DIALOGUE

The Burden of Unburdening: Administrative Law of Deregulation

Summary

The Donald Trump Administration has been attempting to roll back a wide array of regulations, including rules that have governed methane emissions, established energy-efficiency standards, and defined "waters of the United States." The U.S. administrative law framework allows rules to be changed or undone, but governs how these modifications can happen. In most cases, the Administrative Procedure Act (APA) mandates justifications similar to those required for an original rulemaking if a regulation is to be cancelled or rescinded. If an agency seeks to disregard the factual record on which an original rule rests, it must provide a more detailed justification for the change, and satisfy additional requirements. Suspending rules or delaying their effective date also places procedural obligations on agencies.

On May 16, 2018, ELI convened experts to discuss obstacles to deregulation, including when and how an agency must consider costs and benefits of staying, repealing, and rewriting rules. Speakers commented on current challenges to the Trump Administration's deregulation agenda, and offered insights on the ways administrative law is developing through interpretation of the APA and other relevant statutes. Below, we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

Caitlin McCarthy is Director of the Associates Program at the Environmental Law Institute.
Bethany Davis Noll (moderator) is Litigation Director at the Institute for Policy Integrity, New York University School of Law.
Susannah Landes Weaver is a Partner at Donahue, Goldberg & Weaver, LLP.
Kathryn Kovacs is a Professor of Law at Rutgers Law School.
Fred Wagner is a Partner at Venable, LLP.

Caitlin McCarthy: I would like to introduce the moderator of our panel. Bethany Davis Noll is the litigation director at the Institute for Policy Integrity at New York University School of Law. Previously, she worked as assistant solicitor general in the New York Attorney General's Office, Appeals and Opinions Division, where she filed briefs on behalf of a coalition of states in support of the U.S. Environmental Protection Agency's (EPA's) Clean Power Plan. Prior to working at the Attorney General's Office, Bethany was a litigation associate in private practice, where she led a team in a pro bono Clean Water Act enforcement suit.

Bethany Davis Noll: Thank you. I'm going to introduce the rest of the panel and provide a road map for our discussion. With me on the panel are Susannah Weaver, Prof. Kati Kovacs, and Fred Wagner.

Susannah is a partner at Donahue, Goldberg & Weaver, which specializes in cutting-edge environmental issues and appeals. Susannah previously worked at Orrick, Herrington, and clerked for three judges—Justice Stephen Breyer, Circuit Judge Bob Katzmann on the U.S. Court of Appeals for the Second Circuit, and District Judge Henry Kennedy Jr. on the District Court for the District of Columbia. In law school, notably, she helped draft the cert petition and the merits briefs in *Massachusetts v. Environmental Protection Agency*,[1] a hugely important environmental case where the Court found that the Clean Air Act (CAA)[2] covers greenhouse gases.

Professor Kovacs teaches administrative law, environmental and natural resources law, and property law at Rutgers Law School. Before that, she was at the U.S. Department of Justice (DOJ) for 12 years, where she worked in the Environment and Natural Resources Division and did appellate work. She was appointed as senior adviser to the director of the Bureau of Land Management (BLM).

Editor's Note: Bethany Davis Noll filed amicus briefs in several of the cases discussed here, including *California v. U.S. Bureau of Land Management*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017); *Natural Resources Defense Council v. National Highway Traffic Safety Administration*, 894 F.3d 95, 115 (2d Cir. 2018); and *Natural Resources Defense Council Inc. v. EPA*, No. 18-1048 (S.D.N.Y. Feb. 6, 2018). She did not represent any of the parties.

1. 549 U.S. 497, 37 ELR 20075 (2007).
2. 42 U.S.C. §§7401-7671q; ELR Stat. CAA §§101-618.

Fred Wagner is a partner at Venable, where he works in the environmental group. He previously served as chief counsel to the Federal Highway Administration (FHwA), where he worked on many high-profile national projects across the country involving bridges like the Tappan Zee and important highway interchanges like the one involving O'Hare Airport. He also served in the Environment and Natural Resources Division at DOJ.

I'm going to start with a brief overview of the APA[3] and explain where we are today with a focus on two specific issues that I think are interesting. Susannah will then provide more detail about some of these issues and an overview of what has happened in the past year in this new era of deregulation.

Professor Kovacs will provide more of a cautionary tale about the use of courts in the context of deregulation and regulation. She is going to talk about the rulemaking process and how it's important not to overburden it.

Fred is going to give some inside agency perspective and talk about how burdening the rulemaking process can be both good and bad, and discuss what we might call "ossification" of the rulemaking process, which could potentially drive the agencies away from rulemaking.

I want to start with the basic structure of administrative procedure law, which governs agency decisions. Administrative procedure law basically contemplates a few important things: public involvement, reasoned decisionmaking, and regulatory certainty. Why does it do that? Modern administrative law began in 1946 with the passage of the APA. The U.S. Congress, when passing the statute, had the plan of forming rules to govern what agencies do, because otherwise agencies could run amok, and these agencies are run by heads who aren't elected. So, how does the public exert some level of control over what they do, since we can't vote them out of office? What Congress came up with at the time were basically two important things: one, make sure the public is informed of agency decisionmaking and has an opportunity to participate in that; and two, make sure agencies give us their reasons for their decisions.

How does this work in the context of *deregulation*? The APA makes clear that these rules apply both when issuing regulations and when repealing regulations—and, since the 1980s, we also know from the courts that this is how it should work. In *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,[4] which was the big decision that came out of the last deregulatory era, and in *Federal Communications Commission v. Fox Television Stations, Inc.*,[5] the U.S. Supreme Court confirmed that when an agency is rolling a rule back, the same principles apply.

One important thing to keep in mind for repeals that I think was made clear in *Fox* is that when the agencies are rolling back or getting rid of a rule, they are supposed to address the facts underlying the previous rule. Thus, while the legal standard is the same, they have more work to do than they would if issuing the rule in the first instance.

What do these rules get us? Like I mentioned, they give us a certain level of control over what agencies are doing, and there are three reasons why this is good, in my opinion. The first reason is that regulated industries and the public can count on a certain amount of stability. These administrative rules make it a bit difficult to issue rules or to take rules away. The idea there is that once the rule has been passed, someone running a business knows where to invest in order to comply with the rule, and can move on to, for example, how big an airport should be, and so on. This allows industries to focus on productive innovation and investment instead of regulatory changes.

The second thing was flagged in the 1980s by Judge Merrick Garland while he was at a law firm and representing State Farm in the Supreme Court. He wrote an interesting article[6] that I highly recommend. In the early 1980s, there weren't really a lot of court decisions addressing deregulation, so Judge Garland flagged administrative procedure and principles to help keep agencies faithful to congressional intent. As he explained, it's not enough for an agency to just listen to the public's views and then make a political decision. The agency has to also abide by what Congress initially wanted, and that's another way we keep them under control.

Third, these principles are important for democracy. One thing political scientists talk about is the stability of the rules that apply—for example, if your party loses and you're mad about that, you should be able to count on the rule staying in place in case your political party wins the next time. If you can't count on that, then you might end up putting your efforts into something that's anti-democratic or outside the democratic process. That would be a problem. So, what these rules allow activists to do is to focus on using the political process for politics. These are the reasons I believe the APA is important. You may hear other views.

Now, the Trump Administration has launched a full frontal attack on regulations that were issued during the previous administration. This is nothing new obviously, but it's been pretty aggressive. Indeed, as former EPA Administrator Scott Pruitt said, he wanted it to be aggressive, and the new Administrator, Andrew Wheeler, has said he would stick with those priorities.[7] What you're going to hear from the panel is what is happening during this deregulatory push. I want to flag two interesting issues that are percolating, interesting because we might see decisions in the near future on these issues: the "closed-mind" doctrine, and how to deal with costs and benefits when rolling a rule back.

First, under this doctrine, an agency head needs to act with an open mind, and if that person is unwilling or unable to rationally consider arguments and is acting

3. 5 U.S.C. §§500-559.
4. 463 U.S. 29, 13 ELR 20672 (1983).
5. 556 U.S. 502 (2009).
6. Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 507, 585-86 (1985).
7. Timothy Puke & Heidi Vogt, *Acting EPA Chief Plans to Stick With Trump's Priorities*, Wall St. J., https://www.wsj.com/articles/new-epa-chief-plans-to-stick-with-trumps-priorities-1530919299.

with a closed mind, this violates both due process and the APA. In the APA, agencies are supposed to get comments, and they're supposed to think about them, but if they are unwilling to consider what those comments say, then what's the point of seeking comment? How can you say the agency has complied with the APA if it's not even willing to look at comments?

The doctrine was brought up several times to challenge multiple Barack Obama Administration officials, and just hasn't had much success. The closed-mind doctrine so far has not been adopted at the circuit court level. There are a few lower court cases[8] where it has succeeded, but in general, the courts have said that having a preexisting policy position isn't enough. It's a pretty high burden. So, what's happening now? This doctrine is being brought up in multiple cases in multiple challenges to deregulatory actions.

As an example, BLM issued a rule under President Obama, the Methane Waste Prevention Rule,[9] to restrict the waste of natural gas from mining on public lands in the West. The idea was that in oil and gas mining operations, methane shouldn't be vented or burned, it should be preserved and sold, or used in other beneficial ways. So now, BLM, under the Trump Administration, wants to roll back this rule. The rule was in the crosshairs of Congress, mentioned in the Congressional Review Act (CRA)[10] context, but that didn't work. After Congress rejected the idea that they should use the CRA to kill this rule, BLM issued a press release[11] saying, basically, don't worry, we're going to kill it.

This is just one piece of evidence from a lot of interesting evidence. The Office of the Secretary of the U.S. Department of the Interior is saying it will suspend, revise, or rescind this rule, leaving no opening for keeping it—and, in the public comment process, people have definitely submitted comments asking the agency to keep the rule. I don't purport to know how this is going to turn out, but I think it's going to be interesting.

The other interesting example I'd like to mention is that, under President Obama, EPA issued the Clean Water Rule,[12] clarifying the jurisdictional scope of the Clean Water Act (CWA),[13] and it gives a definition for "waters of the United States" that would have increased the number of wetlands protected under the CWA. This rule has been a top priority of the current administration to roll back. The plaintiffs have cited radio transcript after radio transcript of Pruitt saying he will get rid of the rule.[14] The case is in summary judgment briefing right now. Again, we don't know what will happen, but I think this is interesting.

I would also like to flag the cost-benefit analysis issue. That's the issue near and dear to our hearts at the Institute for Policy Integrity. The idea is that cost-benefit analysis can be used to promote rational and beneficial rules. It's a useful tool. When agencies roll rules back, they have to grapple with the facts and circumstances underlying the agency's previous decision, and as I mentioned before, that means they have to deal with the math justifying the original rule.

As you know, judges don't like to get in the business of what agencies are doing. They don't like to question the judgment of the agency and so on. But when you see numbers on the page, it's really hard not to question an agency that's rolling a rule back that had benefits that were millions of dollars more than the cost. You flip the numbers to the other side and basically you're rolling the rule back for purposes of saving $40 million, but you're costing society $450 million. This is like an Achilles' heel of a lot of these proposed repeals.

So far, we have one example of a court holding that ignoring the benefits of the original rule completely was arbitrary and capricious.[15] That case dealt with the Methane Waste Prevention Rule, which had a cost-benefit analysis that really supported the rule, I mean by millions of dollars. And when the agency suspended the rule under President Trump, it didn't mention the benefits at all. There has been decision after decision saying that's irrational, that you can't do that kind of lopsided analysis.

I'll briefly mention two other pending cases. One has to do with the Clean Water Rule that I mentioned before. EPA suspended the rule, asserting that the suspension is not going to cause any forgone benefits. But that assertion ignored the fact that the Clean Water Rule was about to come back into effect after having been stayed by the U.S. Court of Appeals for the Sixth Circuit and thus the suspension really did change the status quo.

Something similar is going on with the National Highway Traffic Safety Administration (NHTSA). NHTSA delayed an adjustment that had been put in place to increase the penalties that match inflation for violation of the fuel economy standards. In that delay, NHTSA said it's not going to cause any harm. But it's really easy to use the agency's own model to show how much gasoline would have been saved if they kept the penalty where it was. The U.S. Court of Appeals for the Second Circuit already vacated this suspension and then issued an opinion finding that the delay was "anything but inconsequential."[16]

I'm going to turn it over to Susannah who can talk in more detail about the existing cases and about the decisions that we've already seen.

8. Nehemiah Corp. of Am. v. Jackson, 546 F. Supp. 2d 830, 847 (E.D. Cal. 2008); Int'l Snowmobile Mfrs. Ass'n v. Norton, 340 F. Supp. 2d 1249, 1261 (D. Wyo. 2004); Air Transp. Ass'n of Am. v. Hernandez, 264 F. Supp. 227, 231-32 (D.D.C. 1967).
9. 81 Fed. Reg. 83008 (Nov. 18, 2016).
10. 5 U.S.C. §§801-808.
11. *E.g.*, Press Release, Interior Statement on Venting and Flaring Rule Vote, *available at* https://www.doi.gov/pressreleases/interior-statement-venting-and-flaring-rule-vote.
12. 80 Fed. Reg. 37053 (June 29, 2015).
13. 33 U.S.C. §§1251-1387; ELR Stat. FWPCA §§101-607.
14. Pls. Mem. of Law in Support of Pls. Mot. for Summ. J. at 20-22, Natural Resources Defense Council, Inc. v. Envtl. Protection Agency, No. 18-cv-01048 (S.D.N.Y. Feb. 6, 2018), ECF No. 55.
15. State v. United States Bureau of Land Management, 277 F. Supp. 3d 1106 (N.D. Cal. 2017).
16. Natural Resources Defense Council v. National Highway Traffic Safety Administration, 894 F.3d 95, 115, 48 ELR 20109 (2d Cir. 2018).

Susannah Landes Weaver: This is a really good time for this discussion because it was just about one year ago that there were a slew of rule suspensions and the beginning of challenges to them. A year ago we didn't have any court decisions, now we have a bunch of them. And I think we're entering a new phase where, rather than agencies issuing rule suspensions, we're seeing rule revisions and rescissions. I'm going to give some perspective and on-the-ground view from the past year.

Picking up on what Bethany said, in our system of administrative law enshrined in cases like *Federal Communications Commission v. Fox*, there is this balance between politics and administrative rulemaking. The APA allows changes, but it makes sure that they occur through deliberative public processes and they are based on good reasons, grounded in the agency's statutory authority and supported by the facts in the record. Some statutes, like the CAA, have even more stringent procedural requirements, and, importantly, it's the same rules whether regulating or deregulating. Repealing or suspending a regulation is not considered a neutral act. So, while elections surely have consequences, they are limited with respect to regulations by the laws on the ground and the facts on the ground.

From my perspective, this is a good thing, and Bethany gave a couple of reasons why these guardrails are good. I'll add a few more. One, they ensure that when an agency promulgates a regulation or suspends or repeals one, it doesn't do so rashly, but does so through a thoughtful process, getting information from the public, thinking through the hard questions, thoroughly explaining itself, and acting consistently with its authority. It promotes fairness to stakeholders who should have a fair chance to convince the agency to adopt their view. It ensures that an agency's hard work isn't thrown out without a real deliberative process.

Bethany mentioned the benefits to regulatory certainty for both regulated entities and regulatory beneficiaries. One quote I came across in my research that really captured the importance of these came from U.S. Court of Appeals for the Fourth Circuit Judge James Harvie Wilkinson in the concurring opinion from 2012 that said:

> Changes in course, however, cannot be solely a matter of political winds and currents. The Administrative Procedure Act requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process. Otherwise, government becomes a matter of the whim and caprice of the bureaucracy, and regulated entities will have no assurance that business planning predicated on today's rules will not be arbitrarily upset tomorrow.[17]

I think that captures the hard balance between politics "mattering," and at the same time having statutory limits and facts, having rules that need to be followed.

In the past year, I've been involved in litigating a bunch of challenges to agency suspensions. I think the reason we've seen a lot of suspensions is that the new administration came in with very different views. Still, the process for actually revising or repealing a regulation is not quick. You have to look at the statutory authority. You have to look at the facts in the record. You have to get public input. You have to explain.

So, I think there was a lot of impatience from the new administration to make changes on the ground now. They want to change compliance requirements now. They want to do it now and they'll do the explaining and thinking and deliberating later. I think it's hard to understate the pervasiveness of these efforts in the past year. They've been across multiple agencies and there are way more examples than I'll have time to discuss, but I want to talk about three mechanisms that I've seen in my cases that are attempts to freeze regulatory requirements quickly to allow time for the more complete regulatory process.

The first two that I'll talk about are two different species of the same genus maybe. Both are what I would call pretextual uses of limited stay authority. Some of the statutes do have limited authority to suspend final regulations. The first, under CAA §307(d)(7)(B), is a limited authority to stay a regulation for no more than three months under certain circumstances. If you look at the statutory text, it's certainly not a blank check. It has a set of requirements. There has to have been an objection that was impractical to raise during the comment period. That objection has to be of central relevance to the outcome, and again, it's limited to three months. So, clearly not a very open-ended authority.

Just over a year ago, Administrator Pruitt published in the *Federal Register* a notice[18] saying that he was suspending an oil and gas regulation for three months pursuant to this authority, and did so I think about two days after when the main compliance deadline had been set. Long story short, the D.C. Circuit pretty quickly vacated the suspension,[19] rejecting the Administrator's assertion that this provision gave broad authority, and concluding that it was arbitrary and capricious because EPA had not shown that there was any objection that was impractical to raise or of central relevance. So, the court said, basically, we are going to take Congress at its word here that it's limited. Importantly, one of the things that the D.C. Circuit did in that case is affirmed that the mere fact that an agency is reconsidering a regulation, that it has concerns about a regulation, doesn't affect the status of the regulation.

The second mechanism that falls into the pretextual use of limited authority is under APA §705. Again, this is broader than the §307(d)(7)(B) authority, but it still has some important limitations that Congress added. It can only be used to postpone the effective date of a rule. And the courts, the D.C. Circuit and the District Court for the Northern District of California, have interpreted that to say it can only be done before a regulation goes into effect, not after. It also has to be "pending judicial review." So, it has to be, I would argue, for the purposes of allowing

17. North Carolina Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755, 772 (4th Cir. 2012).

18. 82 Fed. Reg. 27641 (June 16, 2017).

19. Clean Air Council v. Pruitt, 862 F.3d 1, 47 ELR 20084 (2017).

judicial review to proceed, not for the purposes of allowing agency reconsideration to occur.

Finally, it has to be found that "justice so requires" the postponement, which is a fairly broad concept but it's not meaningless. One case I worked on where this came up was the Methane Waste Prevention Rule. In June 2017, Secretary of the Interior Ryan Zinke published a notice in the *Federal Register*,[20] saying that the agency was going to stay that rule pending judicial review under §705. One of the notable things is that there was no discussion at all of the forgone benefits of doing that. Again, a district court pretty quickly vacated that suspension,[21] noting that after years of developing the rule and working with the public and industry stakeholders, the Secretary's suspension of the rule five months after it went into effect did not maintain the status quo, but belatedly disrupted it. I think one of the more important things that came out of that case is that justice at least requires a balancing and looking at both the cost to industry and the forgone benefits to the public.

The third mechanism, which I actually find the most legally interesting, is the idea of doing a notice-and-comment rulemaking to suspend a regulation. Notice and comment doesn't itself provide any authority. Typically, the authority relied on is the same authority that the regulation was promulgated under. Sometimes agencies haven't actually pointed to any authority, the idea being that they're doing a notice and comment as the APA requires, but it's going to be this quick non-substantive notice and comment, and then they'll promulgate the suspension.

I find this really interesting because it depends on authority to revise a regulation at the same time the agency is generally claiming that it's not revising the regulation but merely pausing it. I think the contradiction becomes particularly apparent in the limitations on the comments. And sometimes, we've seen this upfront in the proposal that says don't comment on the rule we're suspending or what you want to see. Or sometimes, we see them say that this was outside the scope of the comments, if you're commenting on the rule they're suspending, or what you think the rule should be.

I guess another way of saying this is that the agency will say it needs to suspend the rule to consider, to investigate its concerns, but then if a commenter says let me be critical of your concerns, the response is going to be, well, we'll deal with your critiques in the later rulemaking. So, then the purpose of accepting comments becomes a little bit unclear. One example in a case that I've worked on was again the Methane Waste Prevention Rule, where after the district court vacated the initial §705 stay, they did a very quick notice-and-comment suspension. Another district court judge preliminarily enjoined that suspension, concluding that it was "untethered to the evidence" because the Secretary based the suspension on concerns that were contradicted by the evidence in the record because the Secretary hadn't yet gone through and explained, investigated the previous record, or built a new one.[22]

So far in the past year, this Administration has not had a very good track record in the courts with suspensions. I'm not aware of any case yet where a court has upheld one of the suspensions. I think everyone has reason to be wary of attempts to quickly change the regulatory status quo with little or no comment and based upon pretty flimsy, extra-statutory rationales. Because the APA, as Bethany said, doesn't have a thumb on the scale in favor of deregulation, and what you can do quickly one way, you can do quickly the other.

That doesn't mean that steps shouldn't be taken to speed the regulatory process. I probably don't disagree with some of the comments I expect to hear about ossification and how difficult it has become to regulate and deregulate. And I think there are probably steps that should be taken, but the suspensions we've seen in the past year, many done without notice and comment or any real look at the facts or the law, are a recipe for poor decisionmaking and long-term uncertainty.

Kathryn Kovacs: We're seeing a huge conservative push to decrease federal regulation. Part of that is a push to amend the APA. At the same time, we've got agencies that are playing fast and loose with the rules of the game, and so progressives are also motivated to rein in agencies. We're all kind of in crisis mode right now trying to prevent the sky from falling.

But while we're in crisis mode, I want to add a note of caution. I want to lend some historic perspective to the discussion and urge that we stick to the APA, to the compromise that Congress reached in 1946, and not disturb the balance enshrined in that law. Certainly, it needs to be updated, and certainly, we need to hold agencies accountable. But we need to be very careful not to overburden agencies while we're at it.

In the beginning, there was the U.S. Constitution, and the Constitution didn't say much about agencies, but they've always existed. One hundred years ago, there weren't too many, and those that did exist didn't do much that affected people's everyday lives. Then in 1933, Franklin D. Roosevelt was elected president and kicked off the New Deal. Suddenly, we've got all these new agencies, and along with these new agencies comes the question of how you control them? Agencies in Europe had become tools of fascist autocrats. Stalin's show trials started in 1936. Kristallnacht was in 1938. There was a real fear here in the United States that President Roosevelt would go down the same road. So, the legislative record of the APA is riddled with arguments based on the need to avoid totalitarianism. That's what the APA was designed to do.

Back in 1933, the American Bar Association (ABA) took the lead on administrative reform. In 1937, the Supreme Court started upholding New Deal programs,

20. 82 Fed. Reg. 27430 (June 15, 2017).
21. California v. Bureau of Land Management, 277 F. Supp. 3d 1106 (N.D. Cal. 2017).
22. California v. Bureau of Land Management, 286 F. Supp. 3d 1054, 48 ELR 20029 (N.D. Cal. 2018).

and that gave the impetus to finally pass a bill, the Walter-Logan Bill, which was a pretty conservative bill. It would have reined in agencies substantially. President Roosevelt vetoed it.

Then we got dragged into World War II, and the war brought with it a load more bureaucracy. There were 26 new agencies related to the war effort alone. Suddenly, federal agencies were blamed for shortages and rationing and inflation. Agencies were none too popular during the war. Then, two weeks after D-Day, the ABA's bill was submitted in Congress. It was designed as a compromise between the conservative approach and the liberal approach. It passed unanimously. President Harry Truman signed it in 1946.

There was a lot in the APA that was controversial. There were tons of compromises, and a lot of the language in the APA is completely murky because that was the only way to pass the law. But other things in the APA are abundantly clear. For example, the same standard of review applies to all agencies. No agency should be getting super deference in APA cases, and everyone agreed on that in 1946. EPA should be getting as much deference as the Department of Homeland Security in APA cases. Everyone also agreed that rulemaking should be pretty simple. The APA left a lot of the rulemaking process to agency discretion in order to encourage rulemaking, because rulemaking would give regulated parties certainty and it would avoid the separation-of-powers concerns with courts filling in the blanks left in statutes.

Unfortunately, rulemaking has become pretty difficult. Congress has layered on more rulemaking requirements in other statutes. The courts put on an overlay of administrative common law. Presidents have issued Executive Orders with even more requirements. Agencies have put more requirements on themselves. So, rulemaking has become incredibly resource-intensive.

Agencies try to avoid it through subregulatory approaches, guidance documents, manuals, handbooks, opinion letters, and so on. For various reasons, those often don't work. So, the upshot is that it's really hard for agencies to make policy in a timely fashion. It's hard for agencies to respond to new circumstances. It's hard for agencies to respond to elections. That is one of the reasons, I believe, that presidents have increasingly made policy themselves instead of leaving it to agencies.

Now, obviously there are a lot of other reasons why presidents take direct action themselves. First of all, Congress is stuck. It's been more than 20 years since Congress passed a budget on time. We don't have climate change legislation. That's one of the reasons presidents come in and make policy themselves. Presidents also like the publicity. They like to take credit for the policy themselves, then blame it on the agency when it goes wrong.

This is not a new phenomenon. President William Clinton issued numerous memos directing agencies to take particular actions. President George W. Bush issued signing statements with his interpretation of the law. He tried to influence agency science. Remember all of the U.S. Fish and Wildlife Service's Endangered Species Act[23] listings that needed to be redone in the next administration? President Obama appointed, I think, 38 White House czars and mastered the art of appropriating agency policy as his own. But President Trump has taken presidential control to a whole new level.

Unitary executive theory is the idea that the Constitution vests all executive power in the president. So, executive power is vested in the president alone regardless of what statutes might say. This is no longer a theory. President Trump is the administrator-in-chief. He makes policy that previously would have come from agencies without engaging in rulemaking, and he does this every single week. Now, in one sense this is good, because it responds to elections—President Trump was apparently elected.

On the other hand, it's bad because the president operates in a black box. His process is not transparent. We don't know who he's talking to. He apparently is not getting feedback from affected interests in order to hone his policies. I can't imagine that President Trump spoke with transgendered servicemembers before prohibiting them from serving in the military. In reality, there's very little democratic accountability. A fraction of the population votes for president, only every four years. Agency rulemaking, on the other hand, is far from perfect, but it has all of the benefits that Bethany and Susannah already talked about. It's more deliberative. It has more public involvement. Thus at least in theory, and most of the time, I think in actuality, it yields better policy.

The key though is that agencies have to follow the rules. We are right now seeing an unprecedented level of agencies breaking the rulemaking rules. They are reversing policies without giving notice and comment. When they do give notice, the notice is totally inadequate. They are giving ridiculously short public comment periods. The explanations they're giving when they do make decisions are mind-bogglingly inadequate. But if we overreact and overburden agencies, we will only exacerbate the presidential direct action problem. We will fall into the very trap that the "greatest generation" designed the APA to avoid.

In the legislative proposals on Capitol Hill, there are a lot of great ideas floating around concerning enhancing public participation in rulemaking, enhancing transparency, promoting deliberation, and establishing minimum comment periods. For example, in 1946, Congress didn't require minimum comment periods because it thought it could trust agencies. Clearly, that is not the case anymore. Other proposals on the Hill would burden agencies too much. The same is true in litigation. What's good for the goose is good for the gander. Be careful what you wish for now, it might come back to bite you.

The bottom line is, if Congress doesn't make policy, which it's not, and it's too difficult for agencies to make policy, then it's left to the president who is supposed to represent all 323 million Americans, and to the courts that don't represent anyone. We might not mind that so much

23. 16 U.S.C. §§1531-1544; ELR Stat. ESA §§2-18.

now, but let's not forget that President Trump has set a record on court appointments. So, let's be careful to preserve the balance that Congress struck in 1946. Let's get agencies to follow the rules of rulemaking without taking them out of the game entirely, because the president would be more than happy to fill the void.

Fred Wagner: I write a blog called EnviroStructure,[24] which looks at the intersection of environmental law and infrastructure, and I've written about everything that my colleagues just talked about. For example, *Regulatory Reform: Be Careful What You Wish For* is the title of one of my posts.[25] There is the notion of this balance between changing and amending all the time versus regulatory certainty, at least in the private sector. Now that I'm back in the private sector, all my clients say, this is great, but so many of the rules that are being talked about that are being undone had their derivation from industry.

For example, the post-*Deepwater Horizon* rules—for offshore rigs—that came from industry. The people who were playing by the rules and had this put in place didn't want the bad players to create havoc for the rest of the industry. So, they said do this. And then, all of a sudden, the industry executives say no, undo this. I gave a speech to the National Ocean Industries Association, and I said be careful what you wish for, think about that before you do it, but they still did it.

I wrote another piece called *Environmental Regulation and the Return to Regular Order*.[26] Remember when Sen. John McCain (R-Ariz.) famously gave his speech for the vote on healthcare? He wanted to return to regular order. My theory was that Congress is really mucking up the administrative procedure, and this is in the context of the rider, which I think is still floating around, to try to say that the Clean Water Rule cannot be reviewed, or the APA won't apply toward this. So, I wondered if that could be constitutional. And sure enough, it is. There's actually been litigation over whether riders like that are okay and, believe it or not, they are. You can just excise, review certain rules from the APA, and there's actually fairly recent cases in that regard.

I also wrote about cost-benefit analysis, focusing on the next wave of APA litigation.[27] The post focused specifically on how in the world EPA and the U.S. Army Corps of Engineers were going to undo 400 pages of cost-benefit analysis in the Clean Water Rule. All this stuff that talked about the benefit, how do you just make that go away? I mean, they did. They tried to. But how do you really do that under the auspices of the APA?

I'm here to be the contrarian, in a way, to the thought of APA and administrative rules being one of the bastions of democracy. I'm here to say that the administrative process is broken, and that the rulemaking process is inherently broken. How do you get from one end of the spectrum to finally getting a rule out the door? I'm going to give you a bit of perspective from inside a federal agency.

Now, I've got to tell you, the FHwA, at the U.S. Department of Transportation (DOT), is not a very strong regulatory agency. We have one little book in the *Code of Federal Regulations*, Title 23. So, we're not a regulatory agency, but we get involved in regulations.

How do we get involved in regulations? Because Congress says, "Thou shalt regulate." In every reauthorization bill with the dollars in transportation, there's always stuff. Like Congress says, "Oh, by the way, within 90 days of this bill, you should issue a regulation on such and such." So, first of all, the congressional punting makes it impossible. It's as if Congress says, "I'm thinking of a number between one and 722,000. You go out and regulate. And I'll let you know if you hit the mark." As chief counsel, I actually took phone calls from congressional staffers who said, "We just read this regulation." I said, "Very good. Why are you calling?" The staffer says, "That's not what we meant." And I would say, "Well, what did you mean?" I'm reading the bill. There's zero legislative history that's helpful. And we're left to write a regulation to try to effectuate what's in the bills. "Well, we didn't mean that. Whatever it is, we didn't mean that." So, what do you do with that? How do you deal with that?

Congress does this all the time: unreasonable deadlines and vague language—and sometimes, language that just doesn't work. We provide technical assistance in the agencies before they write the bill. We say whatever you do, don't write that in the bill because that will become unworkable. And how often do they listen? Sometimes, but not all the time, and that creates a huge burden for the regulators. One of the internal agency puzzles, I call it, one thing that's fascinating, even within DOT, is who writes the rules. In some of the transportation modes, there were people who are pretty good at it; NHTSA, for example, had people who were good at writing the rules.

At FHwA, they had engineers writing the rules. They're bad at writing rules, very bad. So, we would get the drafts of the rules and the lawyers would look at it for the first time and we'd be rewriting it completely. The administrator would get mad at the words, asking, "Why are you rewriting these rules?" And I would say, "Because they're bad. They're bad rules. And they wouldn't do any good in the general public." So, that slows down the process. We would continually debate. Should the lawyers sit down with the engineers and the regulators saying, tell me what you want to do? The lawyers who have the discipline most of the time are writing things the way that people understood. So, inside the agency, who's doing that and why?

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24. EnviroStructure, https://www.envirostructure.com/ (last visited July 25, 2018).
25. Fred Wagner, *Regulatory Reform: Be Careful What You Wish For*, EnviroStructure (Apr. 12, 2017), https://www.envirostructure.com/2017/04/regulatory-reform-be-careful-what-you-wish-for/.
26. Fred Wagner, *Environmental Regulation and the Return to Regular Order*, EnviroStructure (July 28, 2017), https://www.envirostructure.com/2017/07/environmental-regulation-and-the-return-to-regular-order/.
27. Fred Wagner, *Cost-Benefit Analyses: Focus of the Next Wave of APA Litigation*, EnviroStructure (Oct 18, 2017), https://www.envirostructure.com/2017/04/regulatory-reform-be-careful-what-you-wish-for/.

How long does it take when a lot of these people have other responsibilities besides just writing rules?

The other thing about the internal agency puzzle relates to the Office of Management and Budget (OMB). Within a big agency, there are always mandates that Congress set up. You shall regulate within 90 days, and so on. Which ones get out the door where you have this list that you have to update every quarter of your priority rulemakings? So, you have FHwA, tussling with NHTSA, tussling with the Federal Aviation Administration, tussling with the Federal Transit Administration about what rules will get to the top of the list. At each agency, you have many rules, and you have to make a cut. Which, maybe three at most, were going to make it to the top of the list of the agency to go forward to OMB, because the pipeline is only so big?

Therefore, we were compelled, even in the face of mandates to write regulations, to brush off to the side a whole bunch of them because we had to make these priorities in order to get something through OMB. So at the chief counsel meeting at DOT, the biggest part of the meeting was when each of the chiefs of the different mode would say here are my top rules. It was like horse trading to try to make sure that your top rule from your client, the administrator, got through. And you're having this discussion with the other modes saying the same thing about theirs. How does an agency deal with that?

Then, of course, there is the litigation component, which just extends the life of litigation. The Roadless Rule[28] in the Clinton Administration started when I left DOJ. And it was there when I got reappointed as a political appointee. I was a trial attorney. I went into private practice, became a political appointee, and they were still litigating the Roadless Rule.

How was that good? How was that helpful? I know it's democratic in the sense that yes, we should have challenges to these rules and people have rights. But at what point does the litigation unduly interfere with the purpose of an agency, to provide certainty and guidance on how things should be done? Of course, we issue guidance, documents, manuals, and handbooks. Because who would want that? Who would want to start a rule and see your kid graduate college and the rule still isn't done? It isn't funny, because people spend their lives trying to do these things in what they think is a positive way. You get tens of thousands of comments. How many were there on the Roadless Rule, a million comments? Okay, a lot of those were postcards. But there's hundreds of thousands of comments and you have to religiously go through them, to show your record; otherwise, you're subject to challenge and review. It's a broken system.

And even worse, now we enter politics into it. Politics is always a part of it. The impression was, here's our regulations; we're working, working, working. But in an election year, all regulatory actions are stopping. Why? Because the election is coming up. Which one? The mid-terms, the general, the special election of the Pennsylvania sixth district, and so on. Thus, in March or April, you would get these edicts from the general counsel saying, sorry, this is it. Your folks in the agency are working on these things, they're working really, really hard, but yet there's a stop work order in essence because, you know, we're not going to get it through.

I can give you some real-life examples. Again, we're not a regulatory agency. We're FHwA. Everyone likes FHwA. But, we have this thing called the *Manual on Uniform Traffic Control Devices* (MUTCD).[29] Nobody's ever heard of it, but it's the reason why stop signs are red and octagonal. It's the idea that wherever you go in the United States, you know when to stop. And it works for the most part. The MUTCD contains all sorts of engineering and counseling advice on how to do signs and markings on the road, which seems like a good idea.

One year, they came up with a proposed rule: that when street signs are retired and need to be replaced, the font on the sign is changed from all caps to upper and lower case. That was the recommendation. Why? Because there have been study upon study that concluded, when people get older, due to perception and the ability to read from distances, apparently it's easier for them to read upper and lower case than all capital letters. So, the people who write the MUTCD said, hey, look, the population of the United States is aging. There's a lot more of us now, so when you retire a sign, this new system is going up.

But Rush Limbaugh picked up this rule—you'd think I'm making these things up. He said the federal government, the nanny state, is commanding states and local governments to replace all the street signs to the cost of trillions of dollars with this rule about upper and lower cases. It's the nanny state run amok. As fast as you can say Jackie Robinson, it went from Rush to the White House. It was the one time that my client, the administrator, said that he got a direct call from the White House complaining about something that was done by FHwA. Within 48 hours. And so, what did we have to do? We had to redo the regulation and make sure that it wasn't mandatory; we stressed the retirement angle.

The science was there; in the debate over science and what science says, this is science with a little "s." This is something that can be verified when you go to an eye doctor and the eye doctor puts upper and lower cases up and then just upper case letters. You'll do better when it's upper and lower case. Yet, the political pressure introduced to this rulemaking meant that we had to go back, withdraw it, and redo it in a way that was acceptable for the political environment. Now, imagine if there's something with science with a capital "S," like climate change.

Budgetary actions in Congress become political. There are many riders and examples of "thou shalt not spend money on X. The agency shall be prohibited from spending money on Y." Nine times out of 10, it's related to a

28. 66 Fed. Reg. 3244 (Jan. 21, 2001).

29. 23 C.F.R. §655.603 (2018); *Manual on Uniform Traffic Control Devices for Streets and Highways*, U.S. DOT, https://mutcd.fhwa.dot.gov/ (last visited July 25, 2018).

regulatory action because they don't like the way a certain office is working. And then, of course, there's the CRA, which for the first time since its passage was aggressively used by the Congress post-November 2016. I think the final tally ended up being 17 rules and regulations. The Methane Waste Prevention Rule didn't make it, so they're trying to do it through other ways. It's even now become a debate to expand the CRA. So, you can reach back and pull out even more rules and regulations that you don't like. If you're an agency and you see this kind of intervention from the legislative branch, how likely are you to gleefully move forward with anything in your work that's even remotely controversial?

True story—the last secretary of transportation, Secretary Foxx, hated metropolitan planning organizations (MPOs). He thought they were ineffective and inefficient. They overlapped, and they just created havoc. That was his experience in Charlotte, where there were maybe seven overlapping MPOs in his hometown. He commanded that a rule be written by the time he left office changing how MPOs are recertified and commanding that in certain instances, MPOs be combined—commanding it. There's more than 20 and he was trying to shrink the number of MPOs. That could be really good as a policy objective. That could be perfectly fine.

But it was literally regulation from the top: thou shalt do it. The agency dutifully wrote the regulation. And, unbelievably, this was not overturned through the CRA. This was overturned through a regular act of Congress. It was so arbitrary and capricious. Four-hundred-and-something to two in the House, and unanimous in the Senate. Think about that. Not even through the CRA. It was rulemaking run amok.

I wrote comments on behalf of people who were objecting to it. But I would call my buddies and say, what happened here? They said, we can't tell you, but go ahead and file your comments, please. Because they were really compelled to write this rule, it's pretty amazing. I wish I could be optimistic. I wish I could say that we're for the APA or this or that or the other thing that really kind of changed this process. As we've seen from anything that's remotely complicated or important, be it the Clean Power Plan or Roadless Rule, it's just a mess.

I've been in the public sector and the private sector. And from the private sector, it's great. Clients call up and say, what should we do? guess that means business. In the public sector, it stinks because you really try to organize and motivate your team and your staff of lawyers and experts to do the right thing. To make sure that Congress' intent can be honored by implementing regulations that make sense. But, at the end of the day, it's become almost an insurmountable challenge. On that happy note, I'll turn it over for questions.

Bethany Davis Noll: Based on something Fred just said, and on Susannah's presentation, too, I'm wondering what's going on. I mean, over the past year, these have been controversial issues, right? It sounds like there's reasons for agencies not to enter a controversial sphere. But they currently are. Left and right. And they're doing that in a way that's really slipshod. So, what's happening? Does anybody have any theories?

Fred Wagner: Don't think that this is the first time this kind of stuff has happened. There was an official Executive Order from every president in the past four or five administrations, ordering a regulatory lookback to see if there were old, outdated, or unnecessary regulations that should be eliminated. But even that was hard to do for some of these plainly out-of-date regulations. So, on one hand, it's not new. Everyone's trying to do it because everyone likes to say that they got rid of regulations that don't make sense.

The difference now is the blatant introduction of the political into the regulatory. Why are we out of the Iran nuclear deal? We are not out of the Iran deal because people analyzed it or it makes sense to withdraw; we're out of the Iran deal because that's simply what the Trump Administration said they were going to do, and they did.

And the Roadless Rule is the worst thing since sliced bread. It's never been implemented. How do we know if it's good or bad or otherwise? But they ran on, it's overburdened. And so, that's what they're doing. It's the blatant introduction of politics into the regulatory process. In the good old days, the regulations would actually have some time to work or not. There'd be some adaptive management as to whether the rules should be amended and fixed and so forth. Unfortunately, I think that's out the window. The adaptive management is November 7 or 8 or whenever election day is in a given year, and what the winning party runs on.

Kathryn Kovacs: It's interesting. I actually asked my class this question this semester. I think there is something new this go-round in that the Trump Administration is forcing DOJ lawyers to go to court to try to defend things that are barely defensible. That has been, I think, a bit more rare in the past. Agencies and the lawyers out there have to be telling them, you just can't do it this way, we're going to lose in court. And they're saying, so what? My class came up with the obvious, that it's about the press. It's about looking like they're doing the right thing. You know, you just throw spaghetti at the wall and maybe something will work.

I think it's actually part of a deeper effort though. We can't forget that the Trump Administration has a view that the administrative state itself is unconstitutional. What they would like to do is not just roll back regulations, but roll back the entire fourth branch of government. They think it is unconstitutional. They think that the Constitution vests all executive power in the president, period. There should not be an APA. Not just there shouldn't be regulation or standards, but there just shouldn't be an administrative state.

So, I think that this is actually a battle in that bigger war that also goes way, way back. It goes back to the 1930s

really. But that's the battle that we're fighting. That's the battle that they're fighting. We might not realize that we're fighting it though.

Caitlin McCarthy: We have a question sent in from the audience. Are there any congressional proposals to simplify rulemaking? Most proposals like the REINS Act and Regulatory Accountability Act[30] impose more procedural requirements.

Fred Wagner: I don't think there's a rule to simplify the process. I know there have been proposals to try to curtail and restrict judicial review. In some ways, people consider that as a simplification in terms of the litigation component. I know there have been proposals to try to severely limit or restrict and/or consolidate the nature of rulemaking challenges. All of our cases go directly to the D.C. Circuit, to try to create a body that just deals with these things, because the feeling is that those bodies know how to do it, and, as a matter of routine, can go through it more swiftly. They have rules in terms of briefing. They get it teed up more quickly and things like that. But in terms of the agency side, I'm not very familiar with that.

Audience Member: I have two questions. One is for Fred. I saw that the revisions for the Well Control Rule[31] came out. They looked pretty minor compared to what the agency could have done in terms of the cost-benefit analysis. So, for a little bit of background, the cost-benefit analysis for the Well Control Rule severely underestimated the benefits because they didn't know what the risk reduction would be. They said it would only be like $23 million over 10 years from environmental benefits. And then, the rest of the benefits come from a deregulatory provision. I'm wondering what your take is on those revisions. They seemed kind of minor, but I'm not an engineer.

Fred Wagner: Nor am I. On some levels, I was badmouthing it. But on another level, I think you're right. I think they could have gotten much further. But, again, it's back to what I said. I think that people at the agencies—whether it's the Bureau of Ocean Energy Management or EPA or DOT—they don't wake up one morning and say, hey, let's write a regulation. They are reacting to stuff. They are reacting to legislative action or they are reacting to real things that have happened in the world that command a response. You know, it could be a public health and safety issue that needs some sort of response.

We just read that possibly 27 or 28 individuals have died with the new cars, the keyless entry cars, because somehow they don't know the cars are still on. And there have been terrible disasters with carbon monoxide poisoning. I bet you dollars to donuts that NHTSA is going to be considering some sort of regulation in terms of beeping or some sort of change in terms of the production by the original equipment manufacturers to try to address that.

That's why people regulate. And that's regulation in the good sense. We hate to be motivated by disaster. But oftentimes we are. Same thing with the rearview cameras in cars that are now ubiquitous. Everybody has one because there was a god-awful number of backup accidents involving children. That's how we got the rules and regulation.

I think even the oil industry with the Well Control Rule said, okay, *Deepwater Horizon*, have we had many accidents since then? No. Has this additional reporting helped us internally in terms of our own insurance and our own cost? Yes. Should we keep it up? Sure, but there are certain things we don't want. And I think they were targeted to those sorts of things. In the long run, some industries like that have invested so much money into these things. They also have internal incentives to do things in a way that are protective to their employees or their profits. Because you know what happened to BP, nobody wants to be in that situation.

So, as a private lawyer now, I always tell people that I like working with private industry because they are oftentimes three or four steps ahead of the regulators. Out there in the field, they know what works. There's always tension, of course. They're not always cheering on regulation, but my point is, they kind of know what's going on.

Audience Member: I have one more question, for Bethany. In the California case[32] with the BLM delay, the judge seemed to not fully understand the regulatory impact analysis. There was also something about the domestic social cost of carbon. I was wondering what you thought of that decision.

Bethany Davis Noll: I think the way to read that decision is that it's just a sort of short-term injunction decision. It really wasn't on the merits of the issue, of whether the court should show deference to the agency on its consideration of the social cost of carbon. So, as background, the social cost of carbon under the Obama Administration was developed through a really rigorous interagency working group process. The interagency working group came up with the number that agencies were using sort of across the board—the point was to create some level of consistency.

Now, we have this interim proposal from EPA and BLM. It's not a number that's being used across the board now. I mean, there are agencies that are still using the interagency working group number in some proposals. We have to wait and see what happens with EPA and BLM. The Clean Power Plan is still in the proposal stage. And other big rules like that are still in the proposal phase. We even saw EPA not use the interim social cost of carbon when it did some changes to its Methane Rule recently.

But, as for this decision that came out in California on the injunction, I think it's yet to be determined what's

30. S. 21, 115th Cong. (2017); S. 951, 115th Cong. (2017).
31. 83 Fed. Reg. 22128 (May 11, 2018).
32. California v. Bureau of Land Management, 286 F. Supp. 3d 1054 (N.D. Cal. 2018).

going to happen. That was sort of a quick injunction briefing. It really wasn't fully presented. So, it is yet to be seen what will happen when a court has to actually review an agency's decision to use this interim social cost of carbon.

Audience Member: If there's an overarching message I'm getting from the panel, it's that the system is broken, but don't throw out the baby with the bath water. I wonder if anybody on the panel has any insights as to a scenario under which effective regulatory reform could occur. And what would that mean from your own vantage point in terms of effective reform of the APA in particular?

Kathryn Kovacs: Well, the Senate version of the Regulatory Accountability Act has a lot of good stuff in it. There's a lot that I think goes a bit too far. Having hearings whenever requested on major rules, I think would be a huge burden for some agencies. But there are a lot of really good ideas, and it does have quite a bit of bipartisan support. It seemed about six months ago like it might actually move. Now that we're in an election year, I doubt it will really get anywhere. But it's supported by the ABA. It's got a lot of support out there. It's conceivable that it could go.

There is no getting rid of "hard look" review. There's no getting rid of the Office of Information and Regulatory Affairs (OIRA). There's no getting rid of all of the other layers and all the other substantive statutes. But it would clean up the APA in some ways. It might improve the rulemaking process, bringing it into the modern age in some ways that I think would be good. From what I hear, it's probably the best bet currently that has any realistic chance of happening.

My personal battle is to try to get the courts to back off and quit imposing all of these extratextual requirements on agencies. I think I'm waging my own little battle on that one. Nobody's actually listening. I think five people read each of my law review articles. But if one of my friends on the D.C. Circuit would please read them, maybe that would help a little bit, too.

Fred Wagner: I'm probably a little bit more moderate in terms of the spectrum of what you cited. I think cost-benefit analysis has to go. It's phony. The numbers are so made up that it's not to be believed. Sometimes, they're so expansive with respect to the benefits that you expect to see. It's like this: oh, you carry the two, you multiply it by three—and then, over 50 years, with 300 million Americans, it's $18 trillion dollars. Then, you look at the cost, and it's the same thing. The reason I know that they're phony is that we come up with our rule. We present it to the economist for the agency. The economist with nothing, has no idea what the rule's about, the merits of it, the specifics of it. They do their own thing and they come back with a number. And it's based on all these assumptions.

And then when they went to OIRA, they did another brand of economist on top of the economics, and we got even less reliable. Yet we are slaves to making sure that we have something that makes sense. They don't. I think it's just a lot of make-work and qualitative announcements about what you're trying to do. Twenty-eight deaths from being stuck in your car without knowing it's on, to me it's enough. I don't need to calculate the cost of human life. That's enough for me to say the agency should act.

Bethany Davis Noll: I've got to jump in here. First, how does an agency know that 28 deaths is enough? What about if on the other side, because of what you do, you're going to cause hundreds of deaths? You need to weigh your actions in some way. It's important to have some way to figure out where to set the line. And cost-benefit analysis is a really useful way of doing that.

There's one really important thing I'd like to say about this. When you're issuing a regulation, you want that regulation to stick—you have these agencies with their career staffers who are pouring their hearts and souls into issuing regulations that are really important. Now, what we're seeing is regulations that were supported by only something qualitative, something someone decided is enough that isn't backed up by hard numbers, are easier to roll back and get rid of. It makes them seem more flimsy, making it harder to defend them in the rollback era. And it means that the agency work was for nothing almost.

Fred Wagner: Let's talk about the Clean Water Rule for a minute. The main premise behind the rescission was that they just didn't buy into the benefits related to the characteristics of wetlands. So, instead of it being worth however-many millions of dollars—it wasn't an economic analysis, it was an analysis that said, okay, we think they're a little less valuable. Instead of assuming—I'm making up the number—$100 per acre of wetlands, we're going to assume $10 or $5. Then they started doing the math and they came up with a number. I disagree with that as a matter of science. But, there were numbers associated with it. There was an analysis. There was just a fundamental decision as with every economic decision about the assumptions and you tie it to the numbers. And their assumption was that it's not as important, and so not $100. Who's right?

Bethany Davis Noll: Well, that's not actually how they did it. What they did is they chopped off a whole set of studies that supported the benefits that were found by the prior administration and said those are too old. They were basically 20 years older. And then, they used a bunch of studies that were just as old to support their findings on the cost savings. A lot of people commented about that. It looked really dumb.

Fred Wagner: I think it's going to fail.

Bethany Davis Noll: Yeah. But now we see that the Agency may be sending something new to OMB, maybe a notice of data availability, or something else. Something like what happened with BLM and the Methane Rule.

Where originally, they said, we can't quantify the forgone benefits. Eventually, they said, okay, fine, I guess we do have to quantify the forgone benefits.

So, we see that the Agency may be taking that seriously and it is a hurdle that the Agency has to get over in repealing this rule. It's really easy for the public to wrap their minds around this. Because you tell the public that these wetlands have a monetary value. You can give them a dollar value. It can be understood in that way. It's worth $40, right, to protect this. And if you protect this number of wetlands, it's worth $400 million. And then, this is how much the costs are. It's worth $100. So, it's something that makes it easier for the Agency to figure out what course to take. Something that makes the public understand the decision better.

Kathryn Kovacs: What's interesting about this little debate is that isn't it why we have a Congress, to gather information, gather opinions, weigh the costs and benefits, and come up with a value judgment? Because you're both right. Anytime you're making a decision like this, the agency is necessarily weighing competing values. Isn't that why we have representative government? This is the problem that the more conservative law professors out there see with the administrative state. I agree with them. I would really prefer that Congress be making those judgments. But how the heck do you get Congress to do its job? Is that part of the solution? No, not realistically.

Bethany Davis Noll: That's why the APA contemplates agencies following the law and following what Congress told them to do. That's why that principle is so important. Because that is how we make sure that Congress gets what it wanted.

Audience Member: I have two questions. Some of these rules that are most controversial are ones that are wholly discretionary within the agency. For example, the Roadless Rule. I'm sure most people don't agree with that. As a policy judgment, it made a lot of sense. But I don't think you can discern that Congress in any way had a preference or no preference for the Roadless Rule. I think that some of the rules that are sort of more or less controversial here fall into that category. So, to say, well, this is what Congress intended for some of these discretionary rules is, I think, more complicated than that.

I think one of the reasons the Fracking Rule[33] and the Methane Waste Prevention Rule had been so controversial is that you're using a law, the Mineral Leasing Act from 1920, as your statutory basis. To go back and say, well, I think that Congress was very concerned about waste, for sure. But it becomes tough when the rule is entirely discretionary. Obviously, for many EPA rules, that's not true. But, I think that the Congress has expressed a desire and that's discernible by the courts. I think it gets a little more complicated.

My question is that part of the problems that we have now are related to the rulemaking problems, right? All of these rollbacks would have been a lot harder if the Fracking Rule had taken effect, if the Waste Prevention Rule had taken effect, if the Clean Water Rule had taken effect, if the Roadless Rule had taken effect, if the Clean Power Plan had taken effect. Then, we would have real-world understanding of how these things work. And I think we would know in a lot of the instances that these were not particularly burdensome rules to the agencies, right? But they were.

So, what's your advice? That's assuming that there's a Kamala Harris or Kirsten Gillibrand Administration soon on the horizon. This excellent panel has been put into that Administration to advise the agencies on environmental policy. And you've given, by and large, with some endorsement of APA principles, your advice to avoid this the next time around.

Susannah Landes Weaver: One thing I've been thinking about is that what we see now is just this purest sense of being in power. They're trying to get done what those who put them in power, and, especially in some sense, what the extreme elements want done. You're seeing instances where what's going on at EPA isn't even what industry wants, right? My advice would be, let's try to start by actually taking this seriously and hearing from everyone. Trying to craft a rule that people aren't going to be so angry about and bring those people to the table earlier. I know that that's a little chaotic. Anybody can sue. So, that's sort of the problem. But some people are better at suing than others. If you're able to craft a compromise, then people don't want to come out and sue on day one.

You saw that with the truck standards from the last administration, which largely went unchallenged. It was I think a real success story of bringing the stakeholders to the table. And I think you're hearing more and more, from the industry side, responsible voices saying, we need regulation. Let's talk about how to do it. So, I would be somewhat hopeful that there would be opportunities to craft things where they wouldn't get quite as stuck.

Bethany Davis Noll: I think this is an interesting point because it really shows how risky the repeals are. I mean, basically, what the Trump Administration has done is changed the lay of the land for purposes of judging a proposed repeal. This is going to be a problem. Because they have done this by issuing a bunch of suspensions that are being declared illegal through multiple court proceedings. Now, what the public is being asked to comment on is the wrong thing. Can we repeal a rule that we illegally stayed? We shouldn't be commenting on that. We should be commenting on, should you be repealing a rule that has been implemented for 15 months? The public isn't being given that chance.

So, I think that's a problem for the repeal. I think the other problem is the agency still has to justify the repeal as

33. 80 Fed. Reg. 16127 (Mar. 26, 2015).

though it was implemented. And most of the repeal proposals that we're seeing don't address that. They pretend the status quo is the illegal stay. I think this is a really interesting issue that is brewing out there.

Fred Wagner: And I would say, President Harris, expand exponentially the use of negotiated rulemaking under the APA. Use that more often as your default and try to get more buy-in upfront.

Caitlin McCarthy: Thank you, all. We hope you'll continue to think about deregulation and the multifaceted legal issues presented here today.