ESSAY

Regime Change and Regulatory Resilience

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INTRODUCTION

Like most candidates, the incoming President made many promises while campaigning, on issues ranging from trade to immigration. Attempts to divine which of those promises will be kept is, as always, an exercise in speculation, particularly at this early juncture. Indeed, the President-elect already appears to have softened his stance on some issues,[1] including (to some degree) climate change.[2] But while the new administration may not ultimately be willing or able to deliver on campaign promises to withdraw from the Paris Agreement or abolish the Environmental Protection Agency ("EPA"),[3] it has thus far remained fairly adamant about its intent to roll back environmental regulations where possible[4]—and would likely have Congress' support if it in fact pursues that goal.[5] This begs the question: to what extent *is* it possible to roll back existing environmental regulations?

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[1] *See* Julie Hirschfeld Davis, *Donald Trump Appears to Soften Stance on Immigration, But Not on Abortion*, N.Y.TIMES (Nov. 13, 2016), http://www.nytimes.com/2016/11/14/us/politics/donald-trump-twitter-white-house.html; Alice Ross, *Donald Trump Appears to Soften on Obamacare and Clinton Emails*, THE GUARDIAN (Nov. 12, 2016), https://www.theguardian.com/us-news/2016/nov/12/donald-trump-appears-to-soften-stance-on-range-of-pledges.

[2] *See* Roberta Rampton, *Trump Keeping 'Open Mind' on Pulling out of Climate Accord*, REUTERS (Nov. 23, 2016), http://www.reuters.com/article/us-usa-trump-idUSKBN13H1DZ.

[3] *See* Michael Biesecker, *Trump Roll-Back of Obama Climate Agenda May Prove Challenging,* ASSOCIATED PRESS (Nov. 29, 2016), http://bigstory.ap.org/article/9816a3745aa5405abc7fa6291f7ae886/trump-rollback-obama-climate-agenda-may-prove-challenging.

[4] *Compare* Amy Harder, *Donald Trump Pledges to Roll Back Energy Regulations, Bolster Coal Industry*, THE WALL STREET JOURNAL (Aug. 8, 2016), http://www.wsj.com/articles/donald-trump-pledges-to-roll-back-energy-regulations-bolster-coal-industry-1470703160, *with* Andrew O'Reilly, *Trump's Energy Plans Look to Roll Back Obama's Climate Moves*, FOX NEWS (Nov. 21, 2016), http://www.foxnews.com/politics/2016/11/21/trumps-energy-plans-look-to-roll-back-obamas-climate-moves.html.

[5] Over the past few years, both houses of Congress have proposed drastic cuts to EPA funding and drafted numerous bills to block environmental regulations. *See* David Roberts & Brad Plumer, *Most People are Wildly Underestimating What Trump's Win Will Mean for the Environment*, VOX (Nov. 14, 2016), http://www.vox.com/science-and-health/2016/11/14/13582562/trump-gop-climate-environmental-policy.

While legal commentators and scholars have already made prognostications ranging from the deeply pessimistic[6] to the cautiously optimistic,[7] I posit that there is a relatively simple framework for analyzing whether and to what extent environmental regulations are likely to stand. Specifically, there are two factors that primarily inform the answer to that question: (1) the recency of the regulation, and (2) the level of discretion that EPA (or any other agency that engages in environmental regulation) is exercising. Using these factors, one can create a rough rubric of resiliency, identifying the environmental rules that may be viewed as low-hanging fruit for new leaders spearheading anti-regulatory initiatives, as well as those that are less likely to be readily reversed in the coming months and years.

I. RECENCY

While it may seem obvious that recent regulations are more likely to be rolled back by a new administration than longstanding rules, those seeking to prevent such regulatory rollback would do well to consider the reasons why this is so.

First, incoming administrations have directed agency leaders to extend the effective date of particularly recent regulations (often called "midnight regulations") that are final but have not yet taken effect, as both the George W. Bush and Obama administrations did on their first days in office.[8] This gives the new administration time to either undo the rule through notice-and-comment rulemaking, or to settle ongoing challenges to the new rule and use the settlement as a vehicle to allow the agency to revise or rescind the rule.[9] The extension of a rule's effective date could be challenged, but such actions have often evaded judicial review in the past because they are usually limited to relatively short time periods (e.g., 60 days),[10] and there is accordingly little precedent on which to mount a challenge.

Second, the 1996 Congressional Review Act ("CRA")[11] empowers Congress, by passage of a joint resolution, to overrule a final regulation within sixty legislative days of its promulgation.[12] Because the President can veto a CRA joint resolution, the Act has

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[6] *See, e.g.*, *id.*

[7] *See, e.g.*, Jeremy P. Jacobs, *Rescinding Obama Regs? Not So fast, Legal Scholars Say*, E&E NEWS (Nov. 11, 2016), http://www.eenews.net/stories/1060045632.

[8] *See* MAEVE P. CAREY, CONG. RESEARCH SERV., R42612, MIDNIGHT RULEMAKING, 4–7 (2012); Ann Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 472–73 (2011). Carey and O'Connell both note that incoming administrations have also directed agencies not to finish regulations that are not yet final without approval, and to withdraw regulations submitted to the Federal Register prior to publication. This article, however, focuses on the likely fate of final regulations that have been published in the Federal Register.

[9] O'Connell, *supra* note 8, at 530.

[10] *See* Carey, *supra* note 8, at n.23.

[11] 5 U.S.C. §§ 801–808 (2012).

[12] *Id*. at § 801 (b)(1), 2(a); *see also* Stacy Cowley, *With Trump's Signature, Dozens of Obama's Rules Could Fall*, N.Y. TIMES (Nov. 15, 2016), http://www.nytimes.com/2016/11/16/business/with-trumps-signature-obamas-rules-could-fall.html.

been used successfully only once to date.[13] However, in the rare instance where the House, Senate, and incoming administration are politically aligned, the CRA may become a powerful tool for overturning actions taken by the executive branch in the waning months of an administration.[14] Such resolutions bypass committee review in the Senate,[15] and are not subject to filibuster,[16] thus making them more efficient vehicles for achieving a de-regulatory agenda than, say, if Congress were to actually attempt to enact a law addressing the same topic. Due to the infrequency with which Congress conducts legislative business, the 60-legislative-day wormhole that is about to open will reach back to around June 13, 2016,[17] potentially putting more than a hundred significant rules on the chopping block.[18] Targets for a CRA strike might include EPA's August 2016 performance standards and guidelines for new and existing municipal landfills, which seek to reduce methane-rich landfill gas emissions.[19]

There are, however, important limitations to Congress' ability to use the CRA to undo regulatory action. Critically, while there is no opportunity to filibuster, the Senate must allot ten hours of debate for each CRA joint resolution,[20] and the Act contemplates that rules be addressed individually—i.e., a separate resolution is arguably required for each rule.[21] Thus, to use the CRA to overturn even a handful of regulations, the Senate would have to allocate a substantial amount of floor time to the effort. Nonetheless, while even a fairly unified Congressional majority will have to choose where to focus its energies in employing the CRA, there is a not-insignificant degree of uncertainty associated with the regulatory work EPA and other agencies have done in the past six months.

Perhaps the most dangerous aspect of the CRA is the provision stating that, once the President signs a joint resolution of disapproval, not only does the rule in question not

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[13] In March 2001, George W. Bush signed a joint resolution overturning a workplace ergonomics rule promulgated by the Occupational Safety and Health Administration during the last months of the Clinton administration. *See* Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2169–74 (2009).

[14] *Id.* at 2167 ("No President would, under ordinary circumstances, sign a disapproval resolution disavowing a regulation that his own government had just enacted. CRA disapproval resolutions are most likely to be enacted at the beginning of a new administration, when both the new administration and Congress disapprove of the prior administration's midnight regulation").

[15] *See* 5 U.S.C. § 802(c)–(d) (2012).

[16] *See id.* at § 802(d)(2).

[17] Christopher M. Davis & Richard S. Beth, *Agency Final Rules Submitted on or After June 13, 2016, May Be Subject to Disapproval by the 115th Congress*, CRS INSIGHT (Dec. 15, 2016), https://fas.org/sgp/crs/misc/IN10437.pdf.

[18] *See* Clyde Wayne Crews Jr., *Donald Trump And the 115th Congress Could Get Rid Of These 140 Obama Regulations*, FORBES (Nov. 14, 2016), at http://www.forbes.com/sites/waynecrews/2016/11/14/donald-trump-and-the-115th-congress-could-get-rid-of-these-140-obama-regulations/#188924826457.

[19] 81 Fed. Reg. 59,332 *et seq*.; 81 Fed Reg. 59,276 *et seq*.

[20] 5 U.S.C. § 802 (2012).

[21] The prescribed text for joint resolutions disapproving agency action is: "That Congress disapproves the rule submitted by the __________ relating to __________, and such rule shall have no force or effect." *Id.* at § 802(a).

take effect, the agency may not reissue the rule in "substantially the same form,"[22] thus potentially preventing a future administration from reenacting a similar regulation. To date, out of the tens of thousands of rules enacted by federal agencies since 1996, the CRA has only been used to disapprove one—the Occupational Safety and Health Administration's 2000 final rule on workplace ergonomics—and even a President generally in agreement with Congress on the merits (or lack thereof) of a prior rulemaking might decline to sign a joint resolution for fear of the same fate befalling his own administration's actions.[23] But the coming months may well offer Congress an unprecedented opportunity to test the power it gave itself when it enacted the CRA in 1996.

Another reason that more recent regulations are less likely to endure the transition to an anti-regulatory administration is that rules promulgated in the past year—or even during the past several years—often are still subject to judicial challenges or pending administrative reconsideration petitions. While, as Professor Jody Freeman recently pointed out, an agency "can't rescind a rule with the stroke of a pen," but rather must engage in a new round of notice-and-comment rulemaking to reverse its course,[24] such a process is far more easily initiated when the prior regulation remains subject to review. A petition for administrative reconsideration, submitted to the agency by an entity challenging the rule, provides a hook by which an agency can revisit a rule in light of alleged new information—and, at the same time, in light of changed policy directives. Thus, an agency with changed leadership and priorities might use a pending reconsideration petition as a vehicle for revisiting a final rule, and simultaneously move to stay any related litigation.[25] This path requires the agency to engage in supplemental rulemaking—a process not generally known for its brevity or speed[26]—and thus does not necessarily spell a quick death for the target regulation. But even where the agency does not move aggressively to reverse its prior course, by granting a petition for reconsideration, it can essentially consign a rule to regulatory purgatory for some time.[27]

Where a regulation is the subject of pending judicial challenges, a new administration could ask the court to remand the rule back to the agency for further consideration or

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[22] *Id.* § 801(b)(2).

[23] *See* Carey, *supra* note 8, at 11.

[24] Paul Voosen, *What Trump Can—and Can't—Do All by Himself on Climate*, SCIENCE MAG. (Nov. 9, 2016) http://www.sciencemag.org/news/2016/11/what-trump-can-and-cant-do-all-himself-climate (quoting J. Freeman).

[25] For example, in July 2009 (six months after President Obama took office), the EPA used a pending reconsideration petition as the vehicle to reverse a 2008 decision denying California a waiver of Clean Air Act preemption for its greenhouse gas emission standards for motor vehicles. *See* 74 Fed. Reg. 32,744 *et seq*. Judicial challenges to the 2008 denial had already been held in abeyance at EPA's request in February 2009. *See id.* at 32,747, n.6.

[26] *See* Ann Joseph O'Connell, *supra* note 8, at 476–78, 533 (describing rulemaking as "not short").

[27] The potential "purgatory" period is meaningfully limited, however, in the Clean Air Act context, where Congress provided that a grant of reconsideration does not render a rule non-final, and that EPA and the courts may only stay a final rule pending reconsideration for up to three months. *See* 42 U.S.C. § 7607(b)(1); § 7607 (d)(7)(B).

enter into a settlement agreeing to revisit the substance of the rule. While agencies do not often make such a request after a case has been briefed and argued—and indeed the court might well reject such a request at that stage (as it would no doubt be urged to by intervenors supporting the regulation) given the time and effort it had already expended—it is relatively easy to take such action in the early stages of a case, prior to the initiation of briefing. Furthermore, even after receiving a decision on the merits, a new administration could theoretically decline to continue to defend a regulation on appeal, even if the initial decision was in the agency's favor.[28]

The bottom line is that there are many ways to revisit, challenge, and reverse newer rulemakings. Effective dates can be extended. Congress can reverse the rules through the CRA. Agencies may still have opportunities to reconsider the findings that underlie the rules, and the judicial process allows for a range of ways to alter or amend judicially challenged rulemakings.

Older regulations are more likely to survive a change of administration not only because some of the options described above may no longer be available, but also because, the older the regulation, the more likely it is that industry actors will have already taken irreversible steps to comply. Revising or rescinding a rule in such circumstances might unfairly give companies that delayed taking steps to comply a competitive advantage, and accordingly the regulated industry may not be overly eager to have Congress or the President change the new status quo. One example of a regulation that may fall in this category is EPA's 2012 Mercury and Air Toxics Standards.[29] While certain aspects of that rulemaking are subject to ongoing judicial review pursuant to the Supreme Court's decision in *Michigan v. EPA*,[30] utilities have already made decisions and expended funds based on the assumption that the rule will remain in effect.[31] Having invested in the technology needed to comply with the rule, companies may well lack the incentive to lobby for its reversal, or perhaps even lobby *against* such action. Thus, the passage of time is a powerful weapon in the anti-regulatory-rollback arsenal.

[28] *See* Jody Freeman, *Implications of Trump's Victory and the Republican Congress for Environmental, Climate and Energy*, HARV. ENVTL. LAW PROG. (Nov. 10, 2016) http://environment.law.harvard.edu/postelection/.

[29] 77 Fed. Reg. 9304 et seq. (Feb. 16, 2012).

[30] 135 S. Ct. 2699 (2015) (holding that the agency had unreasonably declined to consider costs when deciding whether regulation was "appropriate and necessary"). On remand, the agency published a final rule finding that, after considering costs, it remained appropriate and necessary to set standards for emissions of mercury and other toxics from power plants. 81 Fed. Reg. 24,420 *et seq*. (Apr. 25, 2016).

[31] *See* Emily Hammond, *Deference for Interesting Times*, 28 GEO. ENVTL. L. REV. 441, n. 20 (2016) (citing statement by counsel for coal-fired power plant at December 2015 oral argument that the MATS rule should not be vacated pursuant to *Michigan v. EPA* because industry had already incurred costs to comply).

II. DISCRETION

The second major factor that informs the regulatory resilience analysis is the degree to which the agency action in question can be characterized as discretionary or non-discretionary. For these purposes, a rule may be non-discretionary either because the statute itself or the administrative record compels it. It is generally going to be easier for an agency to rescind or change a purely discretionary action—i.e., where it would be difficult to argue that either the existence of the regulation or its contents are mandatory—than a non-discretionary action.

A regulation may be characterized as non-discretionary because the statute compels its contents, or even its outright existence. The question of whether a regulation is compelled by the governing statutory provision is generally answered by recourse to the familiar *Chevron* standard, under which courts ask (1) whether the agency's interpretation of the statute is compelled and (2) if not, whether that interpretation it is at least reasonable.[32] Where the agency's interpretation is not compelled under *Chevron* Step One, then the agency is free to change that interpretation, and the discretionary *Chevron* Step Two "reasonableness" standard applies no less to the changed interpretation of the statute than to the agency's prior interpretation.[33] Indeed, *Chevron* itself addressed EPA's revised interpretation of the statutory term "source," and the Supreme Court rejected the assertion that deference was unwarranted because the agency had changed its reading:

> An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.[34]

Nonetheless, even when an agency's prior interpretation of the statute is not compelled under *Chevron* Step One, an attempt to change course is likely to face increased skepticism from the reviewing court. As the Supreme Court noted a little over a decade ago, while "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework," it may nonetheless be "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."[35]

In no small part because of the leeway it gives agencies to strike, and then change, their course, *Chevron* has become a favorite target of judges and scholars skeptical of the size and power of the administrative state. Some have argued that it should be abandoned altogether in favor of an inquiry starting with judicial analysis of the "best" reading of the statute,[36] which would considerably lessen the discretion afforded to agencies (including

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[32] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
[33] Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (*Chevron* applies where an agency has changed its interpretation of the statute).
[34] *Chevron*, 467 U.S. at 863–64.
[35] *Nat'l Cable & Telecomm. Ass'n*, 545 U.S. at 981.
[36] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016).

to change their minds). While such a fundamental doctrinal shift has yet to make the leap from scholarly discussion to case law, the Supreme Court has nonetheless found an increasing number of reasons to decline to apply *Chevron* in particular administrative law cases based on (inter alia) the impact of the challenged regulation on the economy.[37] It will be interesting to see whether such arguments remain popular among those seeking to rein in agency action when the action in question is de-regulatory in nature.

Regulations likely to be considered non-discretionary under the *Chevron* rubric include those promulgated pursuant to clear statutory deadlines; i.e., where the governing statute explicitly requires that the agency take a certain action by a certain time. The Clean Air Act ("CAA") sets forth a number of obligations that fall into the first category, requiring that EPA take certain actions, under certain programs, by certain deadlines. For example, the CAA requires EPA to determine whether each area of the country has met each of the national ambient air quality standards by specific deadlines.[38] Even if a new administration might not love the EPA's prior conclusion that a particular area has not attained one of the standards and therefore must take measures to reduce emissions, it is less likely to expend time, effort, and political capital trying to undo such a regulation given that (a) the statute plainly requires the agency to make a determination one way or the other, and (b) the facts in the existent administrative record (which, for this type of finding, include data collected over multi-year periods) strongly indicate that the area has not attained the standard. Were the agency to nonetheless try to rescind the regulation, NGOs and citizen groups would almost certainly challenge that action. And while that is no doubt equally true of many other potential de-regulatory actions (and probably not a significant deterrent to an administration with a strong de-regulatory bent), a rational decision-maker would likely recognize that such challenges would probably result in an adverse court order. Thus, actions to undo such regulations, the existence of which are mandated by the statute and the contents of which are drawn from a data set that the agency cannot easily supplant, are less likely to rise to the top of the de-regulatory agenda.

The situation described above—where not only does the statute mandate that the agency act, but the data in the record plainly points in a particular direction—brings us to the second line of argument those seeking to prevent regulatory rollback might employ to argue that a rule cannot be rescinded: i.e., that the administrative record compels the rule's content. Record-based challenges to agency action are generally governed by the "arbitrary and capricious" standard (whether because it is prescribed by the governing statute[39] or the Administrative Procedures Act[40]), which requires only that the agency's conclusion be "rational."[41] But while, in the first instance, the same set of facts can often be interpreted in multiple ways, once an agency has reached a conclusion based on a

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[37] *See, e.g.*, Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2444 (2014).

[38] *See generally* 42 U.S.C. § 7407(d)(1).

[39] *See, e.g.*, 42 U.S.C. § 7609(d)(9) ("arbitrary and capricious" standard for certain CAA regulations).

[40] *See* 5 U.S.C. § 706(2).

[41] *See* Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983).

particular data set (usually collected over a number of years), it would be hard pressed to completely reverse course; for example, it would likely be difficult for EPA to now claim that mercury emissions from power plants do not increase the risk of neurological defects in children.[42]

Rather, a reviewing court is likely to be fairly skeptical of agency action where it is at odds with a prior conclusion drawn from similar data.[43] As the D.C. Circuit noted almost 50 years ago, "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis[.]"[44] Indeed, that court would likely be fairly skeptical of an EPA rulemaking concluding that—despite what the agency found in 2009, based on an extensive record[45]—greenhouse gas emissions do not, in fact, endanger human health and welfare. At the very least, the agency would have to undertake the difficult and time-consuming task of marshaling a substantial body of new scientific evidence to counterbalance the record on which its 2009 Endangerment Finding was based. Thus, even where a court would likely conclude that the substance of a past rulemaking was discretionary, rather than compelled, the contents of that rulemaking record still meaningfully constrain the agency's ability to change course.

In short, where an agency seeks to strike out on a new path that plainly diverges from its prior course, whether because the agency's interpretation of the statute has changed or because it has revised its analysis of the facts in the administrative record, the question will be how much deference the reviewing court is willing to give the agency in light of its past interpretations and conclusions to the contrary. Where the prior rulemaking was not compelled in some sense—i.e., where the inherently discretionary standards of rationality and reasonableness apply—courts are more likely to give agencies some leeway to change course, reversing prior environmental regulations. Where the prior action was arguably mandatory—whether because the statute compels the agency to take a certain action, or because the administrative record strongly supports a particular outcome—those seeking to prevent regulatory rollback will have a much better chance of doing so.

CONCLUSION

Using the two criteria identified above—recency and discretion—one can identify past agency actions that might be targets for rescission or reversal by the incoming administration, and concurrently analyze the likelihood that such attempts to change

[42] *See* National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units, 77 Fed. Reg. 9310–11 (Feb. 16, 2012).

[43] *See State Farm*, 463 U.S. at 46–57 (rejecting agency's attempt to revoke airbag and seatbelt safety standards given inconsistency with the agency's findings regarding the efficacy of such devices in prior rulemakings and the lack of new data indicating otherwise).

[44] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1971), cert. denied, 403 U.S. 923 (1971).

[45] *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,497 (Dec. 15, 2009).

course will succeed. Indeed, those interested in doing so could roughly plot out the relative strength of past agency actions using recency and the level of discretion with which the agency acted as the *x* and *y* axes for a grid, thereby creating a rough rubric of resiliency—and perhaps a battle plan.