Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge

*Lisa Heinzerling**

President Trump has promised a historic rollback of regulation. In his early days in office, he produced a flurry of executive orders directing executive agencies to begin to undo a wide variety of regulatory measures put in place in the Obama administration.[1] The broadest of these orders instructed agencies to pull back two regulations for every one issued and to abide by regulatory budgets limiting the regulatory costs agencies could impose on private entities.[2] Agencies led by Trump's appointees have already announced their intention to reconsider, and dismantle, a broad array of existing rules.[3] In this endeavor, many agencies are being guided by political personnel who have come straight from jobs as lobbyists for the industries they will be deregulating.[4] It seems fair to say that a central goal of the Trump administration is indeed the one dramatically described by a prominent former White House aide: "the deconstruction of the administrative state."[5]

In service of this deregulatory agenda, the Trump administration has delayed or suspended dozens of final rules issued in the Obama administration. On President Trump's first day in office, his Chief of Staff at the time, Reince Priebus, sent a memorandum to the heads of all executive agencies,

* Justice William J. Brennan, Jr. Professor of Law, Georgetown University. I am grateful to Leah Wisser for outstanding research assistance and to Susannah Weaver for exceptionally helpful comments.

[1] *See, e.g.*, Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 24, 2017); Exec. Order No. 13,772, 82 Fed. Reg. 9965 (Feb. 3, 2017); Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017); Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017); Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

[2] *See* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (instructing agencies to identify two existing regulations to eliminate for every new regulation proposed).

[3] *See, e.g.*, Improve Tracking of Workplace Injuries and Illnesses: Proposed Delay of Compliance Date, 82 Fed. Reg. 29,261 (June 28, 2017) (to be codified at 29 C.F.R. pt. 1904); Public Statement, Acting Chairman Michael S. Piwowar, SEC, Reconsideration of Pay Ratio Rule Implementation (Feb. 6, 2017), https://www.sec.gov/news/statement/reconsideration-of-pay-ratio-rule-implementation.html [https://perma.cc/7WP8-34QS]; NHTSA Civil Penalties, Reconsideration of final rule and request for comments, 82 Fed. Reg. 32,140 (July 12, 2017) (to be codified at 49 C.F.R. pt. 578).

[4] *See* Danielle Ivory & Robert Faturechi, *Secrecy and Suspicion Surround Trump's Deregulation Teams*, N.Y. TIMES (Aug. 7, 2017); Danielle Ivory et al., *The Business Links of Those Leading Trump's Rollbacks*, N.Y. TIMES (updated Aug. 7, 2017); Danielle Ivory & Robert Faturechi, *The Deep Industry Ties of Trump's Deregulation Teams*, N.Y. TIMES (July 11, 2017).

[5] *See* Phillip Rucker & Robert Costa, *Bannon vows a daily fight for 'deconstruction of the administrative state'*, WASH. POST: POL. (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?utm_term=.7eb6a5033de1 [https://perma.cc/4SFY-RBQ8].

instructing them to "temporarily postpone" by sixty days the effective dates of published rules that had not yet taken effect.[6] The memorandum directed the agencies to take this step "immediately," but encouraged the agencies to consider taking notice and comment on delays beyond the initial sixty-day period.[7] The memorandum specified that the agencies should postpone effective dates only "as permitted by applicable law" and should notify the Director of the Office of Management and Budget (OMB) if any of the relevant regulations should not be delayed because they affected "critical health, safety, financial, or national security matters."[8]

Pursuant to this memorandum, agencies across the federal government have delayed the effective dates, and in some cases the compliance dates,[9] of dozens of final rules. These rules span a wide array of regulatory fields, including environmental protection, consumer financial protection, education, energy efficiency, nutrition disclosures, workplace health and safety, and more.[10] Agencies have also, in many cases, stretched the delays well beyond the initial sixty-day period, sometimes suspending the rules indefinitely.[11] Agencies have opened, or announced an intention to open, numerous notice and comment proceedings to support further delay.[12]

Memoranda and orders from President Trump have taken aim not only at rules that have not yet taken legal effect but also at final rules that have been in place for some time. President Trump has ordered a broad rethinking of rules relating to infrastructure, energy, financial regulation, and water pollution.[13] Here, too, agencies have responded by delaying the targeted rules, in some cases putting off indefinitely the dates by which regulated entities

---

[6] Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review, 82 Fed. Reg. 8346, 8346 (Jan. 20, 2017).

[7] *Id.*

[8] *Id.*

[9] *See, e.g.*, Compliance Date Extension; Formaldehyde Emission Standards for Composite Wood Products, 40 C.F.R. § 770.2 (2017).

[10] For a chart cataloging the rules delayed as of mid-July, 2017, see RENA STEINZOR & ELISE DESIDERIO, CENTER FOR PROGRESSIVE REFORM, THE TRUMP ADMINISTRATION'S RULEMAKING DELAYS (2017), http://www.progressivereform.org/articles/Trump_Rule_Delays_Charts_071917.pdf [https://perma.cc/JXR4-5K8R].

[11] *See, e.g.*, Civil Penalties; delay of effective date, 82 Fed. Reg. 32,140, 32,143 (July 12, 2017) (to be codified at 49 C.F.R. pt. 578); National Performance Management Measures, Final regulation; 23 C.F.R. § 490 (2017) ("indefinite delay").

[12] *See, e.g.*, Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements, Proposed rule, 82 Fed. Reg. 27,645, 27,645 (June 16, 2017) (to be codified at 40 C.F.R. pt. 60); Public Statement, Acting Chairman Michael S. Piwowar, SEC, Reconsideration of Pay Ratio Rule Implementation (Feb. 6, 2017), https://www.sec.gov/news/statement/reconsideration-of-pay-ratio-rule-implementation.html [https://perma.cc/KZ6E-BVYU]; Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005, 19,006 (Apr. 25, 2017) (to be codified at 40 C.F.R. pt. 423).

[13] *See, e.g.*, Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 24, 2017); Exec. Order No. 13,772, 82 Fed. Reg. 9965 (Feb. 3, 2017); Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017); Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017); Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

must comply.[14] Judicial challenges to these delays and suspensions have been filed around the country.[15]

Administrative agencies get a good deal of deference from the courts when they make choices about law, facts, and policy. Whether they are regulating or deregulating, however, they must follow a few simple rules. Agencies are creatures of statutes, and they must find in statutes authority for the actions they take.[16] They must follow the processes Congress has prescribed for their decisions.[17] They must explain their choices in reasonable and understandable terms.[18] Agencies that recognize their legal limits, follow careful processes, and give sound reasons for what they do are unlikely to get into legal trouble for their choices.

In racing to upend a wide variety of regulatory initiatives, the Trump administration has not obeyed these basic rules. Instead, the administration has put on a display of autocracy, impulsivity, and jerry-rigged reasoning. Within the constraints of administrative law that apply to such regulatory decisions, however, autocracy, impulsivity, and jerry-rigging are the very kinds of urges that get agencies into legal trouble. Indeed, one of Mr. Trump's appointees—Secretary of Labor Alexander Acosta—recognized as much in conceding that he had no legal authority to delay the rule on the fiduciary responsibilities of retirement investment advisors and would instead begin the orderly process of revisiting the substance of the rule.[19]

This article examines the legal risks posed by the decision-making style exhibited by the Trump administration so far, with a focus on the administration's decisions delaying or suspending rules issued by the Obama administration.[20] These early decisions are worth studying for their own sake, as they put the brakes on rules aimed at addressing a broad array of social problems.[21] The decisions are also important for the signals they send about how administrative agencies in the Trump era will go about their business. These early actions portend legal trouble for the administration's deregu-

[14] *See, e.g.*, Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, Notification, 43 C.F.R. § 3170 (2017).

[15] *See, e.g.*, Air All. Hous. v. EPA, No. 17-1155 (D.C. Cir. filed June 22, 2017) (concerning EPA rule on chemical risk management plans); New York v. Perry, No. 17-918 (2d Cir. filed Mar. 31, 2017) (DOE efficiency standards); Clean Air Council v. Pruitt, No. 17-1145, 2017 WL 2838112 (D.C. Cir. July 3, 2017) (concerning EPA rule on methane emissions from oil and gas facilities); Thrivent Fin. for Lutherans v. Acosta, Civil Action No. 16-cv-03289-SRN-DTS (D. Minn. filed Aug. 9, 2017) (concerning DOL's financial advisor rule);

[16] *See, e.g.*, Atlantic City Elec. Co. v. FERC, 295 F.3d 1, 8 (D.C. Cir. 2002).

[17] *See, e.g.*, Perez v. Mortg. Bankers Ass'n., 135 S. Ct. 1199, 1203 (2015).

[18] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); Encino Motorcars v. Navarro, 136 S. Ct. 2117 (2016).

[19] Alexander Acosta, *Deregulators Must Follow the Law, So Regulators Will Too,* WALL STREET J. (May 22, 2017), https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029 [https://perma.cc/F6SL-KCY9].

[20] For excellent treatments of the prevalence and legal consequences of agencies' delays or suspensions of final rules in prior administrations, see Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. U. L. REV. 471 (2011), and Jack M. Beermann, *Midnight Rules: A Reform Agenda*, MICH. J. ENVTL. & ADMIN. L. 286 (2013).

[21] *See* STEINZOR & DESIDERIO, *supra* note 10.

latory push. Agencies in this administration have delayed or suspended existing rules with little attention to legal authority, process, or reason giving, and in doing so have violated basic principles of administrative law.

I begin with a discussion of the law on effective dates—their legal nature and the reviewability of agency decisions changing them. I then turn to an examination of the legal errors the Trump administration has made in delaying or suspending existing rules. These errors include acting without legal authority, failing to use processes prescribed by law, and giving legally unacceptable reasons for the decisions being made. Two central questions going forward are whether the Trump administration will be able to—or even want to—stop itself from continuing to make legally problematic decisions, and whether the courts will brush the administration back when it makes such decisions.

I. Effective Dates and the Law

Most of the Trump administration's early decisions in moving toward deregulation have involved delaying or suspending the effective dates of final rules issued during the Obama administration. In this part, I examine the legal significance of effective dates. Understanding this legal significance is important to grasping the legal implications of the Trump administration's delays. I also examine the reviewability of agencies' decisions to delay or suspend effective dates.

A. The Legal Nature of Effective Dates

It was not always common practice for an incoming administration to delay or suspend a large swath of the outgoing administration's rules. The practice began in the Reagan administration, and has been embraced to some extent by every administration since that time.[22] Within days of entering office, President Reagan issued a presidential memorandum instructing agencies to delay for sixty days rules that had not yet become effective, to give the new administration time to review the rules in light of its own priorities and policies.[23]

In an opinion examining the legality of this presidential directive, the Office of Legal Counsel (OLC) concluded that such delays were not "rulemaking" subject to the notice and comment requirements of the Administrative Procedure Act (APA).[24] OLC thought that deeming extensions of effective dates not to be rulemaking was bolstered by the APA's provision

[22] Presidents George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama all issued—or had their White House Chiefs of Staff issue—memoranda directing agencies, in the immediate wake of the change in presidential administrations, to delay regulations that were not yet effective.

[23] *See, e.g.*, Exec. Order No. 12,291, 82 Fed. Reg. 8657 (Jan. 29, 1981).

[24] Presidential Memorandum Delaying Proposed & Pending Regulations, 5 Op. O.L.C. 55, 57 (1981).

requiring a thirty-day period between the publication of a rule and its effective date: "The purposes of the minimum thirty-day requirement would plainly be furthered if an extension of the effective date were not considered 'rule making,' for such an extension would permit the new Administration to review the pertinent regulations and would free private parties from having to adjust their conduct to regulations that are simultaneously under review."[25] In OLC's view, the same purposes that animated the thirty-day waiting period between publication and effectiveness supported a conclusion that extending an effective date is not rulemaking.

The courts have consistently rejected this view. In an important early case, the Third Circuit held that the Environmental Protection Agency (EPA)'s indefinite postponement of the effective date of the amendments to a regulation governing the discharge of toxic water pollutants into publicly owned treatment works was a "rule" within the meaning of the APA.[26] Quoting the APA's definitions of a "rule" and "rulemaking," the court said:

> In general, an effective date is "part of an agency statement of general or particular applicability and of future effect." It is an essential part of any rule: without an effective date, the "agency statement" could have no "future effect," and could not serve to "implement, interpret, or prescribe law or policy." In short, without an effective date a rule would be a nullity because it would never require adherence.[27]

The Third Circuit described the bad incentives that would be created for agencies by a different ruling:

> If the effective date were not "part of an agency statement" such that material alterations in that date would be subject to the rulemaking provisions of the APA, it would mean that an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date. The APA specifically provides that the repeal of a rule is rulemaking subject to rulemaking procedures. Thus, a holding that EPA's action here was not a rule subject to the rulemaking procedure of the APA would create a contradiction in the statute where there need be no contradiction: the statute would provide that the repeal of a rule requires a rulemaking proceeding, but the agency could (albeit indirectly) repeal a rule simply by eliminating (or indefinitely postponing) its effective date, thereby accomplishing without rulemaking something for which the statute requires a rulemaking proceeding. By treating the indef-

[25] *Id.* OLC was not even sure that agencies needed to provide an opportunity for comment "on the intended effective date of a rule in the first instance." *See id.* at 59 n.2.

[26] *See* Nat. Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 761 (3d Cir. 1982).

[27] *Id.* at 761–62.

> inite postponement of the effective date as a rule for APA purposes, it is possible to avoid such an anomalous result.[28]

Other courts have consistently embraced the Third Circuit's perspective, holding that adjustments to the effective dates of final rules are themselves rules, or amendments to rules, subject (unless an exception applies) to notice and comment requirements.[29]

The idea that an effective date is an "essential part" of a rule, alterations of which require notice and comment, is also supported by federal requirements on the mechanics of federal rulemaking. According to the Office of the Federal Register, the "effective date" of a rule is the date on which the Code of Federal Regulations (CFR) is amended by the underlying agency action.[30] It is, simply put, the date on which the law changes to reflect the agency's new rule. Only rule documents that amend the CFR are given effective dates.[31] Before a final rule may take effect, the rule must be published in the Federal Register. And before a rule may be published in the Federal Register, it must have an effective date.[32] These requirements reflect the core importance of the effective date of a rule: without an effective date, the rule cannot become law.

Judicial decisions on the legal status of rules without effective dates support this conclusion. When the Clinton administration came to power, it withdrew rules that had been sent by the previous administration to the Office of the Federal Register for publication. One rule that ended up in litigation had gone to the Federal Register with no specified effective date. As often happens, in place of a specified date, the rule had gone to the Federal Register with the following notation: "EFFECTIVE DATE: [Insert date of publication in the FEDERAL REGISTER.]" Since the rule was withdrawn before publication, it never received an effective date. In *Zhang v. Slattery*,[33] the Second Circuit held that the rule was not "binding on anyone" without becoming effective, and that, "[b]y its own terms, the Rule never became effective."[34] Distinguishing a case holding that the postponement of a rule's effective date required notice and comment, the Second Circuit stated that,

---

[28] *Id.* at 762.

[29] *See, e.g.*, Envtl. Def. Fund v. Gorsuch, 713 F.2d 802, 815–17 (D.C. Cir. 1983) (stating general rule that changes to effective dates constitute rulemaking and rejecting agency's argument that its decision not to call for hazardous waste permits from a whole class of facilities was a policy statement); Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 580 n.28 (D.C. Cir. 1981); Ranchers Cattlemen Action Legal Fund v. USDA, 566 F. Supp. 2d 995, 1004 (D.S.D. 2008) ("The effective date of a rule generally is more than procedural and its suspension or delay usually is subject to rulemaking."); *see also* New York v. Abraham, 199 F. Supp. 2d 145, 150–51 (S.D.N.Y. 2002) (holding that Department of Energy's suspensions of effective date of energy efficiency rule were "elements of a rule" under Energy Policy and Conservation Act).

[30] OFF. FED. REG., NAT'L ARCHIVES & REC. ADMIN., DOCUMENT DRAFTING HANDBOOK 3–8 (2017).

[31] *See id.*

[32] *See id.*

[33] 55 F.3d 732 (2d Cir. 1995).

[34] *Id.* at 749.

"[u]ntil the 'EFFECTIVE DATE' was reached—by publication—there was no rule to repeal."[35] The failure to specify an effective date, in other words, prevents a final agency decision from having any legal effect.[36]

All of these legal sources reflect the legal power of the effective date. On the effective date of a rule, the rule has a formal legal effect. Without an effective date, the rule has no formal legal effect. By definition, then, the effective date of a rule has a "legal effect" under a settled test for identifying substantive rules subject to notice and comment rulemaking: it activates a binding legal norm.[37]

B. Judicial Review of Rule Delays and Suspensions

To be judicially reviewable under the APA or other similar statutes, an agency decision must reflect "final agency action."[38] The courts have consistently held that agencies' delays or suspensions of the effective dates of final rules are judicially reviewable final agency actions. An important case early in the Trump administration has beaten back an agency's attempt to avoid this legal trend.

In its opinion examining the legality of President Reagan's directive to delay agency rules that had not yet become effective, the OLC only acknowledged that an action to delay or suspend the effective date of a final rule "*may* be subject to judicial review" in the courts.[39] In litigation over agencies' delays of final rules, however, the Reagan administration conceded that such decisions were *indeed* judicially reviewable,[40] and courts handling such cases have had little trouble finding that agency decisions delaying final rules are reviewable.[41]

The Trump administration is chafing at this settled doctrine. In one of the first judicial challenges to its delay of an agency rule, the Trump administration argued that the delay was not judicially reviewable because the delay was not a "final" agency action. In *Clean Air Council v. Pruitt*,[42] the D.C. Circuit considered the grant by EPA of a ninety-day stay of the compliance date for a final rule setting Clean Air Act standards for emissions of methane and other air pollutants from oil and gas facilities. EPA argued that its stay was unreviewable because it was not final.[43] The dissenting judge distinguished deregulatory from regulatory actions in this regard, arguing

---

[35] *Id.*

[36] *See id.*; *see also* Kennecott Utah Copper Corp. v. Dep't of Interior, 88 F.3d 1191, 1208–09 (D.C. Cir. 1996).

[37] *See, e.g.*, Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33 (D.C. Cir. 1974).

[38] 5 U.S.C. § 704 (2012).

[39] Presidential Memorandum Delaying Proposed & Pending Regulations, 5 Op. O.L.C. 55, 56 (1981) (emphasis added).

[40] *See* Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 579 n.26 (D.C. Cir. 1981) (upholding Reagan administration's delay by six months of the effective date of a mine safety rule).

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

[42] 862 F.3d 1 (D.C. Cir. 2017).

[43] *Id.* at 6.

that only the denial of a stay, not the grant of one, had "obvious consequences" for regulated parties; thus, only the denial, not the grant, of a stay was final agency action.[44]

The majority of a three-judge panel of the D.C. Circuit didn't buy it. The court rejected this "one-sided view" of agency action, observing that such a view was "akin to saying that incurring a debt has legal consequences, but forgiving one does not. A debtor would beg to differ." Although the court agreed that an agency's decision to reconsider an existing rule was not final agency action because it did not reflect the agency's final position on the matter, it concluded that a stay of a rule expresses the agency's final word as to delaying the rule and also affects legal rights or obligations insofar as it "relieves regulated parties of liability they would otherwise face."[45]

Clean Air Council involved a specific provision of the Clean Air Act giving EPA authority to grant a limited, ninety-day stay when it decides to reconsider a rule.[46] EPA has invoked this same statutory authority in staying rules on emissions from landfills[47] and prevention of chemical accidents.[48] Insofar as they rely on the same kind of argument presented in *Clean Air Council*, these agency decisions appear to be vulnerable after *Clean Air Council*.

The court's reasoning in *Clean Air Council*, moreover, extends beyond the Clean Air Act. Like the Clean Air Act, the APA requires agency action to be final before judicial review may take place.[49] So, too, do the organic acts that set out rules on reviewability for specific regulatory contexts.[50] The D.C. Circuit's firm rejection of a broad distinction between regulation and deregulation for the purposes of determining finality signals that the court will be equally impatient with this distinction in statutory contexts outside the Clean Air Act. Holding the line against attaching legal importance to the difference between regulation and deregulation has been crucial in challenging the deregulatory moves of past administrations,[51] and it will undoubtedly be equally crucial in this one. The D.C. Circuit's early, negative response to the attempt to dichotomize regulation and deregulation is encouraging for those pushing back on the administration's deregulatory surge.

Upon review of an agency's decision delaying or suspending a rule, the court may grant appropriate relief for any legal problems it finds. It may

---

[44] *Id.* at 15.

[45] *Id.* at 7.

[46] 42 U.S.C. § 7607(d)(7)(B).

[47] Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 82 Fed. Reg. 24,878 (May 31, 2017) (to be codified at 40 C.F.R. pt. 60).

[48] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 13,968 (Mar. 16, 2017) (to be codified at 40 C.F.R. pt. 68).

[49] 5 U.S.C. § 704 (2012).

[50] GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 1097 n. 30 (7th ed. 2016).

[51] *See, e.g.*, Motor Vehicles Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

vacate an agency decision taken without complying with the requirements of administrative law.[52] It may also decline to vacate such a decision on the basis of its judgment that vacatur is inappropriate in the circumstances presented. Indeed, in reviewing two different agency decisions to delay rules in the Trump administration, a single district court in California has chosen one of each of these remedies.[53] A significant question going forward will be not only whether an agency has violated administrative requirements in delaying or suspending a rule, but what the appropriate remedy is for such a violation.

II. Lack of Legal Authority

An administrative agency can only take actions that Congress has allowed it to take. The courts have drawn this principle from the separation of powers, going all the way back to *Marbury v. Madison*: just as "the powers of the legislature are defined and limited," so, too, are the powers of the "modern administrative state."[54] An agency is, as the courts have reminded us, a "creature of statute,"[55] with "literally . . . no power to act, unless and until Congress confers power upon it."[56] An agency's action "cannot stand" if there is no statutory authorization for it.[57] Most important for present purposes, an agency has no "inherent" (non-statutory) authority to delay or suspend rules while it reconsiders them.[58]

It is deeply ironic that, in trying to check the power of what it regards as the all-too-powerful administrative state, the Trump administration has ignored the legal limits on agencies' authority. As noted, settled legal doctrine requires agencies to find and identify statutory authority for the actions they take. In postponing or proposing to postpone final rules, however, agencies in the Trump administration have disregarded this requirement, either failing altogether to state the statutory basis for their actions or offering merely a conclusory statement that their actions fall within a particular statute's domain. These terse assertions betray an array of legal and logical errors.

I discuss each of these legal problems below.

---

[52] *See, e.g.*, California v. Bureau of Land Mgmt., No. 17-CV-03804-E-DL, 2017 WL 4416409, at *7–9 (N.D. Cal. Oct. 4, 2017).

[53] *See id.* (vacating unlawful rule delay); Becerra v. Dep't of the Interior, Docket No. 13, Case No. 17-cv-02376-EDL, slip op. at 13–16 (N.D. Cal. Aug. 30, 2017) (declining to vacate unlawful rule delay).

[54] Michigan v. EPA, 268 F.3d 1075, 1081 (D.C. Cir. 1995).

[55] Atl. City Elec. Co. v. FERC, 295 F.3d 1, 8 (D.C. Cir. 2002); *see generally* Soriano v. United States, 494 F.2d 681, 683 (9th Cir. 1974); Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 915 n.3 (3d Cir. 1981).

[56] *See* La. Pub. Serv. Comm. v. FCC, 476 U.S. 355, 374 (1986).

[57] Michigan v. EPA, 268 F.3d at 1081.

[58] *See* Nat. Res. Def. Council v. Abraham, 355 F.3d 179, 202 (D.C. Cir. 2004).

A. No Legal Authority Identified

Some agencies have dispensed altogether with identifying the source of legal authority for their decisions to delay or suspend rules. Before EPA was chastised by the D.C. Circuit for attempting to stay its rule on methane emissions from oil and gas facilities under section 307(d)(7)(B) of the Clean Air Act, the Agency had proposed a rule to further stay the final rule. In proposing this further delay, EPA avoided the topic of statutory authority altogether; its proposal is silent on the statutory basis for its proposed delay.[59] EPA also stayed the effective date of its "Risk Management Program" rule on chemical safety, while acknowledging that it was staying the rule *before* meeting the requirements specified in the statutory provision it thought authorized the stay.[60] EPA extended the effective date of a rule on reporting and recordkeeping for nanoscale chemical substances without citing any statutory authority for the delay—although it did detail the Agency's compliance with various presidential executive orders.[61] In delaying a rule that increased civil penalties for violations of fuel efficiency standards, the National Highway Traffic Safety Administration (NHTSA) sufficed with a non sequitur: "Because NHTSA is reconsidering the final rule, NHTSA is delaying the effective date pending reconsideration."[62]

I could multiply examples. The point is that many of the rule delays that have taken place in the Trump administration have failed to identify the legal authority under which the delays took place. A court reviewing such delays may not supply, or allow an agency on judicial review to supply, a basis for the agency's action that the agency itself did not identify at the time it took the action.[63] In *Clean Air Council*, the D.C. Circuit took this principle seriously in the context of reviewing and vacating EPA's delay of the methane rule for oil and gas facilities.[64] At the very least, the agencies that have not identified the source of their authority to delay rules are vulnerable to a remand for further explanation. If there is no such authority, their actions are unlawful, and the courts can strike them down.

---

[59] Oil and Natural Gas Sector; Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements, 82 Fed. Reg. 27,645 (June 16, 2017) (to be codified at 40 C.F.R. pt. 60). For a devastating catalog of the legal inadequacies of EPA's proposal to delay the methane rule, see Earthworks et al., Comment on the EPA's Proposed Rules Regarding Stay of Certain Requirements (EPA-HQ-OAR-2010-0505) and Three Month Stay of Certain Requirements (EPA-HQ-OAR-2017-0346) of the Emission Standards for New and Modified Sources in the Oil and Natural Gas Sector (Aug. 9, 2017), https://www.edf.org/sites/default/files/content/joint_env._comments_on_proposed_extended_stays.pdf [https://perma.cc/F8MR-63AV].

[60] Accidental Release Prevention Requirements, Final rule, 82 Fed. Reg. 13,968, 13,969 (Mar. 16, 2017) (to be codified at 40 C.F.R. pt. 68).

[61] Chemical Substances When Manufactured or Processed as Nanoscale Materials; TSCA Reporting and Recordkeeping Requirements 82 Fed. Reg. 22,088 (May 16, 2017) (to be codified at 40 C.F.R. pt. 704).

[62] *See* Civil Penalties 82 Fed. Reg. 32,140 (July 12, 2017) (to be codified at 49 C.F.R. pt. 578).

[63] *See* SEC v. Chenery Corp., 318 U.S. 80 (1943).

[64] *See* Clean Air Council v. Pruitt, 862 F.3d 1, 5–6 (D.C. Cir. 2017).

B. Executive Orders

Several agencies have cited executive orders from President Trump in justifying their delays or suspensions of final rules.[65] These executive orders, however, explicitly provide that they are to be "implemented consistent with applicable law."[66] Executive orders, moreover, do not override statutes; they do not create power where there is none in the underlying statutes. "The president made me do it" is not an identification of the legal authority for an agency action.

The OLC opinion on President Reagan's presidential memorandum instructing agencies to delay rules that had not yet become effective may have come to a different conclusion. The opinion observes that, under section 553(d) of the APA, a rule must be published "not less than 30 days before its effective date." Clearly, OLC reasoned, this provision allows agencies "to adopt in the first instance an effective date provision extending beyond 30 days." This much is plainly right. OLC went on, however, to say: "We do not find anything in the language or legislative history of § 553(d) to suggest that agencies are forbidden to reach the same result by initially providing a 30-day period, and subsequently taking action to extend this period." This sentence is the opinion's only reference, however oblique, to agencies' power to delay the effective dates of already-final rules.

The sentence packs a big punch, one that appears to extend even beyond a situation in which the President has called for rule delays. OLC is either arguing that section 553(d) of the APA itself gives agencies legal authority to delay the effective dates of final, published rules, or it is arguing that agencies inherently have such power unless a statute takes it away from them. Neither argument is persuasive. Section 553(d) does not purport to enlarge agency authority; it limits it. This provision also refers to a discrete moment in time ("the required publication or service of a . . . rule") from which the required interval before effectiveness is to be determined, and allows agencies to set a shorter interval for "good cause" only if they publish a finding of good cause "with the rule." Section 553(d) simply does not speak to the agency's power to push off the established effective dates of rules after the moment when they are published and have become final.

To the extent OLC is instead suggesting that agencies have the inherent power to delay final rules while they reconsider them, and that one must find a statutory provision affirmatively displacing this authority in order to dis-

---

[65] *See, e.g.*, International Entrepreneur Rule: Delay of Effective Date, 82 Fed. Reg. 31,887, 31,888 (July 11, 2017) (to be codified at 8 C.F.R. pts. 103, 212, 274); Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 82 Fed. Reg. 20,825, 20,827 (May 4, 2017) (to be codified at 8 C.F.R. pts. 103, 212, 274) (citing Exec. Order Nos. 13,777, 13,771, 13,563); Certification of Pesticide Applicators 82 Fed. Reg. 22,294, 22,296 (to be codified at 40 C.F.R. pt. 171) (citing Exec. Order No. 13,790).

[66] *See, e.g.*, Exec. Order No. 13,767, 82 Fed. Reg. 8793 (2017); Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (2017); Exec. Order No. 13,771, 82 Fed. Reg. 9339 (2017); Exec. Order No. 13,790, 82 Fed. Reg. 20,237 (2017); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011).

lodge it, that view is foreclosed by the settled principle that agencies do not have authority that Congress has not given them.

C. Priebus Memorandum

Many of the decisions to delay or suspend the effective date of final rules cite, as legal authority, the Priebus memorandum instructing them to freeze rules that had not yet taken effect as of January 19, 2017.[67] A memorandum from the White House Chief of Staff, however, does not enlarge the authority of an administrative agency. Indeed, the memorandum itself acknowledges as much, providing that the agencies should postpone effective dates "only as permitted by applicable law."[68] The Trump administration's many decisions delaying or suspending rules only on the say-so of the former White House Chief of Staff may be legally vulnerable under the principle that agencies must find statutory authority for the actions they take. It often happens, of course, that a brief delay predicated on a "freeze" memorandum from the White House terminates before any judicial action can be filed. That does not mean that the delay was legally valid, but it does limit the concrete consequences of any illegality; parties who would have challenged the delay if it remained in effect might forgo a challenge—and the judicial remedies of remand and vacatur—if the delay lasts only a brief time.

D. Statutory Provisions Unrelated to Stays Pending Reconsideration

Still other decisions on delay have cited, as "authority," the statutory provisions under which the final rules being delayed were promulgated. Often, however, these statutory provisions do not say anything about the agency's authority to reconsider final rules or delay them during reconsideration. Here, too, examples abound, but I will rest with just two. The Department of Agriculture stayed a rule on agricultural bioterrorism, citing as "Authority" the statutory provision authorizing regulation of certain biological agents and toxins.[69] That provision does not authorize a regulatory stay

---

[67] *See, e.g.*, Onshore Oil and Gas Operations, 82 Fed. Reg. 9974, 9975 (Feb. 9, 2017) (to be codified at 43 C.F.R. pt. 3160); Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. 8499, 8500 (Jan. 26, 2017) (to be codified at 40 C.F.R. pts. 22, 51, 52, 61, 68, 80, 81, 124, 147, 171, 239, 259, 300, 770); Affirmative Action for Individuals With Disabilities in Federal Employment, 82 Fed. Reg. 10,863 (Feb. 16, 2017) (to be codified at 29 C.F.R. pt. 1614); Confidentiality of Substance Use Disorder Patient Records; Delay of Effective Date, 82 Fed. Reg. 10,863, 10,863 (Feb. 16, 2017) (to be codified at 42 C.F.R. pt. 2); Clarification of When Products Made or Derived From Tobacco Are Regulated as Drugs, Devices, or Combination Products; Amendments to Regulations Regarding "Intended Uses"; Delayed Effective Date, Final rule; delay of effective date, 82 Fed. Reg. 9501, 9502 (Feb. 7, 2017) (to be codified at 21 C.F.R. pts. 201, 801, 1100); National Organic Program (NOP); Organic Livestock and Poultry Practices, 82 Fed. Reg. 21,677 (May 10, 2017) (to be codified at 7 C.F.R. pt. 205).

[68] Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review, 82 Fed. Reg. 8346 (Jan. 20, 2017).

[69] Agricultural Bioterrorism Protection Act of 2002, 82 Fed. Reg. 10,855 (Feb. 16, 2017) (to be codified at 7 C.F.R. pt. 3319).

pending reconsideration. Likewise, in putting off compliance dates for a rule on formaldehyde in wood products, EPA cited the provision of the Toxic Substances Control Act directing EPA to regulate formaldehyde in wood products.[70] That provision contains no reference to regulatory stays pending reconsideration.[71] An action delaying the effective date of a rule for purposes of reconsideration must be justified not by the statutory provision authorizing the *rule being reconsidered and delayed*, but by a statutory provision authorizing the *delay pending reconsideration*.

E. Contingent Statutory Authority

Another legal mistake agencies in the Trump administration have made is to cite, as authority for rule delays, statutory provisions authorizing changes to effective dates contingent upon the agency making certain findings—without making the required findings. For example, in delaying the effective date of a final rule setting minimum sound requirements for hybrid and electric vehicles, the NHTSA cited several statutory provisions establishing NHTSA's rule-making responsibilities.[72] One of these provisions is about effective dates, and states that NHTSA may, for "good cause" and if it is in the "public interest," set an effective date outside the temporal range specified in that provision.[73] Without making these predicate findings, NHTSA has not established the legal basis for its delay.

Similarly, EPA has cited statutory provisions authorizing stays pending reconsideration without adhering to the limits imposed by those provisions. In staying its rule on methane emissions from oil and gas facilities, the Agency invoked section 307(d)(7)(B) of the Clean Air Act but did not meet the statutory requirements for issuing a stay under that provision.[74] In delaying the designation of areas under its revised ozone air quality standard, EPA invoked section 107(d)(1)(B)(i) of the Clean Air Act,[75] which permits extensions of designations "in the event the Administrator has insufficient information to promulgate the designations."[76] The Agency explained that the Administrator "cannot assess whether he has the necessary information to finalize designations until additional analyses from [the Agency's reevaluation of the ozone standards, occasioned by the change in administrations]

[70] Compliance Date Extension; Formaldehyde Emission Standards for Composite Wood Products, Direct final rule, 82 Fed. Reg. 23735, 23,736 (May 24, 2017) (to be codified at 40 C.F.R. pt. 770) (referring for agency's authority to 15 U.S.C. § 2697 (2012)).

[71] No part of 15 U.S.C. § 2697 deals with delaying rules while reconsidering them. *See* 15 U.S.C.A. § 2697 (West 2017).

[72] Federal Motor Safety Standards; Minimum Sound Requirements for Hybrid and Electric Vehicles, 82 Fed. Reg. 14,477 (Mar. 21, 2017) (to be codified at 49 C.F.R. pts. 571, 585).

[73] 49 U.S.C. § 30111(d) (2012 & Supp. I 2013).

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

[75] Extension of Deadline for Promulgating Designations for the 2015 Ozone National Air Quality Standards, 82 Fed. Reg. 29,246, 29,247 (June 28, 2017).

[76] 42 U.S.C. § 7407(d)(1)(B)(i) (2012).

are available."[77] EPA dropped its proposal to delay the ozone designations the day after state attorneys general sued the Agency, asserting that its delay was unlawful.[78] Environmentalists had also earlier sued the Agency over the delay, arguing in part that the "information" EPA sought to obtain during reconsideration of the ozone standard was not the kind of information the Clean Air Act made relevant in the decision to extend deadlines for designations.[79]

F. APA Section 705

A final potential source of legal authority to postpone rules is section 705 of the APA. Section 705 provides that an agency may, when it "finds that justice so requires, . . . postpone the effective date of action taken by it, pending judicial review."[80] EPA, the Department of the Interior (DOI), and the Department of Education have cited section 705 as the basis of their authority to delay several final rules. EPA, DOI, and the Department of Education have tried to stretch this authority in several implausible directions. Their reasoning cannot stand under the existing jurisprudence of section 705.

For starters, EPA and DOI have tried to justify a delay of a *compliance date* under section 705. They have asserted, without citation or elaboration, that a compliance date *is* an "effective date" within the meaning of section 705 of the APA.[81] The agencies may be attempting to convert compliance dates into effective dates because courts have held that an agency may not "postpone" an effective date under section 705 of the APA once the effective date has passed.[82] EPA and DOI are trying to stretch the period of section 705's relevance to include the period after effectiveness and before compliance.[83]

But compliance dates are not the same as effective dates.[84] Compliance dates are the dates on which parties subject to the underlying rule are ex-

---

[77] Extension of Deadline for Promulgating Designations for the 2015 Ozone National Air Quality Standards, 82 Fed. Reg. at 29,247.

[78] *See* Lisa Friedman, *E.P.A. Reverses Course on Ozone Rule*, N.Y. TIMES (Aug. 3, 2017), https://www.nytimes.com/2017/08/03/climate/epa-reverses-course-on-ozone-rule.html?_r=0 [http://perma.cc/L2QD-AXNZ].

[79] *See* Motion for Summary Vacatur or, in the Alt., for Stay Pending Judicial Review, Am. Lung Ass'n v. EPA, No. 17-1172 (D.C. Cir. July 12, 2017).

[80] 5 U.S.C.A. § 705 (West 2017).

[81] *See* Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Seam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017) (to be codified at 40 C.F.R. pt. 423); Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430, 27,431 (June 15, 2017) (to be codified at 43 C.F.R. pt. 3170).

[82] *See* Safety-Kleen Corp. v. EPA, No. 92-1629, and consolidated case No. 92-1639, 1996 LEXIS 2324, at *2–3 (D.C. Cir. Jan. 19, 1996).

[83] *See* Postponement of Compliance Dates for Effluent Limitations Guidelines, 82 Fed. Reg. at 19,005 (emphasizing that rule's compliance dates "have not yet passed").

[84] Some statutes explicitly contemplate that rules will have both an "effective date" and a "compliance date." *See* Nat. Res. Def. Council v. EPA, 749 F.3d 1055, 1057–58 (D.C. Cir. 2014) (citing 42 U.S.C. § 7412); *see also* Cal. Energy Comm'n v. Dep't of Energy, 585 F.3d 1143 (9th Cir. 2009) (citing Energy Policy and Conservation Act).

pected, on pain of penalty, to conform their conduct to the rule. Effective dates are the dates on which rules take legal effect. Compliance dates set by agencies are often later than effective dates, in order to give affected parties time to bring their activities into conformity with the rule. Under EPA and DOI's assertions about the equivalency of effective dates and compliance dates, rules having both an effective date and a compliance date would have more than one effective date. The point of an effective date, however, is to give clarity about when a rule becomes law. Perhaps for this reason, section 705 of the APA refers to "*the* effective date," in the singular, indicating that an action has just one effective date. EPA and DOI's positions would undo that clarity and singularity, and make a muddle of rules and statutes that carefully distinguish between these two kinds of regulatory milestones.

A district court in California has twice rejected DOI's invocation of section 705 in delaying rules issued in the Obama administration—a rule on royalty valuation and a rule on methane emissions from oil and gas facilities—with reasoning just like that offered above. The court held that compliance dates were not "effective dates" within the meaning of section 705 and that compliance dates and effective dates have different meanings.[85] Because the agencies that have, in the Trump administration, tried to delay compliance dates under section 705 have all called upon this problematic equation of compliance dates and effective dates, these judicial decisions throw all of these delays into legal doubt.

Beyond improperly conflating effective dates and compliance dates, agencies in the Trump administration have also distorted the meaning of "justice" in invoking section 705 to justify rule delays. The term "justice" itself invites consideration of the competing interests at stake in a matter, as a district court has observed in rejecting one of the administration's rule delays.[86] It does not generally countenance a fixation on one set of interests without reference to others. In fact, settled case law on judicial review of agencies' delays of rules under section 705 considers whether agencies have shown that there will be irreparable harm without the delay and whether they have also shown that the harm that will occur without the delay balances out the harm that will come to the beneficiaries of regulation due to the rule delay.[87]

In delaying rules under section 705, however, EPA, DOI, and the Department of Education have paid loving attention to the interests of regulated industry while brushing aside the interests of regulatory beneficiaries. In postponing its rule on toxic water pollution from power plants, EPA mentioned only the costs that regulated industry would avoid during the delay,

[85] *See* California v. Bureau of Land Mgmt., No. 17-CV-03804-E-DL, 2017 WL 4416409, at *11 (N.D. Cal. Oct. 4, 2017); Becerra v. Dep't of the Interior, Docket No. 13, Case No. 17-cv-02376-EDL, slip op. at 13–16 (N.D. Cal. Aug. 30, 2017).

[86] *See California* at *11.

[87] *See* Sierra Club v. Jackson, 833 F. Supp. 2d 11, 34 (D.D.C. 2012).

not the benefits that the general public would forgo.[88] In postponing its rule on venting, flaring, and leaks in the oil and gas industry's operations on federal and Indian lands, DOI referred only to the regulated industry's interests in avoiding the cost of complying with the rule, not to the public's interest in receiving the benefits of the rule.[89] In postponing the effectiveness of its final rule establishing a new standard and process for deciding whether a student borrower has a defense to repayment on a loan based on the behavior of the school she borrowed money to attend, the Department of Education trained its gaze almost exclusively on the costs saved by educational institutions. Student borrowers came into the picture only insofar as the Department indicated they would be taken care of under existing regulations—the very regulations the Department had decided to revise in the borrower defense regulation.[90] Such one-sided analysis does not meet the settled requirements for postponing a rule under section 705 of the APA.

EPA, DOI, and the Department of Education have also tried to smuggle pending processes for internal reconsideration of rules into section 705's authorization of rule postponement. Section 705 authorizes postponement of an agency rule only when the rule is the subject of "pending judicial review." Courts have concluded, reasonably, that an agency seeking to postpone a rule under section 705 must connect its rationale for postponement to the litigation that is invoked as the trigger for the postponement.[91] Agencies in the Trump administration have not drawn this connection.

In putting off the compliance dates for its final rule on preventing wasteful losses of natural gas from facilities on federal and Indian lands, DOI conceded that it "believes the Waste Prevention Rule was properly promulgated," yet it asserted, without elaboration, that the rule faced an "uncertain future" in light of both the pending litigation and the pending administrative consideration of the rule.[92] A district court in California has rejected this reasoning as a basis for postponing the rule under section 705,

[88] *See* Postponement of Compliance Dates for Effluent Limitations Guidelines, 82 Fed. Reg. at 19,005 (discussing "capital expenditure" of regulated industry). EPA followed the same playbook—mentioning only costs saved by regulated entities through delay, not costs incurred by the public—in justifying, as a matter of "justice," its stay of a general permit for municipal stormwater discharges. *See* Notice of EPA's Action To Postpone the Effective Date of the EPA Region 1 Clean Water Act National Pollutant Discharge Elimination System General Permits for Stormwater Discharges From Small Municipal Separate Storm Sewer Systems in Massachusetts, 82 Fed. Reg. 32,357, 32,358 (July 13, 2017).

[89] Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430, 27,431 (June 15, 2017) (to be codified at 43 C.F.R. pt. 3170).

[90] Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 82 Fed. Reg. 27,621 (June 16, 2017) (to be codified at 34 C.F.R. pts. 668, 674, 682, 685).

[91] *See Sierra Club*, 883 F. Supp. 2d at 34.

[92] Waste Prevention, Production Subject to Royalties, and Resource Conservation, 82 Fed. Reg. at 27,431.

finding that the federal defendants had paid mere "lip service" to the requirement that the postponement be tied to the underlying litigation.[93]

This decision threatens other rule delays that have relied on the same legal reasoning. In postponing its borrower defense rule, the Department of Education, without elaboration, asserted that "serious questions" were raised and "legal uncertainty" was created by the pending judicial challenge to the rule. If an agency may simply wave its hand at pending litigation, pronounce its outcome "uncertain," and stay a rule while the litigation unfolds, the link section 705 requires between stays and litigation will disappear, and agencies will be able to use the almost-inevitable litigation that attends any notable rulemaking as an excuse for staying rules indefinitely.

Similarly, in postponing the compliance dates for its final rule on toxic water pollution, EPA referred repeatedly to objections made in petitions for reconsideration of the rule and only glancingly to the pending judicial challenges.[94] EPA even cited data obtained after the final rule was issued—data that will not be admissible in the judicial challenge to the rule.[95] EPA has been schooled before in the requirements for section 705 postponements; yet in the announcement of the postponement of the rule on toxic water pollution, it made virtually the same mistakes all over again—right down to its explicit declination to identify any possible legal error in the underlying rule-making proceeding.[96] So divorced is EPA's postponement of the rule from the attendant judicial challenge that EPA successfully petitioned the court hearing the challenge to hold it in abeyance while EPA reconsidered the rule.[97] Thus has EPA created a kind of Alphonse and Gaston routine for

---

[93] *See* California v. Bureau of Land Mgmt., No. 17-CV-03804-E-DL, 2017 WL 4416409, at *10 (N.D. Cal. Oct. 4, 2017).

[94] In a separate matter, EPA postponed the effective date of a rule promulgating a federal implementation plan for Arkansas, citing section 705, with no reference whatsoever to any pending litigation. *See* Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan; Partial Stay, 82 Fed. Reg. 18,994 (Apr. 25, 2017) (to be codified at C.F.R. pt. 52).

[95] Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005, 19,005 (Apr. 25, 2017).

Similarly, in staying Region 1's general permit for municipal stormwater discharges, EPA did not discuss the merits of the litigation that it invoked, under section 705 of the APA, in staying the permit; it discussed only its desire to conduct Alternative Dispute Resolution regarding the permit itself and to figure out what "changes are appropriate in the permit and to determine next steps." *See* Action To Postpone the Effective Date of the EPA Region 1 Clean Water Act, 82 Fed. Reg. 32,357, 32,358 (July 13, 2017).

[96] Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005, 19,005 (Apr. 25, 2017) ("While EPA is not making any concession of error with respect to the rulemaking, the far-ranging issues contained in the reconsideration petitions warrant careful and considerate review of the Rule."). *Cf.* Sierra Club v. Jackson, 833 F. Supp. 2d 11, 34 (D.C. Cir. 2012) (finding that postponement of two rules had "no rational connection to the underlying litigation" where EPA's notice of postponement stated that the Agency "believe[s] that the final rules reflect reasonable approaches consistent with the requirements of the Clean Air Act," even if some issues related to the rules could "benefit from additional public involvement").

[97] Sw. Elec. Power Co. v. EPA, No. 15-60821 (stayed Apr. 24, 2017 until Aug. 12, 2017). The judicial challenge to EPA Region 1's general permit for municipal stormwater discharges

the regulatory state: the courts give way so that the agency can do its work, and the agency stops the rule so that the courts can do their work.[98]

III. Unlawfully Truncated Process

In making decisions, agencies must use the decision-making process Congress has prescribed for those decisions. For agency rules, this process is usually the familiar notice and comment process of the APA, or a close variant of it specified in other statutes.[99] As I explained in Part I, courts have long held that agency decisions to delay or suspend rules are themselves "rules" subject to notice and comment requirements.

The question then is whether any exception to the procedural requirements for rules applies. As discussed below, the Trump administration has invoked two exceptions to the APA's notice and comment requirement for rulemaking. It has suggested, without elaboration, that some of its decisions delaying or suspending rules are exempt from notice and comment requirements insofar as they are "procedural rules." More often, the administration has argued that its delays need not be preceded by notice and comment because it has "good cause" to forgo this process. I argue below that the Trump administration has misused both of these statutory exceptions.

A. Procedural Rules

The APA exempts from notice and comment requirements "rules of agency organization, procedure, or practice."[100] The Trump administration has justified some of its delays of agency rules on the ground that these decisions are "rules of procedure" and as such do not need to be preceded by notice and comment. The administration has supplied no reasoning for this conclusion in any of the instances in which it has offered it, sufficing with a terse declaration that, "to the extent that 5 U.S.C. 553 APA applies"

was likewise stayed, without objection from EPA, pending agency reconsideration. *See* Action To Postpone the Effective Date of the EPA Region 1 Clean Water Act, 82 Fed. Reg. at 32,358.

[98] In *Becerra*, the district court in California rejected DOI's attempt to justify a delay under section 705 where the Agency had convinced the court reviewing the judicial challenge to the underlying rule to stay the litigation. *See* Becerra v. Dep't of the Interior, Docket No. 13, Case No. 17-cv-02376-EDL, slip op. at 14 (N.D. Cal. Aug. 30, 2017).

[99] The Clean Air Act, for example, requires that many rules promulgated under the Act follow a process much like, though not identical to, the notice and comment process of the APA. *See* 42 U.S.C. § 7607(d) (2012).

[100] 5 U.S.C. § 553(b)(3)(A) (2012).

to the agency decision to delay an effective date,[101] the decision "constitutes a rule of procedure" under the APA.[102]

These attempts to circumvent notice and comment rulemaking are not legally sound. They appear to take the position that delays of effective dates are, as a class, procedural rules. As I just discussed, however, courts have held that such delays are substantive rules, presumptively requiring notice and comment. Moreover, as I explain below, agencies' delays of the effective dates of final rules are not plausibly conceived of as procedural rules.

In thinking through whether delays of rules are procedural rules under the APA, it is helpful to remember the language of the APA itself. The APA's bundling-together of "rules of agency organization, procedure, or practice"[103] implies a concern with rules that govern an agency's internal operations. Agency "organization" and "practice" call to mind an agency's choices about how to structure and govern itself, not choices about how to govern parties outside the agency. Given the adjacent placement of rules of "procedure" in the same statutory provision, it is reasonable to conclude that "procedure" should be read to refer to an agency's processes for organizing or structuring its own operations.

Beyond the text of the APA, courts have cited the legislative history in making the same point: that the exception from notice and comment for rules of "agency organization, procedure, or practice" was "provided to ensure that agencies retain latitude in organizing their internal operations."[104]

A long line of cases accept the basic idea that procedural rules are ones involving agencies' internal operations. Such rules may nevertheless affect outside parties; in an influential early case, the D.C. Circuit quoted Professor

---

[101] It is unclear whether the qualifier "to the extent that" is a subtle suggestion that the agency, if legally challenged, will argue that section 553's notice and comment provisions do not apply at all to an agency's delay of an effective date. Such an argument should fail on the basis of the legal analysis described above. *See supra* Section II.A. It may also fail based on the *Chenery* principle, that an agency's decision must stand or fall based on the reasoning given at the time of the decision. By hedging ("to the extent") rather than declaring, the agencies may not have met *Chenery*'s requirement of contemporaneous explanation. *See generally* SEC v. Chenery Corp., 318 U.S. 80 (1943).

[102] *See, e.g.*, Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 82 Fed. Reg. 20,825, 20,827 (May 4, 2017); Energy Conservation Program: Test Procedures for Walk-in Coolers and Walk-in Freezers, 82 Fed. Reg. 14,426 (Mar. 21, 2017); Energy Conservation Program: Test Procedures for Ceiling Fans, Final rule; further delay of effective date, 82 Fed. Reg. 14,427 (Mar. 21, 2017); Energy Efficiency Standards for the Design and Construction of New Federal Low-Rise Residential Buildings' Baseline Standards Update, 82 Fed. Reg. 10,287, 10,288 (Mar. 21, 2017); Confidentiality of Substance Use Disorder Patient Records, 82 Fed. Reg. 10863 (Feb. 16, 2017); Endangered and Threatened Wildlife and Plants; Endangered Species Status for Rusty Patched Bumble Bee, 82 Fed. Reg. 10,285, 10,286 (Feb. 10, 2017); Onshore Oil and Gas Operations, 82 Fed. Reg. 9974, 9975 (Feb. 9, 2017); Clarification of When Products Made or Derived From Tobacco Are Regulated as Drugs, Devices, or Combination Products, 82 Fed. Reg. 9501, 9502 (Feb. 7, 2017); Refuse to Accept Procedures for Premarket Tobacco Product Submissions, 82 Fed. Reg. 8894 (Feb. 1, 2017); Procedural Rules for DOE Nuclear Activities, 82 Fed. Reg. 8807 (Jan. 31, 2017).

[103] 5 U.S.C. § 553(b)(3)(A) (2012).

[104] Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980).

Freund in observing that "even office hours . . . necessarily require conformity on the part of the public."[105] The courts have held that when the "substantive effect" of a seemingly procedural rule on "the rights or interests of parties" becomes "sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA," notice and comment are required for that rule.[106] This principle has persuaded courts to deem some rules seemingly directed at an agency's internal operations to be substantive rules that require notice and comment.[107]

These precedents are not helpful to the Trump agencies that have opined that their delays of effective dates are rules of procedure. The effective date of a rule is clearly not a rule addressed at an agency's internal operations. It is not a deadline for internal agency filings, or a principle of agency organization, or anything of the sort. It is, rather, the date on which the underlying rule becomes law.

The Trump administration has effectively, even if unintentionally, conceded as much. In delaying the effective dates of Obama-era rules, the administration has consistently pointed to the effects on the public—in particular the regulated industry—of allowing the effective dates to pass without delay.[108] The entire reason for delaying these rules without notice and comment is to shelter regulated industry from having these rules take on the force of law.[109] As in one of the D.C. Circuit cases denying "procedural" status to an agency rule, no agency that has claimed that its delays constitute procedural rules has argued that its "need for 'latitude in organizing [its] internal operations' is implicated at all."[110]

This situation differs fundamentally from ones in the cases that courts have found hard. The hard cases are those in which a superficially "procedural" rule, aimed at internal agency operations, has a substantial substantive effect on external parties. In those cases, the rules' effect is sometimes grave enough for the courts to deem them substantive.[111]

---

[105] *Id.* at 707 (quoting E. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 213 (1928)).

[106] Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec., 653 F.3d 1, 5–7 (D.C. Cir. 2011).

[107] Mendoza v. Perez, 754 F.3d 1002, 1024 (D.C. Cir. 2014).

[108] *See, e.g.*, Changes to the Nutrition Facts Label, FOOD & DRUG ADMIN. (Oct. 2, 2017), https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm#dates [https://perma.cc/R9SL-KQ9Z]; Commission Guidance on Pay Ratio Disclosure, 82 Fed. Reg. 44,917 (Sept. 27, 2017); Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 82 Fed. Reg. 20,825, 20,827–28 (May 4, 2017); Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005, 19,005 (Apr. 25, 2017).

[109] *See, e.g.*, Pesticides; Certification of Pesticide Applicators; Delay of Effective Date, 82 Fed. Reg. 25,529, 25,530 (June 2, 2017) (to be codified at 40 C.F.R. pt. 171); Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments; Extension of Compliance Date, 82 Fed. Reg. 14,437, 14,437 (Mar. 21, 2017) (to be codified at 14 C.F.R. pt. 234); Poultry Grower Ranking Systems, 82 Fed. Reg. 9533, 9533 (Feb. 7, 2017) (to be codified at 9 C.F.R. pt. 201).

[110] Chamber of Commerce v. Dep't of Labor, 174 F.3d 206, 212 (D.C. Cir. 1999).

[111] *Id.*

In the Trump delay cases, however, the agencies are trying the opposite move. They are trying to convert a rule that is explicitly and fundamentally aimed at outside parties—the alteration of the effective date of a final rule—into a procedural rule, aimed at internal agency operations. But that is not what the delays are about. Moreover, even assuming for the sake of argument that some of the rule delays do not have "grave" effects on the rights and interests of the public, that fact does not make them "procedural." The conversion between procedural and substantive, based on the gravity of effects, runs only in one direction; grave effects may turn an apparently procedural rule into a substantive one, but the absence of such effects does not turn a substantive rule into a procedural one. To say otherwise is to make the following logical mistake:

> 1. A rule that has grave effects on the interests of parties is substantive.
> 2. Therefore, a rule that does not have grave effects on the interests of parties is procedural.

The D.C. Circuit has previously criticized this kind of flawed reasoning in the context of determining whether a rule was substantive or procedural, noting that "the agency argues that because a rule backed by the force of law is substantive, a rule that has no binding legal authority must therefore be procedural. By the same reasoning, one would conclude that because all men are mortal, women must be immortal."[112] There is no plausible argument that a delay of an effective date is a way of managing an agency's internal operations. The effects of that delay on external parties, however great or small, cannot convert the decision about delay into a procedural rule.

The D.C. Circuit has occasionally supplemented its focus on substantial impacts on parties with an inquiry into "whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior."[113] Under this approach, the Trump administration's rule delays are not procedural as well. These delays both "encode a substantive value judgment" and "put a stamp of approval or disapproval on a given type of behavior."[114]

A broad imposition of rule delays at the beginning of a new presidential administration reflects a substantive value judgment that the rules of the previous administration are not to be trusted. Indeed, the wholesale imposition of delays, predicated on a generic instruction from the White House to freeze rules, could reflect nothing but such a judgment, since agencies responding in bulk to such an instruction are doing so solely on the basis of the change

---

[112] *Id.*

[113] Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1047 (D.C. Cir. 1987).

[114] *But see* Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN. L. 286, 367 (2013) ("A brief delay of a rule's effective date appears procedural under this standard—the freeze does not necessarily reflect approval or disapproval of the substance of the rule, it merely provides time for the agency to review the rule and perhaps take further substantive action.").

in administrations. Mick Mulvaney, the current Director of OMB, captured this kind of value judgment when, in touting the Trump administration's deregulatory efforts and without citing any specific evidence, he said: "Our philosophy has been that the previous administration fudged the numbers, that they either overstated the benefits to people or understated the costs."[115]

Where agencies in the Trump administration have not relied solely on White House instructions in imposing rule delays, they have most often supported the delays by invoking some form of the argument that imposing costs on regulated industry before they have reconsidered the rules in question is inappropriate. This judgment implicitly assumes that regulatory beneficiaries are the ones who should bear the burden of delay. This preference for regulated parties over regulatory beneficiaries "puts a stamp of approval . . . on a given type of behavior" by allowing activity that the agency previously judged harmful to continue unchanged.

Courts have long emphasized that exceptions to the APA's notice and comment requirements are to be recognized sparingly, to avoid creating " 'escape clauses' that may be arbitrarily utilized at the agency's whim."[116] Conceiving of adjustments to the effective dates of substantive rules as procedural rules would give agencies an easy way out. Agencies could delay rules, either for consecutive brief intervals or for longer periods, without having to justify their antipathy to or suspicion of the final rules they are delaying. This is exactly the kind of end run around the notice and comment process that courts have been anxious to prevent.[117]

B. Good Cause

The APA also provides that an agency may forgo notice and comment rulemaking if it "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[118]

Here, too, the courts have cautioned that exceptions to notice and comment "will be narrowly construed and only reluctantly countenanced."[119] They have specified that use of the good cause exception "should be limited to emergency situations, so that the section does not become an all-purpose

[115] Donna Borak, *Trump's war on regulation comes with tradeoffs*, CNN: MONEY (Aug. 17, 2017, 6:44 AM), http://money.cnn.com/2017/08/17/news/economy/trump-deregulatory-war-agenda/index.html [https://perma.cc/UJG4-QADC].

[116] *See, e.g.*, Am. Fed'n of Gov't Emps., AFL-CIO v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

[117] *See, e.g.*, Nat. Res. Def. Council v. EPA, 683 F.2d 752, 762 (3d Cir. 1982).

[118] 5 U.S.C. § 553(b)(3)(B) (2012).

[119] *Block*, 655 F.2d at 1156 (citing State of N.J., Dep't of Envtl. Prot. v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980)).

escape clause."[120] The courts have also served notice that they "will closely examine the agency's proffered rationale" for finding good cause.[121]

Agencies in the Trump administration have not met the standard for showing "good cause." Agencies in this administration have offered five basic reasons for forgoing notice and comment. They have cited the "imminent" arrival of an effective date, effects on regulated industry, a desire for an orderly administrative process, limited agency resources and personnel, and the change in administrations as reasons to do without notice and comment. As I explain below, these reasons are unsatisfactory insofar as they sweep too broadly in justifying agency decisions taken without notice and comment, expand the concept of "good cause" well beyond current law, or simply make no sense.

1. "Imminent" deadline-like moment

Many agencies in the Trump administration have explained their failure to undertake notice and comment rulemaking on their delays of the effective dates of rules by pointing to the "imminence" of the original effective dates.[122] They have argued that it would simply not be possible to do notice and comment before the effective date passes, and that therefore they must forgo notice and comment.

---

[120] Nat'l Fed'n of Fed. Emps. v. Devine, 671 F.2d 607, 610 (D.C. Cir. 1982) (citing *Block*, 655 F.2d at 1153).

[121] *Id.* Courts have not been able to reach an agreement about the nature of an agency's "good cause" finding. Is it a legal conclusion, subject to de novo review in the courts? *See* United States v. Dean, 604 F.3d 1275, 1278 (11th Cir. 2010); Sorenson Commc'n Inc. v. FCC, 755 F.3d 702, 706 (D.C. Cir. 2014). Is it a discretionary decision, subject to arbitrary and capricious review? *See* United States v. Garner, 767 F.2d 104, 115–16 (5th Cir. 1985). Is it a little bit of both—a legal judgment about whether an agency has asserted a valid and well-grounded reason for forgoing notice and comment, plus a factual judgment about the circumstances in which the agency finds itself? *See* United States v. Reynolds, 710 F.3d 498, 506–07 (3d Cir. 2013). An open circuit split on the standard of review for agencies' good cause determinations has existed for some years, and the Supreme Court has so far declined to address it. *See* JARED P. COLE, CONG. RES. SERV., THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION, 13–16 (2016). Even assuming that the appropriate standard of review for agencies' decisions about "good cause" is the most deferential, arbitrary and capricious standard, agencies in the Trump administration have not met this standard.

[122] National Performance Management Measures, 82 Fed. Reg. 22,879–01 (May 19, 2017) (to be codified at 23 C.F.R. pt. 490); Chemical Substances When Manufactured or Processed as Nanoscale Materials, 82 Fed. Reg. 22,088–01 (May 12, 2017) (to be codified at 40 C.F.R. pt. 704); Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 82 Fed. Reg. 20,825-01 (May 4, 2017) (to be codified at 21 C.F.R. pts. 11, 101); Confidentiality of Substance Use Disorder Patient Records, 82 Fed. Reg. 10,864–01 (to be codified at 42 C.F.R. pt. 73); Clarification of When Products Made or Derived From Tobacco Are Regulated as Drugs, Devices, or Combination Products, 82 Fed. Reg. 9501, 9501–02, (Feb. 7, 2017) (to be codified at 21 C.F.R. pts. 1100, 201, 801); Refuse To Accept Procedures for Premarket Tobacco Product Submissions, 82 Fed. Reg. 8894–01 (Feb. 1, 2017) (to be codified at 21 C.F.R. pt. 1105); Civil Penalties, 82 Fed. Reg. 8694–01 (Jan. 30, 2017) (to be codified at 49 C.F.R. pt. 578); Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. 8499, 8500 (Jan. 26, 2017) (to be codified at 40 C.F.R. pts. 22, 51, 52, 61, 68, 80, 81, 124, 147, 171, 239, 259, 300, 770).

This explanation runs up against the settled principle that the "mere existence" of a deadline usually does not constitute good cause to forgo notice and comment.[123] In assessing whether an impending deadline satisfies the good cause standard, courts have considered whether an "emergency" exists. The exemplar for an "emergency" justifying a failure to conduct notice and comment is a situation that threatens public health or safety.[124]

None of the agencies citing the imminence of effective dates in explaining their failure to conduct notice and comment have claimed any threat to public health or safety from keeping effective dates as is. Indeed, the rules subject to delays under the "imminent" effective date rationale are all, directly or indirectly, aimed at improving public health or safety.[125] Even though the Chief of Staff may have been alluding to this line of cases when he allowed agencies to decline to delay rules if delay would threaten public health or safety,[126] no agency, to my knowledge, took him up on this offer of flexibility. To the extent that public health or safety has figured into agencies' decisions about delay, it has been in the wrong direction: agencies have simply ignored or dismissed the potential threats to public health or safety that may arise from delaying rules aimed at protecting public health and safety.

An imminent effective date, without more, is not an "emergency." The arrival of an effective date means that a final rule, issued after notice and comment rulemaking, will become law on the date the agency previously announced in the rule. It is kind of the opposite of an emergency. Allowing the effective date to remain in place allows events to unfold in precisely the way the agency had said they would.[127]

2. Interests of regulated industry

Agencies have also cited the interests of regulated industry in justifying their failure to conduct notice and comment before delaying the effective dates of final rules. They have asserted that the delays will "ease the burdens on all stakeholders,"[128] including regulated entities, and that soliciting comment would be contrary to the public interest because regulated entities need

---

[123] U.S. Steel v. EPA, 595 F.2d 207, 213 (5th Cir. 1979); Am. Fed'n of Gov't Emps., AFL-CIO v. Block, 655 F.2d 1153, 1158 (D.C. Cir. 1981); Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 581 (D.C. Cir. 1981); Nat. Res. Def. Council, Inc. v. Evans, 316 F.3d 904, 912 (9th Cir. 2003); Chamber of Commerce v. SEC, 443 F.3d 890, 908 (D.C. Cir. 2006).

[124] *See, e.g.*, United States v. Dean, 604 F.3d 1275, 1281 (11th Cir. 2010).

[125] *See supra* note 122.

[126] *See* Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review, 82 Fed. Reg. 8346 (Jan. 20, 2017).

[127] *Cf.* Becerra v. Dep't of the Interior, Docket No. 13, Case No. 17-cv-02376-EDL, slip op. at 14–15 (N.D. Cal. Aug. 30, 2017) (rejecting federal defendants' policy argument for broadening section 705 to include compliance dates, based on idea of maintaining the status quo: "Defendants' position undercuts regulatory predictability and consistency . . . . [The] suspension of the Rule did not merely 'maintain the status quo,' but instead prematurely restored a prior regulatory regime.").

[128] 340B Drug Pricing Program Ceiling Price and Manufacturer Civil Monetary Penalties Regulation, 82 Fed. Reg. 22,893, 22,893 (May 19, 2017) (to be codified at 42 C.F.R. pt. 10).

to know as soon as possible whether the effective dates will be delayed so that they can plan and adjust their behavior accordingly.[129] Regulated entities, as EPA has put it, need "immediate notice" of whether an effective date will be put off, and thus soliciting comment before serving this notice would be against the public interest.[130]

These are the kinds of justifications that could make the good cause exception swallow the rule of notice and comment. Delaying a regulatory requirement will always ease burdens on the entities regulated, at least temporarily. If easing these burdens constitutes good cause for delaying a rule, it is hard to imagine an agency being unable to delay a rule whenever it would like to give industry a break. Nothing in the agencies' explanations for delays in the Trump administration suggests a particularly onerous or exceptional regulatory burden; no agency has asserted that a failure to delay a rule will affect the national economy or undermine an entire industry. Instead, the agencies' references to alleviating costs for industry are generic and unelaborated. If these references suffice for good cause, the good cause constraint is quite meaningless.

There is also a nonsensical idea at the heart of these explanations. The idea, according to the agencies, is that delaying effective dates helps regulated entities plan. It lets them know what lies ahead and gives them time to adjust their conduct. But until the agency announced a delay in the effective date, regulated entities knew exactly what they had to do: they had to conform their conduct to the requirements of the final rule. Delaying the rule disrupts that certainty. Not only is the effective date put off, perhaps temporarily, or perhaps once in a continuing sequence of delays, or perhaps indefinitely, but the announcement of the delay is, in the Trump administration, typically accompanied by a reference to the agency's current doubts about the durability of the underlying final rule.

Delaying effective dates, while simultaneously expressing discomfort with the underlying rule, is not a way to help affected parties plan or adjust their behavior. At its least harmful, it is a way to induce anxiety about the plans and adjustments affected parties are already in the midst of undertaking. At its worst, it ratifies the choices of those who delayed planning and adjustment in the hope the agency would rescue them from their own choices.[131] Indeed, agencies in the Trump administration have exacerbated these dynamics, pitting compliance leaders against compliance laggards, by

[129] Refuse To Accept Procedures for Premarket Tobacco Product Submissions, 82 Fed. Reg. 8894–01 (Feb. 1, 2017) (to be codified at 21 C.F.R. pt. 1105); Agricultural Bioterrorism Protection Act of 2002, 82 Fed. Reg. 10,855, 10,855 (Feb. 16, 2017) (to be codified at 7 C.F.R. pt. 331, 9 C.F.R. pt. 121); National Organic Program, 82 Fed. Reg. 21,677, 21,677 (May 10, 2017) (to be codified at 7 C.F.R. pt. 205).

[130] Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. 8499, 8500 (Jan. 26, 2017) (to be codified at 40 C.F.R. pts. 22, 51, 52, 61, 68, 80, 81, 124, 147, 171, 239, 259, 300, 770).

[131] *Cf.* Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012) (declining to support EPA regulatory exception for "lone manufacturer," to help it escape the "folly of its own choices").

casually dismissing the concerns of those in industry that have already sunk costs into complying with a rule the administration has now delayed.[132]

3. Interest in an orderly administrative process

Agencies in the Trump administration have asserted that they have good cause to forgo notice and comment in announcing rule delays because this choice alleviates uncertainty[133] and promotes an "orderly" process for promulgating rules.[134]

As just discussed, however, last-minute changes to effective dates disrupt the very certainty that identified effective dates are designed to achieve. The situation goes from predictable to unpredictable, from settled to unsettled.

The idea, moreover, that the deregulatory free-for-all we are now witnessing is an "orderly" process for promulgating and implementing rules is almost comical. Agencies in the Trump administration have announced their intentions to delay rules via letters to regulated industry,[135] vague notices posted on their websites,[136] Federal Register notices published after the fact,[137] "interim final" rules,[138] and more. They have finalized delays in effective dates after those dates have passed, backdating their announcements

[132] Onshore Oil and Gas Operations, 82 Fed. Reg. 9974 (Feb. 9, 2017) (to be codified at 43 C.F.R. pt. 3160); Oil and Natural Gas Sectors, 82 Fed. Reg. 27,645 (June 16, 2017) (to be codified at 40 C.F.R. pt. 60); Medicare Program; Advancing Care Coordination Through Episode Payment Models (EPMs) 82 Fed. Reg. 22,895-01 (May 19, 2017) (to be codified at 42 C.F.R. pts. 510, 512).

[133] Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430, 27,431 (June 9, 2017) (to be codified at 43 C.F.R. pt. 3170); 340B Drug Pricing Program Ceiling Price and Manufacturer Civil Monetary Penalties Regulation, 82 Fed. Reg. 22,893, 22,894 (May 19, 2017) (to be codified at 42 C.F.R. pt. 10) (referring to "uncertainty" in the marketplace); Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 17,531, 17,531 (Apr. 12, 2017) (delaying interim final rule would "reduce confusion of uncertainty for the industry" while agency decides "final disposition" of interim final rule).

[134] National Performance Management Measures, Assessing Performance in National Highway System, 82 Fed. Reg. 22,879 (May 19, 2017) (to be codified at 23 C.F.R. pt. 490); Clarification of When Products Made or Derived From Tobacco Are Regulated as Drugs, Devices, or Combination Products, 82 Fed. Reg. 9501 (Feb. 7, 2017) (to be codified at 21 C.F.R. pts. 201, 801, 1100); Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. 8499, 8500 (Jan. 26, 2017) (to be codified at 40 C.F.R. pts. 22, 51, 52, 61, 68, 80, 81, 124, 147, 171, 239, 259, 300, 770).

[135] Press Release, U.S. EPA Office of Media Relations, EPA to Extend Deadline for 2015 Ozone NAAQS Designations (June 6, 2017), https://www.epa.gov/newsreleases/epa-extend-deadline-2015-ozone-naaqs-area-designations [https://perma.cc/7VRL-S2BB].

[136] Changes to the Nutrition Facts Label, (June 19, 2017), https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm [https://perma.cc/8EKN-PEK3] (On June 13, 2017, the FDA announced its intention to extend the compliance date for the Nutrition Facts Label final rules. The FDA will provide details of the extension through a Federal Register Notice at a later time).

[137] Notice of EPA's Action To Postpone the Effective Date of the EPA Region 1 Clean Water Act National Pollutant Discharge Elimination System General Permits for Stormwater Discharges From Small Municipal Separate Storm Sewer Systems in Massachusetts, 82 Fed. Reg. 32,357, 32,357–59 (July 13, 2017).

to the day before the effective dates they are delaying.[139] They have delayed, sometimes indefinitely, the effective dates of rules that were years in the making and of rules that were the subjects of thousands of public comments.[140]

If this is an "orderly" process for promulgating rules, one shudders to imagine what the Trump administration thinks of as a disorderly process.

4. Limited resources and personnel

Some agencies have offered what I believe is a brand new justification for forgoing notice and comment: their resources and personnel are limited. Since agency resources and personnel are always limited, this new justification, if accepted, would devour the rule that agencies must conduct notice and comment before issuing substantive rules.

In citing resource constraints, the Department of Homeland Security simply explained that it would prefer not to spend limited government resources enforcing a rule that it is "highly likely" to rescind, and that this reluctance provides good cause for failing to undertake notice and comment.[141] This reasoning is a non sequitur; an agency's enforcement priorities do not govern whether it must use notice and comment for rulemaking. The Agency's explanation, moreover, betrays a mind already made up on the wisdom of keeping the rule in place, which itself is a betrayal of the open-mindedness ideally associated with the notice and comment process. And to justify a failure to undertake notice and comment on the ground that, someday in the future, a notice and comment rulemaking will ratify the Agency's instincts that the underlying rule is bad and needs to be undone would effectively allow rule rescission in the absence of the usual process for such a decision.

EPA has taken a slightly different approach to making the limited resources argument. It has stated that it would prefer to spend agency resources on the "substance" of regulations rather than on justifying rule delays.[142] This desire, the Agency has asserted, gives it good cause to avoid notice and comment in delaying rules.

---

[138] Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 82 Fed. Reg. 20,825 (May 4, 2017) (to be codified at 21 C.F.R. pts. 11, 101).

[139] Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay, 82 Fed. Reg. 25,730 (June 5, 2017) (to be codified at 40 C.F.R. pt. 60) (stating the delay of underlying rule is effective on June 2, 2017, three days before delay was published in the Federal Register).

[140] Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule, 82 Fed. Reg. 11,823, 11823–24 (Feb. 27, 2017) (to be codified at 30 C.F.R. pts. 1202, 1206).

[141] International Entrepreneur Rule: Delay of Effective Date, 82 Fed. Reg. 31,888 (July 11, 2017) (to be codified at 8 C.F.R. pts. 103, 212, 274a).

[142] Uniform National Discharge Standards for Vessels of the Armed Forces-Phase II Batch One: Delay of Effective Date, 82 Fed. Reg. 9682 (Feb. 8, 2017) (to be codified at 40 C.F.R. pt. 1700); Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. 8499, 8499 (Jan. 26,

But all agencies have limited resources, and all agencies have preferences about which kinds of activities to spend those resources on. If an agency can cite limited resources and the desire to spend those resources on something other than the notice and comment process, good cause will become a meaningless constraint on agency process. For this reason, perhaps, courts have held that constraints on resources are not "exigencies" justifying forgoing notice and comment.[143]

EPA's justification goes beyond even the context of rule delays. Many agencies would probably rather focus on one substantive aspect of rulemaking over another; they might rather, for example, spend resources studying the health risks of particular activities than spend them studying the costs to industry of reducing those risks. This preference does not justify forgoing notice and comment on matters the agency is less interested in.

EPA and the Department of Energy (DOE) have also cited the lack of political personnel in asserting that they have good cause to delay rules without notice and comment. EPA noted the "length[y]" nomination process of its administrator, and the lack of other Senate-confirmed appointees in the Agency, in forgoing notice and comment for a group of rules.[144] DOE also cited the lack of Senate-confirmed political personnel in declining to conduct notice and comment before delaying rules on energy efficiency.[145]

The lack of Senate-confirmed officials in these agencies is in part the administration's own fault. President Trump has not even nominated, or has greatly delayed in nominating, people for the Senate-confirmed positions in these agencies.[146] The lack of Senate-confirmed officials, moreover, does not signify a lack of political personnel. EPA and DOE are thick with political personnel who can do the work of the new administration—many of them, as I said at the outset, fresh off from working for the industries they are now trying to deregulate.[147] Furthermore, even if these agencies have chosen to run their deregulatory actions through a select group of political officials rather than through career channels,[148] this self-imposed choice does not justify forgoing notice and comment.[149]

2017) (to be codified at 40 C.F.R. pts. 22, 51, 52, 61, 68, 80, 81, 124, 147, 171, 239, 259, 300, 770).

[143] Chamber of Commerce v. SEC, 443 F.3d 890, 908 (D.C. Cir. 2006).

[144] Further Delay of Effective Dates for Five Final Regulations, 82 Fed. Reg. 14,324, 14,325 (March 20, 2017) (to be codified at 40 C.F.R. pts. 22, 51, 124, 171, 300, 770).

[145] *See* Energy Efficiency Standards for the Design and Construction of New Federal Low-Rise Residential Buildings' Baseline Standards Update, 82 Fed. Reg. 14,427, 14,428 (March 21, 2017) (to be codified at 10 C.F.R. pt. 435).

[146] *See* Karen Yourish & Gregor Aisch, *The Top Jobs in Trump's Administration Are Mostly Vacant: Who's to Blame?* N.Y. Times (July 20, 2017), https://www.nytimes.com/interactive/2017/07/17/us/politics/trump-appointments.html?_r=0 [https://perma.cc/FSR7-DU4W].

[147] *See supra* note 4.

[148] *See* Coral Davenport & Eric Lipton, *Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say*, N.Y. Times (Aug. 11, 2017), https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html [https://perma.cc/9Z9A-T92Z].

[149] Nat. Res. Def. Council v. Abraham, 355 F.3d 179, 205 (D.C. Cir. 2004).

5. Change in presidential administrations

Numerous agencies have justified forgoing notice and comment for rule delays on the ground that a new administration has been installed.

Some agencies have claimed that they simply have "no discretion" to fail to comply with the Chief of Staff's memorandum instructing them to delay the effective dates of rules not yet effective in January.[150] Their hands are tied, in other words; they cannot do otherwise.

That memorandum itself, however, leaves agencies with discretion to decline to delay rules, and specifically provides that agencies are to delay rules only if consistent with law.[151] Law must, in this instance, include the APA's requirement of notice and comment rulemaking in the absence of good cause. To cite a memorandum recognizing legal constraints (among which is the requirement of good cause) as good cause for disobeying legal constraints is not just unpersuasive; it is baffling.

Even if the Priebus memorandum did not acknowledge legal constraints on agencies, this would not give the agencies authority to ignore them. Again, the incentives created by a different result would be unfortunate. A Chief of Staff could undo the notice and comment requirements of the APA simply by telling agencies to ignore them, thereby giving the agencies "no discretion" to decide otherwise and conduct notice and comment rulemaking. This would create a large "escape clause" indeed.

Some agencies have cited the change in presidential administrations as a reason to forgo notice and comment because, they say, the change in administrations means they need to review and perhaps reconsider the rules that have not yet become effective. In order to do this, they need to be able to delay the effective dates of these rules, and they cannot do this if they are required to conduct notice and comment first. Quite apart from the question of whether the statements of inability to fit notice and comment into the agencies' schedules are factually accurate,[152] this explanation is also unsatisfactory for other reasons. It is utterly generic, giving no hint of whether a particular rule is indeed susceptible to the kind of reconsideration the agency has in mind. It is also the kind of explanation that could be deployed against any rule, thus ushering in widespread exceptions to the requirement of notice and comment.

---

[150] *See also* Endangered and Threatened Wildlife and Plants; Endangered Species Status for Rusty Patched Bumble Bee, 82 Fed. Reg. 10,285, 10,286 (Feb. 10, 2017) (to be codified at 50 C.F.R. pt. 10285) (postponing the effective date and citing the Chief of Staff's memorandum); Onshore Oil and Gas Operations, 82 Fed. Reg. 9974, 9974 (Feb. 9, 2017) (to be codified at 43 C.F.R. pt. 3160) (same); Energy Efficiency Standards for the Design and Construction of New Federal Low-Rise Residential Buildings' Baseline Standards Updates, 82 Fed. Reg. 9343, 9343 (Feb. 6, 2017) (to be codified at 10 C.F.R. pt. 435); Procedural Rules for DOE Nuclear Activities, 82 Fed. Reg. 8807, 8807 (Jan. 31, 2017) (to be codified at 10 C.F.R. pt. 820).

[151] *See* Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review, 82 Fed. Reg. 8346, 8346 (Jan. 20, 2017).

[152] Courts have held that an agency must have a well-grounded factual basis for its assertions about "good cause." Tenn. Gas Pipeline v. FERC, 969 F.2d 1141, 1146 (D.C. Cir. 1992).

Bear in mind that full reconsideration, revision, and even rescission of rules are always available as agency choices. To implement revisions and rescissions of rules, agencies must follow the same process they used in issuing the rules in the first place. Whether an effective date has passed or not, this route is almost always available to the agency. Exceptions exist, as when Congress has disempowered the agency to weaken prior rules, but for the most part agencies remain free to revise or undo rules they have promulgated. Courts have recognized, however, that an agency that effectively undoes a rule, without going through the required process, shifts the dynamic of formally undoing the rule. It shifts the agency's mindset from having to justify the change to having to justify returning the rule to its prior status. Courts have warned against shifting the agency mindset in this way without going through the appropriate process.[153]

To sum up: the agencies' explanations for their conclusions that they have "good cause" to forgo notice and comment in delaying the effective dates of rules are flawed. They would greatly expand the category of decisions not subject to notice and comment. They are inconsistent with legal precedent on the nature of "good cause." They are nonsensical. Even if these explanations are subject only to a constraint of non-arbitrariness, they should fail.

IV. Reason Giving

A basic requirement of modern administrative law is that agencies must give reasons for the choices they make. An agency required to give reasons for what it does may well find that some policy choices it may be considering simply cannot be defended; perhaps the choices do not jibe with the evidence before the agency,[154] or perhaps they are defensible only if the agency considers factors that it is not entitled by law to consider.[155] The requirement of reason giving helps agencies to avoid decisions that do not make sense, and it helps courts to review agency decisions for arbitrariness.

Agencies must give reasons—reasons that make sense—when they decide to delay or suspend final rules. In this part, I consider the most common explanations agencies in the Trump administration have given for choosing to delay or suspend final rules. These explanations overlap considerably with the explanations agencies have given for finding "good cause" to forgo notice and comment in delaying rules—in itself a strange phenomenon, given that in one case, the agencies are trying to justify forgoing notice and comment, and in the other, they are trying to justify putting off the effectiveness of final rules. One might expect, in the latter case, the agencies would show some reason to believe—beyond generic and conclusory assertions—that

[153] *See* Nat. Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 768 (3d Cir. 1982).

[154] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51–52 (1983).

[155] Massachusetts v. EPA, 549 U.S. 497, 533–34 (2007).

there is actually a substantive problem with the underlying final rules. In any event, as I explain below, the agencies' rationales are no more persuasive as reasons for delay on the merits than they are as reasons to do without notice and comment.

A. Imminent Deadline-Like Moment

Agencies in the Trump administration have argued that they need to delay final rules that are not yet effective because, without such a delay, the rules will become effective.[156] As EPA put it in delaying its final rule on chemical facility safety, "A delay of effectiveness can only be put in place prior to a rule becoming effective."[157]

This reasoning is highly unsatisfactory. It is entirely circular: the agency needs to delay the effective date because the agency needs to delay the effective date. Stating a conclusion is not the same as explaining it.

B. Interests of Regulated Industry

As in their decisions forgoing notice and comment, agencies in the Trump administration have been highly solicitous of regulated industry in explaining their need to delay final rules. Sometimes, they simply report that some segment of the regulated industry asked them to revisit a rule,[158] or complained about some aspect of the rule.[159] Sometimes, agencies cite the decrease in compliance costs that will accompany either a revision to the underlying rule[160] or a delay of the rule during reconsideration.[161] In a num-

---

[156] *See* Pesticides; Certification of Pesticide Applicators; Delay of Effective Date, 82 Fed. Reg. 25,529, 25,530 (June 2, 2017) (to be codified at 40 C.F.R. pt. 171); Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments; Extension of Compliance Date, 82 Fed. Reg. 14,437, 14,437 (Mar. 21, 2017) (to be codified at 14 C.F.R. 234); Poultry Grower Ranking Systems, 82 Fed. Reg. 9533, 9533 (Feb. 7, 2017) (to be codified at 9 C.F.R. pt. 201).

[157] *See* Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Further Delay of Effective Date, 82 Fed. Reg. 27,133, 27,142 (June 14, 2017) (to be codified at 40 C.F.R. pt. 68).

[158] *See* Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments, 82 Fed. Reg. at 14,437.

[159] Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 82 Fed. Reg. 20,825, 20,827 (May 4, 2017) (to be codified at 8 C.F.R. pts. 103, 212, 274) ("[S]ome entities with certain business models have stated that they continue to have questions about what provisions of the final rule are applicable to them."); Public Statement, Acting Chairman Michael S. Piwowar, SEC, Reconsideration of Pay Ratio Rule Implementation (Feb. 6, 2017), https://www.sec.gov/news/statement/reconsideration-of-pay-ratio-rule-implementation.html [https://perma.cc/KZ6E-BVYU] ("[S]ome issuers have begun to encounter unanticipated compliance difficulties that may hinder them in meeting the reporting deadline.").

[160] *See* Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 82 Fed. Reg. at 20,827.

[161] *See* Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017) (to be codified at 40 C.F.R. pt. 423).

ber of instances, agencies have cited, in supporting delay, the same consideration agencies have cited in finding "good cause": the need to inform regulated industry as soon as possible so they can plan and adjust their behavior accordingly.[162]

However phrased, the concern for industry has a common characteristic: it is not matched by any concern for regulatory beneficiaries. To the extent agencies in the Trump administration have mentioned forgone regulatory benefits at all, it has been only to dismiss them, as when EPA waved away any possible missed benefits of its rule on chemical facility safety by saying they were "speculative but likely minimal."[163] Agencies have also reasoned that a brief stay, coupled with no substantive changes to the rule, will have no effect on regulatory benefits because, presumably, the regulatory process will unfold just as it would have without the delay.[164] This reasoning is not very convincing when the agency is, elsewhere and at the same time, indicating that it may amend the rule's compliance dates.[165]

In dismissing or slighting the consequences of regulatory delay, agencies in the Trump administration have made an elementary administrative law mistake: they have entirely ignored an important aspect of the problem.[166]

C. Interest in an Orderly Administrative Process

In justifying delay, agencies in the Trump administration have offered some of the same explanations based on process values that they have offered in justifying their failure to conduct notice and comment rulemaking. They have cited a desire to alleviate "regulatory uncertainty"[167] and "public

---

[162] *See supra* note 143; Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 82 Fed. Reg. at 20828; National Organic Program (NOP); Organic Livestock and Poultry Practices, 82 Fed. Reg. 21,677 (May 10, 2017) (to be codified at 7 C.F.R. pt. 205); Agricultural Bioterrorism Protection Act of 2002, 82 Fed. Reg. 10,855, 10,855 (Feb. 16, 2017) (to be codified at 7 C.F.R. pt. 331, 9 C.F.R. pt. 121); Refuse to Accept Procedures for Premarket Tobacco Product Submissions, 82 Fed. Reg. 8894 (Feb. 1, 2017).

[163] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 13,968 (Mar. 16, 2017) (to be codified at 40 C.F.R. pt. 68).

[164] Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors; Proposed rule, 82 Fed. Reg. 29182, 29183 (June 27, 2017) (to be codified at 29 C.F.R. 1915, 1926); Accidental Release Prevention Requirements, 82 Fed. Reg. at 27136; Pesticides; Certification of Pesticide Applicators; Delay of Effective Date, 82 Fed. Reg. 25,529, 25,531 (June 2, 2017) (to be codified at 40 C.F.R. pt. 171).

[165] Accidental Release Prevention Requirements, 82 Fed. Reg. at 27137; Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors, 82 Fed. Reg. at 14439.

[166] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[167] Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430, 27,431 (June 9, 2017) (to be codified at 43 C.F.R. pt. 3170).

confusion,"[168] and to "preserve the regulatory status quo."[169] They have also explained delays based on their judgment that additional public input on a rule would be helpful.[170]

The justifications involving regulatory uncertainty, public confusion, and preserving the status quo are no more persuasive in explaining delays than they are in explaining a failure to undertake notice and comment. Delaying the effective date of a final rule disrupts the status quo; it does not preserve it. In this way, it injects uncertainty into a previously settled situation.

In fact, some agencies have admitted as much. In extending the compliance date for its rule requiring disclosure of pay ratios of chief executive officers to the median compensation of its employees, the head of the Securities and Exchange Commission ordered expedited review of the substance of the rule in order to allow regulated entities to plan.[171] In extending the compliance date for its rule regulating formaldehyde emissions from composite wood products, EPA reasoned that its previous delays of the rule's effective date had shortened the period between the effective date and compliance date and that, to give industry the same amount of time to comply as they had had in the final rule, it needed to extend the compliance date of the rule.[172] This is a circuitous way of acknowledging the disruption caused by the Agency's extension of the rule's effective date.

Agencies' attempts to justify delays on the ground that additional public input would be helpful are similarly unpersuasive. These agencies do not grapple with the fact that the rules in question were the product of an intensive process, years in the making, in which the public was given ample opportunity to raise concerns and objections. The agencies' insistence on more process in a proceeding already full of process is, as the D.C. Circuit put it in a similar context, "like a 'how to' manual for the compulsive perfectionist," one that "withhold[s] *any* regulation until every i is dotted and t is crossed."[173]

---

[168] Further Delay of Effective Dates for Five Final Regulations Published by the EPA Between December 12, 2016 and January 17, 2017, 82 Fed. Reg. 14,324, 14,325 (Mar. 14, 2017) (to be codified at C.F.R. pt. 504).

[169] Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 26,017, 26,018 (May 25, 2017) (to be codified at 40 C.F.R. pt. 423).

[170] Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. at 19,005–06; Occupational Exposure to Beryllium: Further Delay of Effective Date, 82 Fed. Reg. 14,439, 14,439 (Mar. 16, 2017) (to be codified at 29 C.F.R. pts. 1910, 1915, 1926); Civil Penalties, 82 Fed. Reg. 8694, 8694 (Jan. 25, 2017) (to be codified at 49 C.F.R. pt. 578).

[171] Chamber of Commerce v. SEC, 443 F.3d 890, 893 (D.C. Cir. 2006).

[172] Compliance Date Extension; Formaldehyde Emission Standards for Composite Wood Products, 82 Fed. Reg. 23,735 (May 24, 2017) (to be codified at 40 C.F.R. pt. 770).

[173] Pub. Citizen v. Steed, 733 F.2d 93, 105 (D.C. Cir. 1984).

D. Change in Presidential Administrations

Here, too, agencies have cited the change in administrations as justification for their decisions. They have asserted that they have exercised "no discretion" in delaying rules in response to the Chief of Staff's memorandum imposing a regulatory freeze,[174] have cited only this memorandum in justifying some delays,[175] and have explained that they must delay rules in order to give themselves time to reconsider and revise them.[176]

The argument from lack of discretion fails for the same reason given above with respect to agencies' explanations of failure to conduct notice and comment rulemaking: the Chief of Staff's memorandum, by its own terms, leaves the agencies with some discretion in deciding whether to delay rules.[177]

Moreover, the explanation that agencies must delay rules in order to reconsider them actually undercuts the agencies' legal authority to delay the rules. As discussed, courts have found that agencies must have statutory authority for the actions they take and that they have no inherent authority to stay rules pending reconsideration. By justifying delay based on pending reconsideration, agencies concede that they are attempting to do what settled law forbids them to do: stay a rule pending reconsideration without statutory authority to do so.

E. Miscellaneous Bad Reasons

One agency explained that it needed to extend the effective date of a rule because if it did not, it would have no statutory leeway to change the rule once it had taken effect.[178] A desire to avoid a statutory restriction, how-

---

[174] Procedural Rules for DOE Nuclear Activities, 82 Fed. Reg. 8807, 8807 (Jan. 24, 2017) (to be codified at 10 C.F.R. pt. 82).

[175] Affirmative Action for Individuals With Disabilities in Federal Employment, 82 Fed. Reg. 10,863, 10,863 (Feb. 10, 2017) (to be codified at 29 C.F.R. pt. 1614); Endangered and Threatened Wildlife and Plants; Final Rule To List Two Guitarfishes as Threatened Under the Endangered Species Act, 82 Fed. Reg. 9975, 9975 (Feb. 3, 2017) (to be codified at 50 C.F.R. pt. 223); Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Candidate Conservation Agreements With Assurances, 82 Fed. Reg. 8501, 8501 (Jan. 23, 2017) (to be codified at 50 C.F.R. pt. 17).

[176] Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430, 27,431 (June 9, 2017) (to be codified at 43 C.F.R. pt. 3170); Pesticides; Certification of Pesticide Applicators; Delay of Effective Date, 82 FR 25529, 25530 (May 26, 2017) (to be codified at 40 C.F.R. pt. 171); Lease and Interchange of Vehicles; Motor Carriers of Passengers, 82 Fed. Reg. 27,766, 27,766 (May 17, 2017) (to be codified at C.F.R. pt. 390); Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date; Request for Comments, 82 Fed. Reg. 20825, 20825–26 (May 1, 2017) (to be codified at 21 C.F.R. pts. 11, 101).

[177] *See* Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review, 82 Fed. Reg. 8346 (Jan. 20, 2017).

[178] Civil Penalties, 82 Fed. Reg. 32140, 32142 (July 12, 2017) (to be codified at 49 C.F.R. pt. 578).

ever, is a problematic explanation for agency action.[179] Another agency explained, with respect to one rule, that it needed to extend the effective date for that rule because it was extending the effective date for a separate rule—and then, in extending the effective date for the separate rule, it explained that it had extended the effective date for the other rule —a perfect circle of non-explanation.[180]

Summing up: in attempting to justify their delays of final rules, agencies in the Trump administration have offered up a mix of circular reasoning, industry favoritism, internal contradictions, and other exemplars of arbitrary decision making.

Conclusion

The Trump administration has displayed unfortunate tendencies in delaying final rules issued by the Obama administration. It has autocratically put these delays in place without respect for the legal limits on its authority to do so. It has impulsively raced to delay whole blocs of rules on the presumption that rules put in place in the Obama administration are suspect. It has cobbled together reasons for these delays that do not bear scrutiny. If the administration continues these habits in revising or rescinding the rules it has delayed, it will likely face legal trouble.

The delays may survive in some cases despite their legal problems. A district court roundly rejected the DOI's reasons for delaying a final rule on royalty valuation, yet in the end declined to vacate the delay.[181] While the litigation over the delay was pending, DOI had hurried up and repealed the underlying rule.[182] The district court found that although the repeal itself had not yet become effective, it would become effective so imminently that vacating the delay of the repealed rule—and thus temporarily reinstating the repealed rule—would entail "disruptive consequences" insofar as it would require compliance for only "a few days" before the repeal rule became effective.[183] The parties challenging the rule delay won big on the substance but lost on the remedy. Insofar as other agency rule delays have been paired

[179] *Cf.* Nat. Res. Def. Council v. Abraham, 355 F.3d 179, 205 (2d Cir. 2004) ("The only thing that was imminent was the impending operation of a statute intended to limit the agency's discretion (under DOE's interpretation), which cannot constitute a threat to the public interest.").

[180] Enhancing Airline Passenger Protections III: Extension of Compliance Date for Provision Concerning Baggage Handling Statistics Report, 82 Fed. Reg. 14604, 14604 (Mar. 22, 2017) (to be codified at 14 C.F.R. pt. 234).

[181] Becerra v. Dep't of the Interior, Docket No. 13, Case No. 17-cv-02376-EDL, slip op. at 17–18 (N.D. Cal. Aug. 30, 2017).

[182] Press Release, Dep't of the Interior, Interior Repeals Defective Federal Mineral Valuation Rule: Clears the way for developing clearer, more workable regulations for accurate accounting and valuation of oil, gas and coal from Federal and Indian leases (Aug. 7, 2017) (edited Sept. 7, 2017), https://www.doi.gov/pressreleases/interior-repeals-defective-federal-mineral-valuation-rule [https://perma.cc/WG3H-8N4L].

[183] *Becerra*, slip op. at 18.

with speedy reconsiderations and repeals of the underlying rules, they may meet a similar legal fate: judged unlawful but kept in place.

Unfortunately, such a result would only encourage further bad behavior on the part of the agencies. The district court reviewing the delay of the DOI royalty valuation rule had, in finding the case not to be moot, concluded that the federal defendants were likely to repeat their unlawful conduct in delaying rules.[184] The district court's decision to leave the delay rule in place could only embolden agencies in the Trump administration to continue to flout administrative law principles in their zeal to deregulate.

It is of some moment, then, that the very same district court has now vacated a different rule delay. After holding unlawful the DOI's postponement of the compliance date for a final and effective Obama-era rule regulating the waste of natural gas from oil and gas facilities on federal land, the court held that vacatur of the postponement was the appropriate remedy. Not only, the court found, were the Agency's legal errors serious, but allowing the postponement to stand despite its legal flaws "could be viewed as a free pass for agencies to exceed their statutory authority and ignore their legal obligations under the APA, making a mockery of the statute."[185] The court was unimpressed with the argument that "some of the regulated entities of the oil and gas industry" would not, *because they relied on the Agency's postponement of the compliance date,* be able to meet the original compliance deadline. This was a problem, the court said, "to some extent of their own making."[186]

The Trump administration has already lost three cases challenging its rule delays. Given the many delays the administration has put in place without following basic principles of administrative law, there are likely more losses to come.

[184] *Id.* at 9.

[185] California v. Bureau of Land Mgmt., No. 17-CV-03804-EDL, 2017 WL 4416409, at *14 (N.D. Cal. Oct. 4, 2017).

[186] *Id.*