# Requirements For "Repealing Regulations" At The Federal Level


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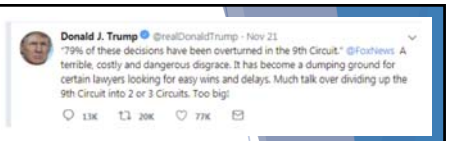


- Rulings on challenges to new/changed regulations under APA:
  - Pre Pres. Trump, gov't generally wins ~70%
  - Post Trump ~ 6%
- Judges appointed by presidents from both parties; many circuits (not just the "terrible 9th Circuit")



# Scope of discussion

- Background
- What do we mean by "Deregulation"?
- Drivers for deregulation
- Statutory & judicial framework
- Selected rules and decisions


# Background

- 1970s – 1990s burst of environmental laws, then regulations, many 'command & control'
- 1990s – today
  - Periodic calls for repeal of particular environmental regulations
  - '2d Generation' Env. Law: Downsides of C&C; inefficiencies, over/under regulations, pro markets
  - Calls for a rebalanced EPA/State relationship: 'new federalism'
- Deregulation under the Trump administration
  - Candidate Donald Trump: "EPA is the laughingstock of the world!"
  - Myron Ebell, part of Trump EPA landing team: The environmental movement and the laws it helped spawn "is the greatest threat to freedom and prosperity in the modern world."
  - Triggered a variety of deregulatory efforts, across many agencies including EPA


Climate change

Green movement 'greatest threat to freedom', says Trump adviser

Climate-change denier Myron Ebell says he expects Trump to withdraw the US from the global climate change agreement

The Guardian

# What do we mean by "Deregulation"?

- EPA's substantial revisions to regulations
  - Repeal
  - Repeal and replace
  - Substantial modification
  - Delayed promulgation or implementation
- Not
  - Defunding
  - Diminished enforcement
  - Deep weed diving (*e.g.* changes to benefit/cost analysis)


# Drivers for deregulation

- New President comes from another party, often promising a different approach to various regulations
- Executive Orders calling for retrospective review of regulations
  - E.O. 12,866 (Clinton): Agencies to periodically submit to OIRA a program under which each reviews their respective regulations to ensure that they remain timely, compatible, and effective, and do not impose unnecessary burdens.
  - E.O.s 13,563 (2011) (Obama): Agencies shall "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."

# Drivers for deregulation

- E.O 13,771 (2017) (Trump), *Reducing Regulation and Controlling Regulatory Costs*
  - "Unless otherwise prohibited by law," for every new regulation, "at least two existing regulations" shall be identified "to be repealed."
  - "[A]ny new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations."
  - The "total incremental cost of all new regulations, including repealed regulations, to be finalized by each agency [in a given year] shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director" of the OMB.
- Final Guidance re Sec. 2 of E.O. 13,771 (2/2/17)
  - E.O. applies only to "significant regulatory actions" per E.O. 12,866
  - **Does** apply to "guidance/interpretive documents"
  - **Does not** apply to independent agencies (although they are "encouraged" to conform).
- Open issue: Whether, and if so, how, the benefits of particular regulations will be incorporated into an agency's analysis for meeting E.O.s' mandates

# Statutory & judicial framework for reviewing "Deregulation"

## APA Review of Repeal of federal Environmental Regulations

- Rule making (and rule rescission) process for federal agencies governed by
  - the Administrative Procedures Act of 1946, 5 § U.S.C. 553, subject to
  - any specific additional provisions in specific environmental statutes.
- Scope of review: per APA, 5 USC § 706(2), a reviewing court can "compel agency action unlawfully withheld or unreasonably delayed" and "hold unlawful and set aside agency action, findings, and conclusions" that are:
  - **Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;**
  - Contrary to constitutional right, power, privilege, or immunity;
  - In excess of statutory jurisdiction, authority or limitations, or short of statutory right;
  - Without observance of procedure required by law;
  - Unsupported by substantial evidence in a case subject to 556 and 557 of this title [concerning formal rulemaking and adjudicatory proceedings] or otherwise reviewed on the record of an agency hearing provided by statute; or
  - Unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

## *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983)

- Background
  - 1977 Pres. Carter: NHTSA rule
    - All new cars shall be equipped with passive restraints, either automatic seat belts or airbags.
  - 1981 Pres. Reagan: NHTSA withdraws rule
    - Revocation of an existing rule should be subject to a more deferential standard of judicial review (applicable to an agency's refusal to regulate) than that given to an agency's issuance of a rule.
- Holding: Court struck down new rule.
  - An "agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."
  - Since "the forces of change do not always or necessarily point in the direction of deregulation," the agency's regulatory direction (promulgation or rescission) "does not alter the standard of judicial review established by law."
  - "We must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'"

## *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983)

- Background
  - 1977 Pres. Carter: NHTSA rule had required that all new cars be equipped with passive restraints, either automatic seat belts or airbags.
  - 1981 Pres. Reagan: NHTSA withdraws rule, arguing that revocation of an existing rule should be subject to a more deferential standard of judicial review (applicable to an agency's refusal to regulate) than that given to an agency's issuance of a rule.
- Holding: Court reversed NHTSA's rule revocation
  - Since "the forces of change do not always or necessarily point in the direction of deregulation," the agency's regulatory direction (promulgation or rescission) "does not alter the standard of judicial review established by law."
  - An "agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."
  - "We must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'"
  - The "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"

## *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983)

- Holding (cont'd)
  - "Normally an agency rule would be arbitrary and capricious if the agency
    - has relied on factors which Congress has not intended it to consider,
    - entirely failed to consider an important aspect of the problem,
    - offered an explanation for its decision that runs counter to the evidence before the agency, or
    - is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."
  - "It also would be arbitrary and capricious if the agency failed to consider certain policy alternatives."
  - Thus,
    - NHTSA was required to consider an available "technological alternative," the use of airbags alone, **which the agency had previously considered as part of promulgation.** Also, the agency **had ignored a factor in the new rule that it had in part relied upon when issuing the prior rule.**
    - "**There is, then, at least a presumption that [the statute's] policies will be carried out best if the settled rule is adhered to."**
- Origin of the 'Hard look' doctrine of judicial review of agency action

## *Federal Communications Commission et al. v. Fox Television Stations, Inc., 556 U.S. 502 (2009).*

- Background
  - Per the Communications Act of 1934, the FCC enforces an indecency provision which prohibits broadcasting the utterance of any obscene, indecent, or profane language between 6 AM and 10 PM
  - In its prior enforcement policy, the FCC had considered the "full context" of a broadcast in determining indecent language, generally looking for the "deliberate and repetitive use" of expletives to determine appropriate enforcement actions.
  - In 1975, non-repetitive "fleeting" uses of expletives on television were OK; George Carlin's "Filthy Words" not OK.
- In 2004, w/o N&C, the FCC changed its enforcement policy regarding indecency in broadcasts. In 2006, it issued two orders to Fox Television for broadcasts it found indecent based on the fleeting use of expletives.
  - Cher, at 2002 Billboard Music Awards: "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** 'em."
  - Nicole Richie, at 2003 Billboard Music Awards: "Why do they even call it 'The Simple Life?' Have you ever tried to get cow s*** out of a Prada purse? It's not so f***ing simple."

## *Federal Communications Commission et al. v. Fox Television Stations, Inc., 556 U.S. 502 (2009).*

- Holding, plurality op. (Scalia), Court upheld FCC change of policy
  - Reaffirmed *State Farm;* APA makes no distinction "between initial agency action and subsequent agency action undoing or revising that action."
  - "We find no basis in the [APA] or in our opinions for a requirement that all agency change be subjected to more searching review."
  - An agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better. . . This means that the agency need not always provide a more detailed justification."
  - An agency must provide "a more detailed justification than what would suffice for a new policy created on a blank slate" in at least two sets of cases:
    - when "its new policy rests upon factual findings that contradict those which underlay its prior policy," and
    - "when its prior policy has engendered serious reliance interests that must be taken into account."

## *Federal Communications Commission et al. v. Fox Television Stations, Inc., 556 U.S. 502 (2009).*

- **But** Justice Kennedy rejected Justice Scalia's analysis of adequacy of FCC's explanation for its change of policy, instead adopted the Justice Breyer's dissenting view.
  - "Where there is a policy change the record may be much more developed because the agency based its prior policy on factual findings. In that instance, **an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate"**
- In sum, *Fox* sets out a 4 part test under the APA when assessing an agency's change of course. An agency's actions will not be arbitrary or capricious when:
  - The agency displays an awareness that it is changing its policy – it cannot silently disregard the previous policy;
  - The new policy is permissible under the statute;
  - The agency "believes" the new policy is better;
  - **There are good reasons for the change**
- In particular disputes, courts will come down somewhere between
  - Justice Scalia: an agency's new course need not be better, just intended), and
  - Justice Breyer: the administrative record supporting the prior regulation cannot be disregarded.

## Recent cases

## *Organized Village of Kake v. USDA*, 795 F.3d 956 (9th Cir. 2015), *cert. denied*, 136 S.Ct. 1509 (2016

- Background
  - 2000 USDA proposed a Roadless Rule in which it inventoried which national forests would be managed as roadless.
  - 2001 Pres. Clinton: USDA issues Record of Decision (ROD) determining that the Tongass National Forest would not be exempted from Roadless Rule.
  - 2003 Pres. George W. Bush: USDA issued a new ROD exempting Tongass from Roadless Rule.
- Holding: Majority of *en banc* court struck down new ROD
  - USDA did not give good reasons for changing the policy, and had relied on findings that were unexplained and contradicted by earlier ones.
  - What had been considered a "high" risk to roadless values under the 2001 ROD was considered a "minor" risk under the 2003 ROD, with no explanation for the change.
  - The absence of a reasoned explanation was arbitrary and capricious under the APA.

"I came, I sawed, I conquered."

## *Clean Air Council et al. v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017)

- Background
  - 2016 President Obama: EPA issued a Final Rule establishing new source performance standards under the CAA for fugitive emissions of methane and other pollutants from oil and gas development facilities (Methane Rule).
  - April and June 2017 President Trump: EPA issued notices of its intent to issue short stay and institute reconsideration of the Methane Rule.
  - June 16, 2017 EPA published a NPRM stating its intention to extend the stay for two years while it restarted the rule making process, allowing it to "look broadly at the entire 2016 Rule" during "the reconsideration proceeding."
- Holding: Stay vacated
  - The decision to grant reconsideration is not reviewable, but the imposition of the stay is appealable.
  - The provisions being challenged on reconsideration were a logical outgrowth of the NPRM and petitioners had actually raised many of the same issues during the prior administrative proceeding. Accordingly, EPA's decision to grant the stay was arbitrary and capricious.
  - Court observed that the EPA was free to go forward with its new NPRM in which it would consider and potentially revise the Methane Rule, so long as per *Fox,* "the new policy is permissible under the statute…, there are good reasons for it, and…the agency *believes* it to be better.

"Can't we just dye the smoke green?"

## *Air Alliance of Houston et al. v. EPA, 906 F.3d 1049 (D.C. Cir. 2018)*

- Background
  - 2017 Pres. Obama: EPA issued final rule under the Risk Management Program of CAA Section 112(r), Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act (RMP Rule). Effective March 14, 2017, with the compliance date for covered facilities to submit a revised Risk Management Plan (RMP) of March 14, 2022.
  - April 4, 2017 Pres. Trump: EPA issued a NPRM proposing to delay the effective date of the RMP Rule for an additional 20 months, until February 19, 2019, which it finalized on June 14, 2017 (RMP Delay Rule).
- Holding: RMP Delay Rule Vacated
  - After finding the petitioners (environmental groups) had standing the court found promulgation of the rule had been arbitrary and capricious. EPA had not made any findings that supported a 20 month delay, other than its desire (reflective of industry) to delay implementation of the final rule long enough for it to promulgate a new one.
  - "EPA may not imploy delay tactics to effectively repeal a final rule while sidestepping the statutory mandated process for revising or repealing that rule on the merits."

## *Pineros y Campesinos Unidos v. Pruitt, 293 F. Supp. 3rd 1062 (N.D. Cal. 2018)*

- Background
  - January 2017 Pres. Obama: EPA issued a final rule strengthening the regulations regarding the certification and use of "restricted use pesticides" (RUP Rule). Effective March 6, 2017 it included a three year implementation schedule.
  - January 26, 2017 Pres. Trump: EPA delayed the March 6, 2017 effective date and continued to issue further delays, with essentially no opportunity for public comment. EPA offered no explanation justifying the delay, other than a desire to reconsider the RUP Rule.
- Holding: Court vacated delay rule, declared RUP Rule effective March 16, 2017
  - Citing *Fox* and *Clean Air Council*, the court held that by delaying the effective date of the RUP Rule the EPA had engaged in substantive rule making and was required to comply with the notice and comment requirements of the APA.
  - Court rejected EPA's argument that its failure to effectively seek public comment or otherwise follow APA notice and comment rulemaking met a "good cause" exception under the APA. Noting that exception is extremely narrow and does not apply here. "A new administration's simple desire to have time to review, and possibly reverse or repeal, its predecessor's regulations falls short of this exacting standard."

## *National Women's Law Center, et al. v. Office of Management and Budget, et al. (D.D.C. March 4, 2019)*


- Background
  - Since 1966 the Equal Employment Opportunity Commission (EEOC) has required employers, with more than 100 employees, to provide data including the number of employees, job categories, race, sex, ethnic origins.
  - 2016 Pres. Obama: After EEOC provided notice and took comments on ways to improve enforcement of the laws prohibiting pay discrimination, it received approval from OMB under the Paperwork Reduction Act to add data collection requirements for employers, to be applicable in April 2018.
  - August 2017 Pres. Trump: OMB notified EEOC that it had decided to stay and review the datacollection requirements. EEOC issued notice in the Federal Register announcing the stay, but providing that employers may continue to use new forms and provide additional data.
- Holding: Stay vacated
  - Per *Clean Air Council* and *Air Alliance of Houston,* the stay is reviewable.
  - OMB may review a previously approved PRA for collection of data if; (1) relevant circumstances have changed or (2) the burden estimate provided by the agency at the time of initial submission was in error.
  - OMB failed to show changed circumstances and merely speculated that the burden estimate may be incorrect. OMB provided inadequate reasoning to support its stay decision and could not "simply rely on the speculation of commenters."

## *Council of Parent Attorneys and Advocates v. Devos, et al.*, (D.D.C., March 7, 2019)

- Background
  - 1990: during George H.W. Bush's presidency, Congress passed the Individuals with Disabilities Act (IDEA).
  - 1997: Congress required states to collect and examine data to determine if significant disproportionality based on race was occurring in the identification and placement of students with disabilities
  - 2004: requirements added requiring states and school districts to address any disproportionality that was found.
  - 2016 Pres. Obama: Dept. of Ed. (DOE) finalized a regulation setting a common methodology for all states to use to determine whether significant disproportionality was occurring in the identification of children with disabilities. Effective date was July 1, 2018.
  - 2018 Pres.Trump: DOE finalized a Rule delaying implementation of the 2016 Rule until July 1, 2020. Comments were solicited only on the delay, not the substance.
- Holding: Delay rule vacated
  - DOE failed to provide reasoned explanation for its change of effective date. While DOE argued it was concerned about the incentive for creating racial quotas, it provided no explanation for the change in view, but wanted more time to study it. Court cites *Fox* and *Air Alliance of Houston*.
  - DOE failed to consider costs to children, parents, society.

## Observation: Disregard of basic APA standards across the federal government

- "Certainly, different administrations may implement different regulatory priorities, but the APA '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.'"
  - *S. Carolina Coastal Conserv. League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018)


## Observation: Courts repeatedly denouncing the government's behavior

**Cabinet Secretary**

- "Plaintiffs have made a clear showing that (1) Secretary Ross acted in bad faith in disclosing the basis of his decision and (2) Defendants acted in bad faith in compiling the Administrative Record."
  - *State of California, et al. v. Wilbur Ross, et al.* 2019 WL 1052439 (N.D. Cal., March 6, 2019)

**Department of Justice**

- "In sum, government counsel's alternative spin on the administrative record is just a *post hoc* rationalization. But, even if it had been the actual rationale, it was arbitrary, capricious, and an abuse of discretion…"
  - *Regents of the University of Calif. And Janet Napolitano v U.S. Dept. of Homeland Security and Kirstjen Nielsen,* 279 F. Supp. 3d 1011, 1046 (N.D. Cal., 1918) *aff'd* 908 F.3d 476 (9th Cir. 2018)

**EPA**

- "Yet again, even a brief scan of the record demonstrates the inaccuracy of EPA's statements."
  - *Clean Air Council et al. v. Pruitt,* 862F.3d 1, 13 (D.C. Cir. 2017)


*"I'll also need you to clean up the environment after I'm done with it."*

## Questions?