

The Law of Administration Change

Administrative Law Strategies for Challenging or
Supporting Policy Changes in a Second Trump
Administration

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Overview

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Law of Administration Change

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Risks & Opportunities for Regulated Industries

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Tools to Manage the Process

4

Effects of Narrow Majorities in Congress

5

Questions?

Substantive Rules for Litigation

- Statutes (e.g., APA) and doctrines (e.g., *Loper Bright*) that will shape the Trump Administration's policymaking options and strategies for regulated parties



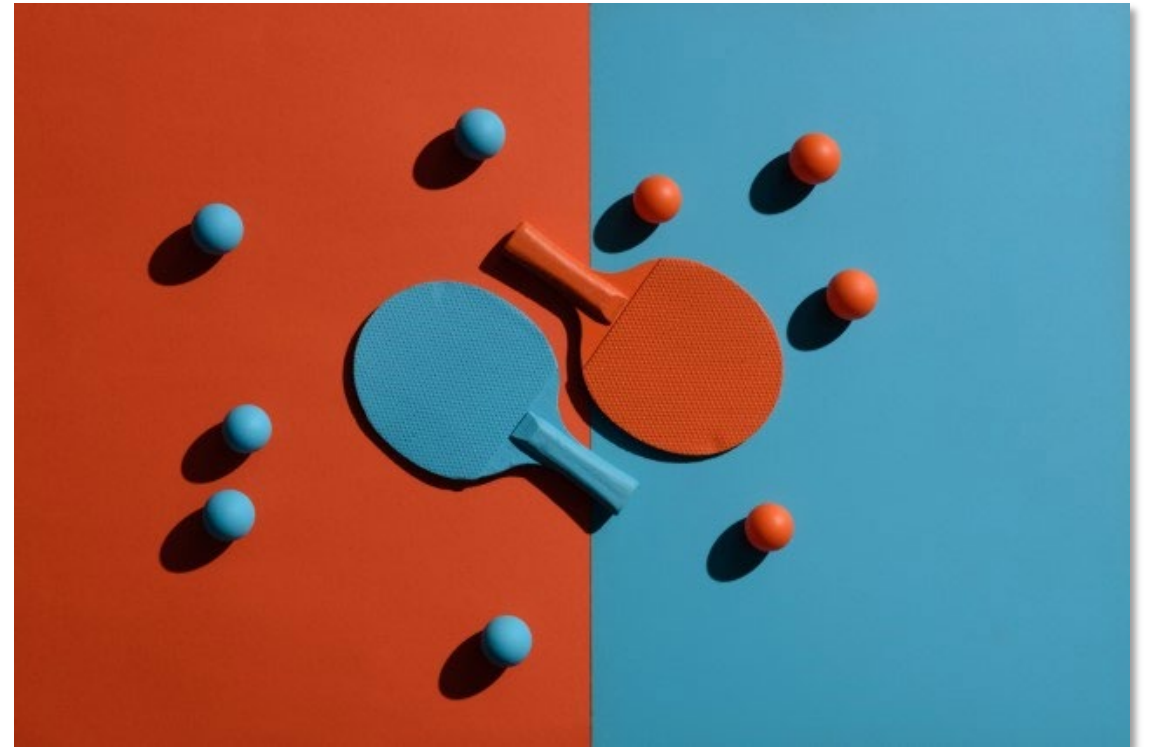
Arbitrary and Capricious Standard

- Baseline requirement of reasoned decisionmaking
- *State Farm* review of agency regulations and orders – arbitrary & capricious standard
 - *State Farm* overturned Reagan Administration changes to vehicle-safety rules



Fox Television Standard for Policy Changes

- Agency must:
 - Acknowledge change
 - Show new policy complies with statute
 - Give good reason for new policy
- Heightened justification required if:
 - Conflicting factual findings
 - Significant reliance on prior policy



Fox Television Standard – Case Studies

- *Encino*: New FLSA interpretation invalidated
 - Insufficient explanation
 - Industry reliance on prior rule
- *Regents of Univ. of Cal.*: DACA rescission invalidated
 - Failure to consider alternatives to full rescission
 - Failure to consider reliance on program
- *Lily*: New “successor employer” rule upheld based on changed factual circumstances
- Lessons:
 - *Fox Television* constrains policy change, but is not an insurmountable hurdle
 - Building a strong evidentiary record during comment period can strengthen *Fox* claims

Deference to Agencies' Legal Interpretations

- Interpretation of statutes
 - *Loper Bright*: Court must use independent judgment (overruling *Chevron*)
 - Agencies still have discretion where Congress has expressly delegated
 - *Skidmore* deference still in play where interpretation has “power to persuade”



Loper Bright in a Second Trump Term

- Parties challenging Trump Administration action will likely make vigorous use of *Loper Bright* and other limits on deference
- Tale of two terms:
 - First Term: Trump Admin. invoked *Chevron* sparingly and often not at all
 - Second Term: May invoke *Loper Bright* “delegation” concept sparingly
- Similar dynamic likely regarding Major Questions Doctrine (*W. Virginia v. EPA*)

Other Possible Forms of Deference

- Generally no deference to changed policies under
 - *Kisor* (re: agency interpretation of own rules)
 - *Skidmore* (other scenarios)
- Usually no deference to new government views in amicus briefs
- But there are exceptions
- We expect a concerted push to overrule *Kisor*



Four Deference Takeaways

- Changed interpretations seldom eligible for deference, with a few narrow exceptions
- Challengers can deploy wide range of arguments, including overruling precedent
- Parties that support changed policies should consider alternative arguments to backstop agency's position
- Continuing erosion of deference doctrines over next four years

Fair Notice and Anti-Retroactivity

- Agencies must provide “fair notice and an opportunity to conform their behavior to legal rules”
- No retroactive rules without express statutory authority
- Meaningfully constrains agency actions following administration change



Procedural Tactics for Litigation

- Intervene in pending third-party litigation
- Participate as *amicus curiae*



Intervention in Pending Litigation

- Intervene to:
 - Defend existing rules
 - Prevent new administration from settling
 - Support/outflank new administration's position
 - Provide industry perspective
- Intervenors have same rights as original parties, with important caveats
- Amici have fewer rights, can't check other parties

Government Litigation Tactics

- Procedural defenses
- Settlement
- Voluntary remand
- Side switching



Government Litigation Tactics – Case Studies

- *Competitive Enterprise*: New administration can challenge standing without defending substance of prior administration rule
- Side switching by administrations of both parties
- *West Virginia v. EPA*: Voluntary cessation by new administration change does not moot a pending case
- Lesson: Important to intervene and/or seek to influence new admin's procedural approach

Timing Considerations

- Effects on ongoing litigation
- Effects on agency proceedings
- Key: Process starts immediately but takes years



Timing Strategies

- Government side switching soon after inauguration
 - Possible even in late stages of litigation
 - But unlikely for cases already argued at SCOTUS
- Agency proceedings
 - Revoking/staying prior administration's regulations
 - White House memo pausing pending rulemakings, etc.
 - Trump Admin. may rely on non-enforcement as policymaking tool
- Lesson: Strategically speeding up or slowing down pending matters can yield significant results

Venue Considerations

- Challengers get to choose venue = significant advantage
 - General venue statute (28 U.S.C. § 1391)
 - 28 U.S.C. § 2112 lottery process
- But other parties may move to stay or transfer (DOJ is doing more of this)
- Recent push against forum shopping may accelerate under Trump



What If The Agency Loses?

- Standard remedy: vacatur
- Alternative: remand without vacatur
- Nationwide/universal injunctions likely to face further resistance

what are other
words for
vacatur?



invalidation, annulment,
nullification, vacation,
defeasance



Agency-Level Proceedings

- Agency-level reconsideration
- Agencies generally have reconsideration authority, but scope depends on text and structure of statute
- Unless statute specifies, power of reconsideration is measured in “weeks, not years”



Administration Change & Agency Proceedings

- Notice-and-comment rulemaking requirement
 - Exceptions
- Adjudication proceedings
- Agency inaction
- Timing: special rules for regulations published by January 19



Strategies for Agency Proceedings

- Regulated parties' tools: carrots, sticks, and landmines



Strategies for Agency Proceedings

- Consider submitting:
 - Legal argument addressing agency authority
 - Expert reports addressing agency cost/benefit analysis
 - Evidence of environmental/small business impact
- Agencies must answer all material comments (*i.e.*, that would require change to proposal if credited)
- Example: *Ohio v. EPA*

Policy Change by Executive Order

- EOs directly changing the law
- EOs instructing agencies to implement changes



Strategic Considerations Re: Executive Orders

- Challenging executive orders in court
 - EOs changing the law: subject to immediate constitutional or statutory challenge
 - EOs instructing agencies: parties usually must wait to challenge implementing action
 - Consider: ripeness, standing, emergency relief, availability of nationwide injunctions
- Supporting executive orders
 - Intervene in support of gov't in third-party litigation

Independent Agencies and Commissions

- Special timing considerations
- Vulnerable to constitutional attack



Congressional Review Act



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Congressional Review Act Process



1. Report submitted to Congress and GAO
2. Limited window for fast-track review

Congressional Review Act Process

3. Specific congressional procedures

- Joint resolution referred to committee
- Fast track: discharge committee, floor debate on resolution, followed by a vote

4. Joint resolution of disapproval

- Simple majority of House and Senate, signed by the President (or 2/3 vote to override presidential veto)

Congressional Review Act – Case Study #1

- Disapproval of 2020 EPA Methane Rule



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Congressional Review Act – Case Study #2

- 2017 disapproval of FCC Broadband Privacy Rules



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