

In terms of regulatory policy, the second half of Trump's term is shaping up to look a lot like Obama's final two years in office. Congress won't be doing much to advance Trump's environment/energy agenda, as was the case with Obama. So, like Obama, Trump's focus will be on administrative action, particularly regulatory initiatives (or deregulatory ones, in Trump's case). The big question is how these efforts will fare in court. I want to discuss four aspects of that question: timing, judicial review of statutory issues, and judicial review of policy analysis.

Timing. The Trump people are keenly aware that some of Obama's most important rules were still in the litigation process when he left office, which has kept those rules in hanging in the wind for the two years since Trump took office. They seem desperate to avoid the same fate, so they are rushing to get a tremendous number of rules issued in time for the courts to make definitive rulings before the end of Trump's term. But this strategy has its risks. It increases the chances that the agencies will make analytic mistakes or simply overlook issues, which courts may seize upon to invalidate rules. It also risks congestion in the litigation process if too many big rules come out all at once. DOJ's capacity to defend the rules may be stretched a little thin. More seriously, in terms of the Administration's timing goals, courts (especially the D.C. Circuit) may find themselves overloaded, resulting in longer litigation delays. And because so many big rules will be coming out at once, the Supreme Court will be able to review only a small subset, leaving the lower courts with the final word on important issues. After all, it's not as if the Trump Administration isn't generating any other important litigation. That means that putting Kavanaugh on the Court may help the Administration in only two or three out of maybe a dozen or more major environment and energy rules. That can still be an advantage in the highest profile cases, such as the repeal of Obama's emission cuts for power plants or expansion/clarification of federal wetland jurisdiction. But the Court may not have the time to consider other major rules dealing with methane emissions or with fuel efficiency standards for cars. And clustering big rules may raise their salience for voters, which the other side may be able to exploit.

Statutory Issues. The first line of attack on the Trump rollbacks will be that EPA or some other agency violated its statutory mandate. The Obama Administration relied heavily on the *Chevron* doctrine to fight off similar attacks. (To brutally oversimplify, *Chevron* says that courts should defer to any reasonable interpretation of a statute by an agency, even if it's not the interpretation that the court itself would have adopted.) The Trump Administration will want to do the same thing. But that will put it and conservative judges in a bit of a bind, since conservatives have come to hate *Chevron*. We'll see how that sorts out. My somewhat cynical view is that conservative judges will come to realize that *Chevron* really isn't as bad

as they had previously thought.

Putting aside the *Chevron* problem, the statutory issues are going to come down to a statute-by-statute analysis of the law's text and history. A lot of key cases will be in the D.C. Circuit (for air pollution and energy regulation cases) or in the Ninth Circuit (for public lands cases), which are not favorable forums for Trump. And as I pointed out earlier, the Supreme Court isn't going to have time to review more than a handful of cases.

Policy Analysis. It isn't up to courts to decide issues of environmental or energy policy; that's the job of the agency. But courts do determine if an agency's policy decision was "arbitrary or capricious." Basically, to win, the agency has to provide a reasoned explanation of its conclusions based on the evidence in the record. Evidence and reasoned analysis aren't the hallmarks of the Trump Administration, and some of the rule-making contain particularly glaring analytic holes. A prime example is the rollback of fuel-efficiency standards, which is riddled with inconsistencies and other glitches. If courts overturn rules on this basis, the Supreme Court has a very limited capacity to review these determinations. The Justices simply aren't going to want to spend their time (or their law clerks' time) pouring over complicated scientific or economics disputes, especially since rulings on such issues may have little value as precedents. Lower courts are quite aware of this, and if they want to insulate their rulings from Supreme Court review, they will write long, boring opinions focusing on technical matters.

The Bottom Line. It seems likely that a significant number of Trump's regulatory initiatives will be struck down by the courts or remanded to agencies. Others will still be stuck in litigation at the end of 2019. Of course, that won't matter as much if Trump is reelected. If that happens, all bets are off.