracy, law is a very significant constraint on the ambitions of any new Administration.

My example is President Obama's legacy on climate and energy policy, which is embodied in a variety of regulations and other Executive Branch policies, all of which the Trump Administration has announced it intends to unravel. To understand what a rollback would entail, you first need to know what the Obama Administration put in place. For those of you who follow energy, environmental law, climate change, and related topics, this will all sound familiar, but for some in the audience, a quick review will be helpful.

A. Obama-Era Climate Change Policy

There are two main pillars to climate change policy in the Obama Administration: regulations to control greenhouse gases from the transportation sector of the U.S. economy and regulations to control greenhouse-gas emissions from the electricity sector. These rules would cover almost two-thirds of U.S. greenhouse-gas emissions, so if implemented, they would have a significant impact on reducing our emissions.³¹ These regulatory policies were the second-best option which the Administration adopted when Congress failed to pass a climate bill in 2010.³² And they are the building blocks for the U.S. pledge to the Paris Accord to reduce our emissions between twenty-six and twenty-eight percent compared to 2005 levels by 2025.³³

Let's start with the transportation sector.³⁴ Everyone is familiar with fuel-efficiency standards, which are known by the acronym CAFE, which stands for Corporate Average Fuel Economy.³⁵ The Na-

31. U.S. ENVTL. PROT. AGENCY, EPA 430-R-16-002, INVENTORY OF GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2014, at 2-22 to 2-32 (2016).

32. Evan Lehmann, *Senate Abandons Climate Effort, Dealing Blow to President*, N.Y. TIMES (July 23, 2010), <http://www.nytimes.com/cwire/2010/07/23/23climatewire-senate-abandons-climate-effort-dealing-blow-88864.html?pagewanted=all>.

33. UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, U.S.A. FIRST NDC SUBMISSION, <http://www4.unfccc.int/ndcregistry/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf> [<http://perma.unl.edu/8Z47-GAQ6>].

34. See generally Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal"*, 35 HARV. ENVTL. L. REV. 343 (2011).

35. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,329–30 (May 7, 2010) (codified in scattered parts of 40 and 49 C.F.R.).

tional Highway Traffic Safety Administration sets these standards for cars and trucks pursuant to statutes passed by Congress, which focus on energy-efficient appliances and cars and the like, including most recently the Energy Independence and Security Act of 2007.³⁶ Also in 2007, the Supreme Court ruled that the EPA has the authority to regulate greenhouse-gas pollution from cars and trucks under the Clean Air Act, introducing the EPA as a second regulator for the auto industry.³⁷ Improving efficiency and cutting pollution from vehicles require the same thing, which is to reduce the amount of gasoline burned. The interesting twist is that there is a third potential regulator in this mix. The Clean Air Act has a special provision allowing California to set its own pollution standards for cars and trucks if necessary to address the state's unique air pollution problems, which also authorizes other states to copy them.³⁸ Upon taking office, President Obama was faced with this potentially fragmented approach to regulating the auto industry, and he saw an opportunity to harmonize all of these standards. In exchange for the regulatory certainty that would come with harmonization, however, the industry would need to commit to improving the efficiency of *all* cars and trucks steadily over the years, for each make and model, regardless of the composition of each fleet.³⁹ Under this program, each auto company is required to meet a different target based on the mix of vehicles it sells to consumers. In fact, the agencies set different standards for each type of vehicle, taking into account its particular footprint, which results in a sliding scale of stringency—lower standards for the largest cars and trucks and higher standards for the smaller ones.

The White House conducted a negotiation over these standards in which the two regulatory agencies worked closely together and consulted extensively with the auto industry, ultimately producing an agreement to set a CAFE standard of 54.5 miles per gallon by 2025, which would approximately double fuel efficiency compared to the 2010 standards.⁴⁰ The caveat here is that this standard is really a *projection* based on an estimate of what consumers will buy, and if it turns out that consumers buy a very different mix of vehicles than what was assumed in the government's modeling (e.g., many more

36. 42 U.S.C. §§ 17001–17386 (2012).

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

38. Freeman, *supra* note 34, at 349–50.

39. Juliet Eilperin, *Automakers, Obama Administration Agree on Fuel Efficiency Standards Through 2025*, WASH. POST (July 27, 2011), https://www.washingtonpost.com/national/health-science/obama-administration-auto-industry-strike-deal-on-vehicle-fuel-efficiency/2011/07/27/gIQA72mKdI_story.html?utm_term=.908997b785d5 [<http://perma.unl.edu/9V2Q-L6ZP>].

40. See Bill Vlasic, *Carmakers Back Strict New Rules for Gas Mileage*, N.Y. TIMES, July 29, 2011, at A1, <http://www.nytimes.com/2011/07/29/business/carmakers-back-strict-new-rules-for-gas-mileage.html>.

SUVs and fewer small cars), the standards achieved in practice will fall short of the initial projection. And that is precisely what has happened as oil prices have cratered: SUVs have been flying off the lots.⁴¹ I am happy to take questions on all of this later, but for now it's important just to appreciate that the Administration established a new comprehensive regulatory framework for addressing greenhouse-gas emissions from the transport sector, which is responsible for about one third of U.S. *emissions*. It began by setting standards for light-duty passenger vehicles, which it did in two phases from 2012–2016⁴² and 2017–2025,⁴³ and later took the same approach to medium- and heavy-duty trucks.⁴⁴

The second key climate policy adopted by the Obama Administration is known as the Clean Power Plan, which sets greenhouse-gas emission standards for the nation's new and existing fossil fuel-fired power plants.⁴⁵ The standards for the *existing* fleet of fossil fuel-fired plants is the most important and controversial part of the Plan because these plants are old, dirty, lightly regulated if regulated at all, and have been in operation on average for much longer than what was originally anticipated as their useful lives. They have been clunking along, for some of them, well over fifty years.⁴⁶

The question facing the Administration was how to deal with greenhouse gases from these plants under the authority provided in

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41. See Nathan Bomey, *Used Cars Get Cheaper as People Buy More SUVs*, USA TODAY (June 23, 2017), <https://www.usatoday.com/story/money/cars/2017/06/23/used-car-prices-falling/415559001> [<http://perma.unl.edu/A7TW-LZVP>].
 42. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,409 (May 7, 2010) (codified at 40 C.F.R. pts. 531, 533, 536–38).
 43. 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624, 62,771–72 (Oct. 15, 2012) (to be codified at 40 C.F.R. pts 85, 86, 600 and 49 C.F.R. pts 523, 531, 536, 537).
 44. Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2, 81 Fed. Reg. 73,478, 73,684–86 (Oct. 25, 2016) (codified in scattered parts of 40 C.F.R.); Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 76 Fed. Reg. 57,106, 57,134–97 (Sept. 15, 2011) (codified in scattered parts of 40 and 49 C.F.R.).
 45. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60); *Climate Change: Obama Unveils Clean Power Plan*, BBC NEWS (Aug. 3, 2015), <http://www.bbc.com/news/world-us-canada-33753067> [<http://perma.unl.edu/HYL4-NCM4>].
 46. Richard L. Revesz & Jack Lienke, *Obama Takes a Crucial Step on Climate Change*, N.Y. TIMES (Aug. 3, 2015), <https://www.nytimes.com/2015/08/04/opinion/obama-takes-a-crucial-step-on-climate-change.html> (“Traditionally, the economically useful life of a coal-fired plant was thought to be about 30 years. As of 2014, coal-fired plants in the United States had been operating for an average of 42 years, and many plants had been in service far longer”).

the Clean Air Act in order to reduce GHG emissions from the electricity sector. The EPA decided to use a little-known section of the Act which allows the Agency to set standards for pollutants that are not otherwise controlled under the Act's major pollution programs.⁴⁷ This gap-filling section of the law requires the states to set performance standards for existing sources of otherwise unregulated pollutants, subject to guidelines issued by EPA.⁴⁸ Importantly, the Act defines the performance standards the states must set in terms of the "best system of emissions reduction" that in the EPA Administrator's view has been adequately demonstrated to be achievable by the regulated sources.⁴⁹

The most controversial aspect of this rulemaking is the EPA's view that the "best system" for reducing emissions of GHGs from these sources can entail a "grid-wide" approach, which takes into account opportunities to reduce emissions at a particular source by substituting another less polluting source, for example by substituting lower polluting natural gas and renewables for higher polluting coal-fired plants to produce the same amount of energy on the interconnected grid.⁵⁰ This approach goes beyond requiring minor operational or equipment modifications to improve efficiency that each plant could make to units on-site.

Reacting to what they viewed as the EPA's overreach, twenty-eight states, including the State of Nebraska, along with a variety of utility-sector stakeholders, sued to challenge the rule.⁵¹ This fall, the District of Columbia Circuit Court of Appeals heard argument en banc (with a full complement of the court's ten active judges) over the legality of the plan.⁵² The consensus view after the arguments was that the Government won the day; it seemed unlikely, based on the judges' questions, that there would be six votes to invalidate the Clean Power Plan.⁵³ But that was before the presidential election. Following the

47. Recent Regulation, *EPA Interprets the Clean Air Act to Allow Regulation of Carbon Dioxide Emissions from Existing Power Plants*, 129 HARV. L. REV. 1152, 1154–56 (2016).

48. *Id.* at 1154.

49. Clean Air Act, 42 U.S.C. § 7411(a)(1) (2012) ("The term 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which . . . the Administrator determines has been adequately demonstrated.")

50. See generally LINDA TSANG & ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44480, CLEAN POWER PLAN: LEGAL BACKGROUND AND PENDING LITIGATION IN *WEST VIRGINIA V. EPA* (2017), <https://fas.org/sgp/crs/misc/R44480.pdf> [<http://perma.unl.edu/ADT2-WB6Y>].

51. *Id.* at 10.

52. *Id.* at 15–16.

53. See Jonathan H. Adler, *The En Banc D.C. Circuit Meets the Clean Power Plan*, WASH. POST (Sept. 28, 2016), <https://www.washingtonpost.com/news/volokh-on>

election, the Trump Administration asked the Department of Justice to request that the court hold the case in abeyance, and although the case was both briefed and argued, the court agreed. The court has yet to issue an opinion and may never do so.

Thus, when the Obama Administration left office, it had adopted two important rules to address greenhouse-gas emissions: one to control emissions from the transportation sector and the other to limit emissions from the utility sector. Neither had been done before.

The Obama Administration took a variety of other steps too, including adopting rules to regulate methane from new oil-and-gas facilities on both public and private land.⁵⁴ Methane is a highly potent greenhouse gas, about twenty-five times the global warming potential of carbon dioxide,⁵⁵ so limiting venting to the atmosphere is important. The Obama DOE strengthened many appliance efficiency standards for things like microwaves, fridges, and TVs, which consume huge amounts of energy and which had been stalled for years, even though technology exists to make them much more energy efficient.⁵⁶

The Obama Administration also prioritized siting renewable-energy installations by accelerating the permitting process and working with the states to get big solar and wind installations built on public lands.⁵⁷ And recall that, at the beginning of the Administration, when Congress passed the Recovery Act to shore up the faltering economy, at least sixty billion dollars was directed to spending on energy, including grid improvements, battery technologies, and advanced vehi-

spiracy/wp/2016/09/28/the-en-banc-d-c-circuit-meets-the-clean-power-plan/?utm_term=.72f8adb987eb [http://perma.unl.edu/3UFQ-NPTQ].

54. Press Release, Env'tl. Prot. Agency, EPA Releases First-Ever Standards to Cut Methane Emissions from the Oil and Gas Sector (May 12, 2016), <https://www.epa.gov/newsreleases/epa-releases-first-ever-standards-cut-methane-emissions-oil-and-gas-sector> [http://perma.unl.edu/X63A-USGU]; see Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule, 81 Fed. Reg. 35,824 (July 3, 2016) (codified at 40 C.F.R. pt. 60); Waste Prevention, Production Subject to Royalties, and Resource Conservation; Final Rule, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (codified at 43 C.F.R. pts. 3100, 3160, 3170).
55. See *Understanding Global Warming Potentials*, EPA, <https://www.epa.gov/ghgemissions/understanding-global-warming-potentials> [http://perma.unl.edu/ZY2S-8WBK].
56. See NRDC, STRONG U.S. ENERGY EFFICIENCY STANDARDS: DECADES OF USING ENERGY SMARTER 3–4 (2014), <https://www.nrdc.org/sites/default/files/appliance-energy-efficiency-standards-FS.pdf> [http://perma.unl.edu/A7VM-L3V4].
57. Jenny Rowland & Julie Katsnelson, *The Obama Administration Just Made It Easier to Put Solar and Wind On Public Lands*, THINKPROGRESS (Nov. 11, 2016), <https://thinkprogress.org/solar-leasing-public-lands-rule-29eb962804ce> [http://perma.unl.edu/PA6L-RMHR].

cle technologies.⁵⁸ The Administration also supported extending tax credits for renewable energy, which many Republicans also support.⁵⁹

The final aspect of the Obama legacy to note is the President's commitment to negotiating the international climate agreement and his historic partnership with President Xi of China. It was striking for these two leaders to shake hands and publicly say they would work together on the Paris Accord.⁶⁰ This Accord was a breakthrough in international climate change negotiations because it encompasses all of the world's major economies, both developed and developing, unlike the Kyoto Protocol, which created a bifurcated regime in which only the developed world committed to binding emissions cuts.⁶¹

B. Trump Administration Changes to Climate Change Policy

All of this background on the Obama Administration's policies is necessary to set the stage for the key questions, which are: What can a new Administration do to change course, using which instruments, and what are the constraints on dramatic policy reversals?

This next slide contains the list of what President Trump has indicated he might want to reverse on climate and energy policy. First, he could withdraw from the Paris Agreement. There is clearly an internal debate about this question. Yet, although this decision is the President's alone and is not reviewable by any court, withdrawing from the Paris Agreement is not something the President can do instantaneously with the stroke of a pen. He can announce his *intent* to withdraw the United States from the Accord, but he can't effectuate it right away because the Accord contains a four-year withdrawal process.⁶²

58. Press Release, Office of the Press Sec'y, White House, Fact Sheet: The Recovery Act Made the Largest Single Investment in Clean Energy in History, Driving the Deployment of Clean Energy, Promoting Energy Efficiency, and Supporting Manufacturing (Feb. 25, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/fact-sheet-recovery-act-made-largest-single-investment-clean-energy> [http://perma.unl.edu/2L9M-8BBX].

59. *Id.*

60. Mark Landler & Jane Perlez, *Rare Harmony as China and U.S. Commit to Climate Deal*, N.Y. TIMES, Sept. 4, 2016, at A1, <https://www.nytimes.com/2016/09/04/world/asia/obama-xi-jinping-china-climate-accord.html?mtrref=www.google.com&gwh=688C4C116461142F915A6CC7AF51AC6D&gwt=pay>.

61. Kyoto Protocol to the United Nations Framework Convention on Climate Change, *adopted* Dec. 10, 1997, 37 I.L.M. 22 (entered into force Feb. 16, 2005) [hereinafter Kyoto Protocol].

62. Framework Convention on Climate Change, Adoption of the Paris Agreement, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015), <https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> [http://perma.unl.edu/3YTM-FUGD]; Chelsea Harvey, *Withdrawing From the Paris Deal Takes Four Years. Our Next President Could Join Again in 30 Days*, WASH. POST (June 5, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/06/05/withdrawing-from-the->

In fact, the day President Trump's withdrawal would take effect would be the day *after* the next presidential election. And a new Administration could always reverse Trump's decision and reaffirm the United States' commitment or submit a new U.S. pledge.

The much more concerning possibility is that the Administration might go one step further and withdraw from the underlying international agreement known as the U.N. Framework Convention on Climate Change, which was negotiated by the George H.W. Bush Administration in 1992 and was supported by the Senate at the time on a bipartisan basis.⁶³ That process would take only one year and would be much more disruptive. It seems unlikely that the President would go this far—rejecting a deal struck by a Republican President that attracted not a single dissenting vote in the Senate and that commits the United States to nothing onerous or even binding—but it is always a possibility. Rejoining that ratified treaty could be somewhat more onerous than recommitting to the Paris Accord, which was signed by the President as an executive agreement.⁶⁴

It's also worth noting that the Administration does not need to withdraw from the Paris Accord in order to renege on the U.S. pledge. That is because the agreement depends on voluntary domestic action, and if the Administration chooses to roll back the key domestic regulatory pillars of the pledge—the fuel efficiency standards and the Clean Power Plan—it can effectively thwart our ability to fulfill our Paris commitment. So withdrawal would not really be about meeting or not meeting the U.S. pledge; it would really be a politically motivated gesture: a gift to the President's constituents, a crystal-clear message about how the Administration views climate change, and a symbolic thumb in the eye to the rest of the world.

In addition, President Trump could direct his EPA Administrator, Scott Pruitt, to rescind the Clean Power Plan (something that Pruitt is champing at the bit to do; he's made no secret of it; recall that he was the Attorney General of Oklahoma and joined the litigation challenging the Plan).⁶⁵ But again, the President cannot instantaneously ac-

paris-deal-takes-four-years-our-next-president-could-join-again-in-30-days/?utm_term=.3376faa3cc8a [http://perma.unl.edu/U9P3-GH94].

63. See President George H. W. Bush, *Statement on Signing the Instrument of Ratification for the United Nations Framework Convention on Climate Change*, AM. PRESIDENCY PROJECT (Oct. 13, 1992), <http://www.presidency.ucsb.edu/ws/?pid=21611> [http://perma.unl.edu/M425-DZMP].

64. Zack Colman, *Trump Told Pruitt to Make Plan to Leave Paris Deal, Stay in UNFCCC*, CLIMATE HOME (May 31, 2017), <http://www.climatechangenews.com/2017/05/31/trump-told-pruitt-make-plan-leave-paris-deal-stay-unfccc> [https://perma.unl.edu/3AJ7-PP35] (explaining the difference between the UNFCCC and the Paris Agreement).

65. Chris Mooney, Brady Dennis & Steven Mufson, *Trump Names Scott Pruitt, Oklahoma Attorney General Suing EPA on Climate Change, To Head the EPA*, WASH. POST (Dec. 8, 2016), <https://www.washingtonpost.com/news/energy-envi->

compish this reversal simply by issuing an executive order. Pursuant to the Administrative Procedure Act,⁶⁶ the federal law that governs federal agency action, as it has been interpreted by the D.C. Circuit, a legally binding rule can only be rescinded through the same process used to adopt it, which requires notice-and-comment rulemaking—a process that takes quite a bit of time.⁶⁷ Now, the President can certainly *announce* that he wants to rescind the Clean Power Plan, but since pollution control is the EPA's statutory responsibility, the Agency must undertake any rescission, and in doing so, it must follow the legally required process. What the Agency chooses to do must also survive judicial review since litigation will almost certainly ensue, challenging the Agency's legal authority to do what it has done or arguing that it has been arbitrary, or both.

At the same time, the Trump Administration could take steps to rescind or weaken a variety of other legally effective rules, including the methane standards I mentioned, the rule regulating hydraulic fracturing on public lands, or even appliance efficiency standards. But in all of these cases, the responsible agency, whether the EPA, DOI, or DOE, must go through the notice-and-comment process and must defend its actions against legal challenge. The longer the rules have been in place, the harder they may be to undo because of reliance interests: regulated entities will have spent money complying with these rules, and courts take reliance interests into account when reviewing an agency's decision to change course.⁶⁸ Generally speaking, the existence of significant reliance interests will tend to constrain the agency's flexibility to do an about-face on a rule.⁶⁹ In some instances, larger or more established businesses that are committed to meeting regulatory standards will want to keep baseline rules in place in order to prevent smaller or newer businesses, which are less inclined to follow the rules, from gaining a competitive advantage. Moreover, there is only so much bandwidth in any agency, and it takes focus and resources to rewrite these rules. If the EPA were to rush the rulemaking process, or if the White House were to truncate the OIRA's normally rigorous regulatory review, the rules could be more vulnerable to invalidation in the courts.

ronment/wp/2016/12/07/trump-names-scott-pruitt-oklahoma-attorney-general-suing-epa-on-climate-change-to-head-the-epa/?utm_term=.18637398c4d4 [http://perma.unl.edu/6DPW-SCN7].

66. 5 U.S.C. §§ 500–596 (2012).

67. See generally Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: *Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 15–22 (1994).

68. See generally Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1854–56 (2015).

69. See generally Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112 (2011).

Beyond the Clean Power Plan, the Administration could try to rescind the “endangerment finding,” which is the EPA’s science-based determination that greenhouse gases pose a sufficient danger to health and the environment that they warrant regulation.⁷⁰ This move would invite a firestorm of criticism because it would mean that the EPA has decided to reject the overwhelming scientific consensus on climate change, which is documented in the EPA’s elaborate rulemaking record and in the voluminous peer-reviewed literature.⁷¹ Here again though, the EPA would have to go through a notice-and-comment process and defend its decision in court to an audience of judges that would undoubtedly be skeptical. Even conservative judges will be dubious about an agency reversal based on the most outlier claims when those claims contradict a staggering amount of scientific evidence. As a matter of training and temperament, judges are not especially open to “alternative facts.”⁷² Still, it’s possible to imagine the Trump Administration taking this particular litigation risk to make a political point—which is that it just doesn’t believe the science of climate change. Several cabinet officials, including Scott Pruitt, have questioned the science,⁷³ as has President Trump.⁷⁴

Already, the Administration has signaled that it will reconsider the later years of the GHG/CAFE standards for cars and trucks, which

70. In reality, there is not just one but several endangerment findings—these findings are the legal predicate to regulation under various Clean Air Act programs that address mobile and stationary sources. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (codified at 40 C.F.R. ch. 1).

71. BENJAMIN DEANGELO ET AL., U.S. ENVTL. PROT. AGENCY, ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDINGS FOR GREENHOUSE GASES UNDER SECTION 202(A) OF THE CLEAN AIR ACT (2009), https://www.epa.gov/sites/production/files/2016-08/documents/endangerment_tsd.pdf [<http://perma.unl.edu/E7SX-9SKM>].

72. President Trump’s senior adviser Kellyanne Conway called White House Press Secretary Sean Spicer’s claims about the crowd size at the inauguration “alternative facts,” a statement which caused the phrase to gain instant popularity. See Eric Bradner, *Conway: Trump White House Offered “Alternative Facts” on Crowd Size*, CNN (Jan. 23, 2017), <http://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/index.html> [<http://perma.unl.edu/RBL7-Y488>]; Conway: “Alternative Facts”, MERRIAM-WEBSTER (Jan. 22, 2017), <https://www.merriam-webster.com/news-trend-watch/conway-alternative-facts-20170122> [<http://perma.unl.edu/F7Q8-3XQV>] (stating Internet searches of the word “facts” spiked after Kellyanne Conway described statements as alternative facts).

73. See Mazin Sidahmed, *Climate Change Denial in the Trump Cabinet: Where Do His Nominees Stand?*, GUARDIAN (Dec. 15, 2016), <https://www.theguardian.com/environment/2016/dec/15/trump-cabinet-climate-change-deniers> [<http://perma.unl.edu/Z6FT-Z63R>].

74. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 6, 2012, 2:15 PM), <https://twitter.com/realdonaldtrump/status/265895292191248385?lang=en> [<http://perma.unl.edu/7YRS-X8P2>].

the EPA set through 2025.⁷⁵ But there are significant constraints on doing so: some legal, some political, and some pragmatic. Just before the Obama Administration left office, the EPA conducted a mid-term review (one that had been promised by the Agency as part of the agreement with the industry, but which the EPA rushed to complete ahead of the 2018 deadline) and made a “determination” that the standards for the later years, from 2022–2025 are still reasonable and achievable by the industry.⁷⁶ The Trump Administration has already announced that it will reexamine this finding.⁷⁷ But the rules themselves, which set the standards, are legally binding. To freeze, weaken, or amend them would require the same legal process discussed earlier, which is notice-and-comment rulemaking.⁷⁸

If the EPA does undertake a rulemaking, it is possible that the Agency might do something fairly modest to make compliance easier for the auto industry in the post-2020 period. But they could go farther and weaken the standards substantially or even freeze them. There are real risks to such a move. First, the auto industry may not be entirely aligned on the stringency question. Companies plan their new model years well in advance and may have already sunk considerable costs into compliance. Some companies may prefer stricter rules because they think it plays to their competitive advantage. The auto companies also value regulatory certainty and uniformity—in fact, that was the big prize for them in supporting these standards.⁷⁹ And auto-parts or -component manufacturers might be against any weakening of the standards.

Most importantly, if the Obama-era agreement unravels, California will withdraw its support from the federal standards. It will reverse its decision to “deem” compliance with the federal standards to be compliant with the state’s own stricter standards and seek to enforce its own standards instead. California would claim the authority to do this under the preemption waiver it has already received from the Obama EPA, which goes to 2025. The EPA would have to revoke the waiver (something for which there is no precedent) or sue California to challenge its authority.

One way or another, a significant rollback of the historic fuel-economy standards could backfire on the auto industry and land them pre-

75. Sonari Ginton, *Trump Administration Takes Key Step to Rolling Back Auto Fuel Standards*, NPR (Aug. 14, 2017), <http://www.npr.org/2017/08/14/543474251/trump-administration-takes-key-step-to-rolling-back-auto-fuel-standards>.

76. Brad Plumer, *Trump’s Plan to Roll Back Obama’s Fuel Economy Rules for Cars, Explained*, Vox (Mar. 15, 2017), <https://www.vox.com/energy-and-environment/2017/3/15/14828070/trump-fuel-economy-standards> [<http://perma.unl.edu/B7RR-2KB5>].

77. *Id.*

78. See Anthony, *supra* note 67, at 15–22.

79. Freeman, *supra* note 34.

cisely where they were ten years ago—staring at the prospect of discordant regulation and years of litigation. Congress could take the drastic step of amending the Clean Air Act to eliminate California’s special status, but that move would face significant opposition and would likely fail unless the legislative filibuster rule is changed to allow passage with only fifty votes in the Senate. While I do not entirely rule out this possibility, it does not seem like the most likely path.

There are, however, a number of other less visible policies that the Administration can change quite easily with the stroke of a pen. For example, President Trump can adopt a new method for how the U.S. government calculates the costs and benefits of reducing greenhouse gases. Right now, agencies must calculate the “social cost of carbon” when proposing new rules.⁸⁰ If a rule will increase carbon pollution, that cost is factored in, and if it will reduce carbon pollution, that benefit is factored in.⁸¹ The Administration can essentially attach a lower value to reducing a ton of carbon pollution, which means that it will be marginally harder to justify rules that are helpful in addressing climate change, like energy-efficiency standards and greenhouse-gas emission standards. Likewise, rules that may cause an increase in carbon pollution won’t suffer quite as much of a hit on the *cost* side of the cost–benefit calculation. Because the social cost of carbon is determined by OIRA pursuant to a Clinton-era executive order,⁸² its approach can change just because the President wants it to.

Some policy shifts require relatively little process. For example, the Trump Administration could lift the Obama Administration’s temporary limit on new coal leasing on federal lands, which it imposed to conduct a comprehensive environmental-impact study of the leasing program.⁸³ This policy was adopted by secretarial order, not rulemaking, so the new Secretary of the Interior could simply reverse it.⁸⁴ There are some lingering questions about the legal obligations an agency has once it has begun an environmental-impact analysis under the applicable federal law, so the decision could be challenged in court, but a simple signature by the Interior Secretary, Ryan Zinke, would lift the pause.

In addition, President Trump could try to reverse his predecessor’s withdrawal of federal lands from oil-and-gas development. President Obama protected a significant share of offshore areas from oil-and-gas

80. See generally Jonathan S. Masur & Eric A. Posner, *Climate Regulation and the Limits of Cost–Benefit Analysis*, 99 CAL. L. REV. 1557 (2011).

81. *Id.* at 1577–79.

82. Exec. Order No. 12,866, *supra* note 21.

83. Press Release, U.S. Dep’t of the Interior, Secretary Jewell Launches Comprehensive Review of Federal Coal Program (Jan. 15, 2016), <https://www.doi.gov/press-releases/secretary-jewell-launches-comprehensive-review-federal-coal-program> [<http://perma.unl.edu/5B3L-J432>].

84. See *id.*

drilling before he left office, including areas offshore in the Arctic and the Atlantic. He did so under a legal provision in the Outer Continental Shelf Lands Act,⁸⁵ which allows presidential withdrawals, but there is an open question about whether such withdrawals are permanent or can be reversed.⁸⁶ If President Trump does try to cancel these withdrawals, litigation over his authority to do so is certain to follow. The same would be true if the President tried to reverse or dramatically shrink designations of national monuments.⁸⁷

All of these policy shifts and more are possible, but they will not be immediate. They must follow applicable law, they must be defended in court if litigated, and all of them would be legally challenged. My overarching point is that federal executive power is not absolute or unconstrained; indeed, far from it. The President is limited not only by the Constitution but also by the Administrative Procedure Act, which some scholars have called “quasi-constitutional” because of its outsize importance in ensuring that government agencies act in a rational, transparent, and accountable manner consistent with their statutory mandates.⁸⁸

IV. CONSTRAINTS ON PRESIDENTIAL POLICY REVERSALS

So let me move on now and talk a bit more about the constraints on presidential policy reversals. How much flexibility does a President have? First, the Constitution constrains what the President can do.⁸⁹ Second, agencies are constrained by their governing statutes, from which they derive the legal authority to act.⁹⁰ The statute the agency is purporting to implement, whether it’s an immigration law, an environmental law, or anything else, determines the scope of the agency’s authority.⁹¹ Some statutes confer broad power upon an agency, but others can be quite specific. A law like the Clean Air Act can establish a legal threshold an agency must meet before regulating, dictate the

85. 43 U.S.C. §§ 1331–1356b (2012).

86. See, e.g., Tom DiChristopher, *Environmental Groups Sue Trump in a Bid to Defend Obama’s Arctic Drilling Ban*, CNBC (May 3, 2017), <https://www.cnbc.com/2017/05/03/conservation-groups-sue-trump-to-defend-obamas-arctic-drilling-ban.html?view=story&%24DEVICE%24=native-android-mobile> [http://perma.unl.edu/7RDK-7F63].

87. John D. Leshy & Mark Squillace, *The Endangered Antiquities Act*, N.Y. TIMES, Apr. 1, 2017, at A23, <https://www.nytimes.com/2017/03/31/opinion/the-endangered-antiquities-act.html>.

88. See, e.g., Jerry L. Mashaw, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975, 980 (2010); Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 937 (2016).

89. Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359 (2017).

90. See Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1144–45 (2014).

91. *Id.*

steps an agency must take to develop and justify a regulation, and sometimes even specify what data is necessary to support a regulatory choice. And this is all above and beyond what the Administrative Procedure Act requires. In this sense, law constrains the bureaucracy. I like to say to my students that an agency head does not wake up in the morning—whether the Secretary of Energy, the Secretary of the Interior, or the EPA Administrator—and say, “I think I will do whatever I want today.” Agencies are creatures of statute. Congress has delegated them certain powers, and they may not act beyond their authority—the limits of which are, ultimately, determined by the courts.

In addition to the limits imposed by an agency’s governing statute, agencies must comply with a variety of other laws. A number of statutes apply to all federal agencies, instructing them, for example, to take into account environmental impacts or impacts on small business.⁹²

Of course, the Administrative Procedure Act, as I’ve mentioned, is a significant constraint on agency action. I have been telling my students that they should be carrying the APA around in their pocket right now because of its importance as a brake on government policy reversals. The APA is a remarkable statement of American legal principles. It establishes an expectation that the government will be rational, above all, and requires agencies to follow certain procedures to ensure transparency and accountability.⁹³ The APA creates a presumption of judicial review of agency action—meaning access to the courts—and it prescribes what standards of review apply to what kinds of agency decisions. These standards of review are meant to determine how closely the courts will scrutinize agency action and how much deference they will apply.

And finally, agencies must also comply with executive orders and presidential memos. It’s important to recognize that these are not laws, however. If we analogize to the private sector, they are more akin to a managerial memo from a CEO instructing his executive officers about how they should carry out their responsibilities. These instructions can add burdens to agencies that statutes do not impose, such as the requirement to do a rigorous cost–benefit analysis on significant rules. But if such requirements conflict with statutes passed by Congress, the statutory requirements prevail. Executive orders and presidential memoranda do not supersede or preempt either statutes or the Constitution.

Still, there is significant latitude to change policy within these constraints. If an Administration has relied primarily on executive in-

92. See, e.g., National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 (2012); Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified as amended at 5 U.S.C. §§ 601–612 (2012)).

93. Jill Nylander, *The Administrative Procedure Act*, 85 MICH. B.J. 38, 39–40 (2006).

struments to make policy, a subsequent Administration can reverse that policy using the same tools. This is an instance of “Live by the sword; die by the sword.” As I noted, the Obama Administration faced an intransigent Congress after 2010 and, as prior presidents had done, turned to executive power to accomplish much of its policy agenda. In some instances, the agencies have interpreted existing statutes in creative ways to implement new policies that they believe are within their statutory mandate but have gone unaddressed. People have widely divergent opinions on the propriety of such interpretations, which are normally adopted to address new problems not necessarily foreseen by the enacting Congress.

On the one hand, some people argue that agencies should not stretch their authority to meet new challenges and should await clear instruction in new statutes passed by Congress. On the other hand, since Congress so rarely updates major regulatory statutes, many agencies are stuck implementing outdated laws and are hamstrung by them in dealing with the challenges of a modern economy and society.⁹⁴ And there is usually some flexibility in the regulatory authority Congress delegates because Congress cannot anticipate every possible situation or use precise enough language to cover every detail of a regulatory program. Indeed, there is a long tradition of courts deferring to “reasonable” agency interpretations of their legal mandates. The question boils down to: When does an interpretation go too far?⁹⁵

It is popular to rail against the government and easy to dismiss people working in the federal agencies as nameless, faceless bureaucrats, but in my experience, most people working in these agencies are trying, like all of us, to do their jobs, and often they are operating under difficult circumstances. Think of independent regulatory agencies like the Federal Communications Commission and the Federal Energy Regulatory Commission, or an executive agency like the Environmental Protection Agency, which are implementing laws that haven’t been amended for at least forty years and in some cases since the Depression. And they are trying, in good faith in my experience, to tackle the economic, public health, social, consumer, and criminal justice issues that arise in their assigned domains with these old, outdated statutes. The Federal Communications Act predates the Internet.⁹⁶ The Federal Power Act predates the modern electricity

94. See generally Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014) (explaining how agencies are grappling with congressional failure to pass new laws amidst economic and technological developments).

95. See generally *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844–63 (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, and the principle of deference to administrative interpretations.”).

96. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 (2012)).

grid.⁹⁷ The Clean Air Act anticipated that new pollution problems would emerge but did not deal squarely or comprehensively with global warming.⁹⁸ It is no surprise that the responsible agencies have been forced to engage in a certain amount of creative adaptation using the laws that they possess in order to address the modern problems that we face.

And when Congress is out of the game, as it were—when Congress does not regularly update statutes to keep up with new economic developments, new technology, and new science—when the legislative branch is inert, the Executive Branch is left to use the United States Code, that is, the laws on the books. It should be no surprise to anyone that presidents want to achieve their policy agendas, and to do that, they will use the instruments at their disposal.

What this all boils down to is that presidents can change policy through agency regulations without congressional approval. And that is what we see so far with the Trump Administration's announced regulatory rollbacks. Congress really has very little to do with it. Now, if it wants to, the Republican Congress could help the Trump Administration. Congress can pass new statutes or amend existing ones if they wish. But even when you own the House and the Senate, along with the presidency, it can be challenging to get things done. You see that in Congress now—Republicans are having difficulty within their own party trying to repeal and replace the Affordable Care Act,⁹⁹ or making progress on tax reform,¹⁰⁰ or getting an infrastructure bill off the ground.¹⁰¹ And this leaves the President to act unilaterally through the regulatory process, which means via his executive agencies. What this means is that President Trump can, if he follows the appropriate legal procedures, reverse course on the Clean Power Plan, the fuel-efficiency standards, or the other policies I cited. But this power of reversal is not absolute.

97. The Federal Power Act was adopted in 1935. See Public Utility Act of 1935 tit. II, Pub. L. No. 74-333, 49 Stat. 803, 838-63 (1935) (codified as amended at 16 U.S.C. §§ 791a-828c (2012)).

98. See Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. §§ 7401-7671q (2012)).

99. Juliet Eilperin, Sean Sullivan & Ed O'Keefe, *Senate Republicans' Effort to "Repeal and Replace" Obamacare All but Collapses*, WASH. POST (July 18, 2017), https://www.washingtonpost.com/powerpost/trump-suggests-republicans-will-let-aca-market-collapse-then-rewrite-health-law/2017/07/18/5e79a3ec-6bac-11e7-b9e2-2056e768a7e5_story.html?utm_term=.43aaebb6ec7f [http://perma.unl.edu/UE6H-TUS7].

100. Russell Berman, *Budget Fight Imperils GOP's Tax Reform Dreams*, ATLANTIC (Aug. 7, 2017), <https://www.theatlantic.com/politics/archive/2017/08/why-republicans-cant-just-pivot-to-tax-reform/535764> [http://perma.unl.edu/6PRD-KSKS].

101. *Republicans, Democrats Bicker over Infrastructure Plans*, REUTERS (Jan. 24, 2017), <http://www.reuters.com/article/us-usa-congress-infrastructure-idUSKBN1582G7> [http://perma.unl.edu/C4MW-D6HN].

I should also say that I do think it is important for agencies to be able to change their view. You do not want agencies locked indefinitely into positions, policies, and rules because you do not want a government that's incapable of adjusting to new realities. And, in all fairness, when you win the election, you should be entitled to put your policy prerogatives into operation. At the same time, there must be some ballast in the system to prevent arbitrary swings and the instability that comes with it. This is one of the most profound things about the American legal system. We have made a commitment in the Administrative Procedure Act to nonarbitrary government.¹⁰² This is an astonishing thing. Agencies are delegated awesome power, but they are obligated to justify their decisions, and courts are empowered to oversee them. And as I said earlier, for both "liberal" and "conservative" judges, the notion that there are alternative facts based on one's ideology is anathema.¹⁰³ In the legal world, there is no such thing as alternative facts. There are facts, and there are justifications for policies that pass the rationality test, and there are justifications that do not. Judges are not interested in imaginary things. And my prediction is that even very conservative judges and Justices, even those with pre-commitments to certain methodologies or philosophies of statutory and constitutional interpretation, are committed to the idea of rationality. That is the essence of what we teach in law school—that you are not entitled to simply assert claims without supporting them. The Administrative Procedure Act embodies this obligation to rationality, and the courts are required to enforce it.

Now I was planning to go over the key cases on the extent to which agencies can change their minds—I was planning to discuss *State Farm*,¹⁰⁴ *Fox TV*,¹⁰⁵ *Chevron*,¹⁰⁶ and *Brand X*.¹⁰⁷ These cases show that agencies can and do change policy but that there are certain limits. For one thing, it's hard to do an about-face when you must overcome an elaborate record that supports the initial decision. Courts will also scrutinize policy shifts closely when there are reliance interests.¹⁰⁸ And there also appear to be powerful constraints on the deference the Supreme Court is willing to grant to policy shifts that have unprecedented and broad economic impacts.¹⁰⁹ But we do not have

102. 5 U.S.C. § 706 (2012); see Nicholas Angelocci, *KSR v. Teleflex: Obvious Ambiguity*, 18 DEPAUL J. ART TECH. & INTELL. PROP. L. 293 (2008).

103. See Bradner, *supra* note 72; Ari Melber, *Why Trump Lost: Judge Slams Alternative Facts*, MSNBC (Feb. 6, 2017), <http://www.msnbc.com/the-last-word/watch/why-trump-lost-judge-slams-alternative-facts-871464003958>.

104. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

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

106. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

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

108. See Krishnakumar, *supra* note 68, at 1854–56.

109. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

time for a long doctrinal discussion. My message to the law students here is: please take Administrative Law.

I wanted to mention just one more tool being used right now to reverse policy because knowing something about it will help you to better understand what is unfolding in the first few months of the new Administration. Unbeknownst to most people in the country, Congress and the President are using a very powerful kind of super weapon called the Congressional Review Act (CRA) to retroactively cancel rules that are already in place.¹¹⁰ This statute was passed in the 1990s and was used only once before to jettison an unpopular ergonomics rule that was issued at the close of the Clinton Administration.¹¹¹ To be honest, none of us ever thought it would amount to much. In fact, we professors of Administrative Law never used to teach much about it until now. The CRA allows the House and the Senate to “disapprove” already final and legally effective rules using a fast-track procedure that requires only a majority vote with no filibuster potential.¹¹² And that’s why it is so powerful.

The CRA allows Congress to retroactively reach rules that have been adopted within the prior sixty legislative days.¹¹³ How those days are counted turns out to be complicated, but what matters is that only congressional working days count, and since Congress is often in recess, sixty legislative days can turn into something like six months. So the 115th Congress can reach back to June of the prior year and disapprove Obama-era rules that were adopted six months ago. Now, you may say, “Well, that’s not a terrible idea because every Administration rushes to the finish line and they adopt a lot of rules that are sometimes called ‘midnight regulations,’ and they should be looked at carefully.” The problem is that the CRA is a very blunt instrument and can have some far-reaching and possibly unintended consequences. If Congress disapproves the rule using the fast-track procedure, and the new President signs the resolution, not only is the existing rule eliminated, but the CRA dictates that the agency can never issue a rule that is “substantially the same.”¹¹⁴ And that is an astonishing thing—to permanently disable an agency from regulating just because you disapproved of a rule adopted at a particular time. No one yet knows what this means because no court has ever interpreted the relevant provision and defined what *substantially the same* means. But I predict that there will be a legal clash over this question sooner or later because there may well be a statutory mandate *requir-*

110. 5 U.S.C. §§ 801–808 (2012).

111. Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2162 (2009).

112. § 802(d).

113. § 801(d).

114. § 801(b)(2).

ing regulation, which will lead to a direct conflict with the CRA's prohibition. When Congress adopted the CRA, it was not clear that its use could amount to substantively amending regulatory statutes to essentially cancel key provisions.

This Congress has been active in using the CRA: there are now forty-one resolutions pending to disapprove rules, and two have already been signed by the Trump Administration, one of which was withdrawing a rule that took many years to update to prevent coal companies from dumping mining waste into rivers and streams of the United States without taking adequate precautions to protect U.S. waters.¹¹⁵

I mention this because Congress is now sorting through the approximately 150 regulations that are eligible for disapproval.¹¹⁶ The biggest constraint on this process now is that under the CRA, each rule must be disapproved one at a time. But Congress could pass a new law to allow bundling of rules, and if that happens, Congress could eliminate dozens of rules in one fell swoop.

The final topic I want to mention is so-called regulatory reform, which is embodied in bills like the Regulatory Accountability Act (RAA),¹¹⁷ which, if passed, could dismantle the modern administrative state. Law professors are sometimes prone to hyperbole, but this statement is not an exaggeration. Bills like the RAA are not mild-mannered, "good government" reforms that would, say, minimize regulatory delay and eliminate duplicative rules—something we would all support. They go much further, and their agenda is much more cynical. They are designed to slow and impede regulation to such an extent and to so severely encumber regulatory agencies as to grind them a standstill. Regulatory reform sounds like such an unobjectionable goal in the abstract, and it is hard to generate excitement about it. But the proposals now circulating in Congress are meant to prevent agencies from performing their essential statutory functions, including basic and popular public health, environmental, and consumer protections, which we all take for granted. Among other things, the proposals would: add steps to the regulatory process which are unnecessary and designed only to cause delay; require duplicative analyses of cost implications, which are already accounted for in the White House regulatory review process; attempt to statutorily overturn the

115. Devin Henry, *Trump Signs Bill Undoing Obama Coal Mining Rule*, HILL (Feb. 16, 2017), <http://thehill.com/policy/energy-environment/319938-trump-signs-bill-undoing-obama-coal-mining-rule> [<http://perma.unl.edu/MXG7-ZL3P>].

116. See Jason Pye, *Congress Moves to Cancel Obama-Era Regulations Under the Congressional Review Act*, FREEDOMWORKS (Feb. 3, 2017), <http://www.freedomworks.org/content/congress-moves-cancel-obama-era-regulations-under-congressional-review-act> [<http://perma.unl.edu/XW4L-WCL3>].

117. Regulatory Accountability Act of 2017, H.R. Res. 5, 115th Cong. (2017) (as passed by House of Representatives, Jan. 11, 2017).

Chevron doctrine, which embodies a principle of deference to expert agencies in the face of ambiguous statutory language; and suspend the implementation of legally promulgated rules until all litigation is resolved (a reversal of current precedent, which presumes regulations are lawful until a court determines otherwise).

One proposal would require agencies to submit their entire body of regulations to Congress over a ten-year period (ten percent each year), after which they would expire if Congress were not to affirmatively adopt them again by statute.¹¹⁸ These proposals are far from “sexy” and may not attract much media attention, but they would do significant damage if they were adopted in legislation because they would hobble the ability of the federal government to perform some of its essential functions.

All of this is to say that while the President is using the tools at his disposal, Congress is also busy. It will be interesting to monitor this process as it unfolds—as we move from intention to action. Announcing a regulatory rollback is the easy part; implementing it takes time, and the substantive policy reversals must survive judicial review. Likewise, proposing legislation is the easy part; assembling a filibuster-proof majority is much harder. Even the most seemingly discretionary decisions a President can make, like announcing the intent to withdraw from an executive agreement like the Paris Accord, require considerable discipline and resolve to effectuate because of the legal process.

I am not naive about the potential for significant policy shifts to occur from one Administration and one Congress to the other. But I think it is worth pointing out the number of structural and legal constraints built into the system, which collectively tend to prevent sudden and radical changes of direction.

It is true that agencies can change their minds on some matters without much transparency or process. For example, agencies have a great deal of discretion to allocate their resources unless Congress has prescribed how they must do so; and the same is true for enforcement discretion, which courts normally leave to agency discretion. Many agency documents—like informal guidance or policy documents, which technically are not legally binding but which can have meaningful effects—do not have to go through the notice-and-comment process. And political appointees can reassign civil servants, shut career staff out of key decisions, and politicize agency policymaking. But this sort of behavior eventually comes to light. It inspires resignations, and it provokes leaks. Hollowing out an agency, even if an Administration is determined to do it, takes time and will run into resistance, as we

118. Peter M. Shane, *The Quiet GOP Campaign Against Government Regulation*, ATLANTIC (Jan. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/01/gop-complicates-regulation/514436> [<http://perma.unl.edu/K95U-V72F>].

saw during the Reagan Administration at the EPA.¹¹⁹ Career staff in these agencies can be counted on to resist blatantly illegal or unethical shenanigans and put up something of a fight if they are asked to do things that are contrary to agency practice or violate well-established ethics rules, for example. There are Inspectors General in each of these agencies too, which are meant to be internal accountability mechanisms. And there are litigants and stakeholders that are prepared to sue and challenge what they view as unlawful action.

V. CONCLUSION

The story I'm telling you boils down to this: Presidents are entitled to try to implement their policy prerogatives. That is what happens when you win an election. But there are genuine legal constraints on whimsical, irrational, unlawful, and ill-thought-out reversals of policy. This is true no matter which party you favor. I am trying to give some comfort to those who are concerned about the direction of federal policy at the moment, while also acknowledging—for those who are enthusiastic about it—that there is room to change a prior Administration's policies, provided it is done lawfully.

I suppose this talk is really a paean to the rule of law as a constraint on raw politics and a reminder of the value of understanding how law works so that you can participate in the democratic process. It is also a reminder to look beyond initial announcements, tweets, and press releases, because very few presidential decisions are self-executing, and the real action happens in the legal trenches.

VI. QUESTION AND ANSWER SESSION

A. Question 1—Failure to Comply with Paris Accord

Question. If the United States does not withdraw from the Paris Agreement officially but then effectively stops doing what is necessary to adhere to it, what are the international legal obligations or repercussions? What could potentially be the fallback?

Answer. That is a great question, and there are so many things to say in response. Let me try to be brief. The most practical thing to say is this is not a binding legal agreement.¹²⁰ There's actually no "punishment" or sanction in the sense we think about it as lawyers. There's no penalty other than suffering the opprobrium of the rest of the world. The Paris Accord is fundamentally and intentionally different in design from its predecessor, the Kyoto Protocol, the 1992 treaty

119. See Philip Shabecoff, *Reagan and Environment: To Many, a Stalemate*, N.Y. TIMES (Jan. 2, 1989), <http://www.nytimes.com/1989/01/02/us/reagan-and-environment-to-many-a-stalemate.html?pagewanted=all>.

120. Daniel Bodansky, *The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections*, 49 ARIZ. ST. L.J. 689, 696 (2016).

that required the developed countries to cut their emissions by an average of something like five percent, while not requiring any binding cuts from the developing world.¹²¹

The Paris Accord is *voluntary*, and there is no differential treatment between the developed and developing world.¹²² All of the world's major economies have pledged to take some action, whether to cut their emissions by a certain percentage compared to baseline levels, reduce the carbon intensity of their economies, or commit to a certain percentage of electricity from renewables, or any combination of measures.¹²³ It's a bottom-up agreement and was designed intentionally to allow countries to make a pledge based on what they can accomplish domestically, which presumably makes it politically feasible for them to actually achieve the things they have promised. The key to the Agreement, which has not been fully elaborated yet, is monitoring and verifying what each country has done to hold them accountable for their pledges.

The price of failing to deliver on our own pledge is shame and embarrassment that the richest and most powerful country in the world can't seem to do what it says it will do, the loss of our moral leadership on an issue of global importance, and some chafing with allies with whom we must negotiate on other matters. China is the big winner if we fall short of our pledge, and especially if we formally withdraw from the Paris Accord.¹²⁴ The Chinese leadership must be gleeful at the prospect of saying, "We're the global leader on climate change." This would be a huge gift from President Trump to President Xi. I think that is the real cost.

In the short term, I do not think anything Trump does will unravel the Agreement. The rest of the world has already, if you will, internalized this into the share price. By that I mean that other countries have already figured out that what they're going to get out of the United States for the next four, and perhaps eight, years is, at best, benign neglect. They may even be hoping for benign neglect, because at least they can live to fight another day. It would be worse if the United States were to go further and try to undermine what other countries

121. Kyoto Protocol, *supra* note 61.

122. Brad Plumer, *Stay in or Leave the Paris Climate Deal? Lessons from Kyoto*, N.Y. TIMES, May 10, 2017, at A17, <https://www.nytimes.com/2017/05/09/climate/paris-climate-agreement-kyoto-protocol.html>.

123. *See id.*

124. *See generally* Matthew Pennington, *Trump's Exit from Paris Agreement Could Open Door for China to Lead on Climate Change*, PBS (June 1, 2017), <http://www.pbs.org/newshour/rundown/trumps-exit-paris-agreement-open-door-china-lead-climate-change> [<http://perma.unl.edu/URP5-BXSC>] ("Trump's announcement that the U.S. would leave the Paris accord immediately sparked international criticism, deepening perceptions of an America in retreat after recent reversals on free trade and foreign aid. China may be poised to fill the breach.").

are trying to do to comply. But it is early yet, and we will have to wait and see.

B. Question 2—Informal Agency Rulemaking

Question. You've talked a bit about how the President and the Executive Branch can work on changing policy through regulatory rulemaking and how that process takes time, but I'm interested in the way in which the President and the Executive Branch can actually make changes in, not necessarily law, but the rules that affect everyday people through memoranda, through the President directing department heads and agency heads to issue policy guidance, that sort of thing. And bypassing the regulatory notice-and-comment process altogether.

Answer. This is a great "in-the-weeds" question that I wanted to get to in the course of talking a little bit about the instruments presidents can use. But the basic answer is yes, there are things agencies do to make policy through informal advisories and "guidance documents" that in theory do not make new law but just interpret existing law and regulations, and these do not require an elaborate process.¹²⁵ So there are other tools and mechanisms for announcing policy decisions that are far less formal than so-called legislative rules, more hidden, and more flexible. There are fewer constraints on these tools, but the price of using them is that courts give them less deference.

C. Question 3—The Kyoto Protocol

Question. The Kyoto Agreement—that was a lot of benign neglect, wasn't it?

Answer. Yes, in a way. Of course we never ratified it,¹²⁶ so that's more than benign neglect. President Clinton never submitted the Kyoto Protocol to the Senate because he knew the votes weren't there.¹²⁷ And the big complaint about the Kyoto Protocol was the bifurcation in treatment of the developed and developing world. The U.S. Senate passed a resolution saying that they disapproved of that structure because, although we are the world's largest emitter historically, we were about to be overtaken by China, which has now happened.¹²⁸ And that is why the Obama team worked so hard to design a different

125. See Anthony, *supra* note 67, at 5.

126. See Kyoto Protocol, *supra* note 61.

127. See Christie Aschwanden, *A Lesson from Kyoto's Failure: Don't Let Congress Touch a Climate Deal*, FIVETHIRTYEIGHT (Dec. 4, 2015), <https://fivethirtyeight.com/features/a-lesson-from-kyotos-failure-dont-let-congress-touch-a-climate-deal> [<http://perma.unl.edu/HH7V-U4L3>].

128. *Id.*

structure that could bring China, India, and the other major emerging economies into the fold.¹²⁹

D. Question 4—*Chevron* Deference

Question. I want to talk a little bit about, or hear your thoughts more about, checks and balances. So, from the standpoint of someone who applauds a lot of the Obamas Administration's environmental advancements, not only in air but also in water and other things, toxics and the like, it seems to me that for those in that camp hoping to continue some progressive engagement in greenhouse-gas emissions and that kind of thing, the best we can hope for right now is benign neglect from Congress—that phrase has been used a little bit earlier—and strict judicial review from the judiciary. So, what are your thoughts on *Chevron*? How do all these things fit together?

Answer. I'm not sure I can fully answer that last part, but let me start with *Chevron*. The legal principle established by the famous case called *Chevron* is that when a law is ambiguous, an agency gets the first crack at interpreting it.¹³⁰ This approach is based on the theory that when Congress delegates a law to the agency—entrusts it to the agency for implementation—Congress expects the agency to fill in the gaps and the ambiguities.¹³¹ Now it's hard to test that theory empirically, and it may be a legal fiction, but it has served as the justification for the principle that the agency ought to have the authority to construe ambiguous provisions, providing those interpretations are within a zone of reasonableness. Agencies don't have to get the right answer, but they need to come up with a reasonable one. Expertise is another justification for *Chevron* deference: that the agencies are best positioned to fill in the gaps or silences in a statute because they are the subject-matter experts and they have a lot of experience implementing the law over time.¹³² So if a judgment call has to be made, it is better for the agency rather than the courts to make it. That's the democratic-accountability theory of the *Chevron* decision.

The way *Chevron* works is that if the court reads the law and says it's clear—that is, if Congress has spoken to the issue and it's discernable from the text of the law—the court says, "I don't care what the agency thinks. The statute is clear." But when the law is ambiguous and the court is willing to admit as much, they will defer to the agency as long as the agency is judged to be within the bounds of reasonableness. One way to sum up the idea of *Chevron* is that the "tie goes to

129. Plumer, *supra* note 122.

130. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843–44 (1984).

131. *Id.*

132. *Id.* at 865.

the runner,” meaning, in the case of ambiguity, the expert agency gets the benefit of the doubt.

What tends to happen, however, is that one’s feelings about *Chevron* change depending on whether one’s team is in or out of power. You don’t like deference to the Executive Branch when you do not own it. But when you do own it, you are *Chevron’s* biggest fan! By the way, that is why I find it curious that the regulatory-reform bills that I talked about include this provision trying to jettison *Chevron* deference. Right now, the Republicans should want that deference since it is Trump’s Executive Branch. But these reform bills have been hanging around a long time and appear to have been pretty haphazardly combined into a package full of blunt instruments. I wonder if the Republican members sponsoring them have really thought this through.

E. Question 5—Separation of Powers

Question. This is kind of a follow up to that. I’d like to comment about the intersection of what you just said with separation of powers. How does the separation of powers intersect with rulemaking? On the legislative level in Nebraska, we often see legislation that I think is aimed to give the legislature a second bite at the apple in reviewing rules and regulations once they’ve already passed a law that requires an agency to do rules and regulations. And they keep building in more steps—I don’t know—legislative overview of the rules and regulations. Maybe this is a particular problem in Nebraska. But it has the effect of, the people who lost in the debate of the law that passed, they come and they hound you on the rulemaking process.

Answer. I’ve learned that you are unique here in Nebraska with the unicameral legislature, which I admit I don’t fully understand. I’m not sure about the extent to which that feature of your state government informs your question. But I guess what I would say is, the separation of powers at the federal level is foundational to everything I have said. In other words, Congress is the lawmaking body. Congress passes the statutes and then delegates them to the agencies. But the U.S. Constitution requires bicameralism and presentment to the President to pass legislation. Congress can’t retain control over implementation through mechanisms like a one-house or one-committee legislative veto—a tool that Congress used for a long time until the Supreme Court declared it unconstitutional.¹³³ In other words, once Congress has delegated the statute, that is, handed it off for implementation, members don’t get another bite at the apple on the cheap. Congress is free to amend any statute or repeal any statute, appropriate money, or cut appropriations, but if it wants to substantively amend a statute, it must follow the proper procedure. The fact is the

133. *INS v. Chadha*, 462 U.S. 919 (1983).

agencies are legally obligated to implement a statute unless and until Congress amends it.

Of course, Congress is hardly powerless. Members can hold hearings and embarrass agency officials, and require them to spend significant time and resources defending themselves both in hearings and in the press. They can hound career staff, send letters to them constantly, and launch investigations. They can threaten to cut their budgets too. And I'm sure there are similar accountability mechanisms at the state level in Nebraska.