

THE BROOKINGS INSTITUTION

WEBINAR

TWO YEARS LATER: HOW HAVE OUR NATION'S INSTITUTIONS RESPONDED TO  
LOPER BRIGHT AND THE END OF CHEVRON DEFERENCE?

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PANEL DISCUSSION:

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**TENPAS:** Thank you for joining us today. My name is Katie Dunn Tenpas, and I am today's moderator and the director of the Initiative on Improving Interbranch Relations and Government. Today's discussion focuses on one key aspect of the Supreme Court's Loper Bright decision, its impact on our nation's political institutions.

We are interested in thinking about how the courts, congresses-- Congress, and agencies have responded. Just over two years ago, the Supreme Court issued its landmark ruling that overturned the Chevron doctrine, which previously required judges to defer to an agency's reasonable interpretation of ambiguous statutes.

The Loper Bright decision held, however, that judges must exercise independent judgment when interpreting vague statutes. Speculation at the time expressed concern that the federal courts would be inundated with appeals. Others thought it was possible that Congress would step up to the plate and include language in future bills that would clarify agencies' roles.

Still others thought that there would be a hodgepodge of legal opinions across the country since judges no longer needed to rely on the Chevron doctrine. In July of twenty twenty-four, we addressed these issues at the American Enterprise Institute in a panel entitled "Life after Chevron: How Will Congress and Federal Agencies Adapt?"

Two years later, we are returning to that same question. Though clearly two years is an insufficient amount of time to explain a case's impact on the three branches, it can actually take decades to fully appreciate the impact of a case, it is still worth examining what has happened in the short term, and I'm delighted to introduce my panel of experts who will expand our understanding of America's political institutions in light of the Loper Bright decision.

With us today, we have Phil Wallach, a congressional scholar and senior fellow at the American Enterprise Institute. His latest book, *Why Congress?*, defends the central role of Congress and explains its current dysfunction. Rachel Augustine Potter, a scholar of the bureaucracy, is a non-resident senior fellow with Governance Studies and associate professor at the University of Virginia's Department of Politics.

She's recently published the book, *Going Private: Outsourcing the Administrative State*. And last but not least, Nick Bednar is also a non-resident senior fellow in Governance Studies and the McKnight Land Grant professor at the University of Minnesota Law School. He holds a JD and a PhD in political science, and his research focuses on administrative capacity, bureaucratic politics, and the federal workforce.

So with that introduction, I'd like to sort of start with kind of a broad question, and let's set the stage so that we're all thinking about institutions. Each of you has spent

significant time studying Congress, the bureaucracy, and the courts. And so tell me, what are key features of those institutions, of those institutions that you think are affected by the Supreme Court's decision, and why?

And why don't we start at the talk with Phil? Phil, can you talk a little bit about Congress?

**WALLACH:** All right. Well, thanks for including me, Katie. This is such an important topic. Congress's core activity is legislating, and to figure out what it accomplishes through legislation, we need to know what it is that laws do. Do they actually decide issues, or do they merely empower the next players in the game in the executive branch in various ways to sort of go off and figure things out?

And I think the Chevron regime stood for something like that latter model, that a lot of times what Congress was doing was passing the baton and realizing that insufficiently clear legislative language was going to empower bureaucrats, and maybe that was okay. Bureaucrats would act reasonably and Congress could always come back and do it again.

But, you know, we saw discomfort with the Chevron regime rising throughout the tw-2010s especially a-as people worried that the executive branch was getting a bit carried away with its a-ability to construe ambiguous statutes, that it was actually doing an awful lot that Congress never meant for it to do, and that generally we needed to tighten things up.

So, the Supreme Court's Loper Bright opinion says ambiguities are there, but we, the judges, have to decide what the best reading of the statute is. It's not for bureaucrats to do that. You know, they get to make their case and say why their interpretation is reasonable, but if they're wrong, we will reverse them.

So what does that matter for Congress? Well You know, it depends on how clearly you think Congress is thinking through the consequences of its legislation. So I think if you imagine Congress as being extremely sophisticated then maybe it was very conscientiously leaving ambiguous parts of its statutes for agencies to fill in because that's the way it wanted it.

And, and if that's the case, it's been frustrated by Loper Bright and will have to do things differently. I tend to think that's a little too, too conscientious of a model for Congress, that Congress being a they, not an it of course. If you think Congress often just leaves ambiguous statutes because the, the art of drafting legislation is very difficult and members of Congress are an imperfect lot then maybe they don't really change the way they do things that much knowing that the deference regime has changed.

They, they might be alert to opportunities to take more control by being clear with statutory language, but of course, that was always a possibility. Chevron said if the language is really clear, then that's that. And I think when I-- We'll get to this a- a- as the discussion looks forward, but when we look at how, how things have actually

been changing on the ground in Congress, I think Loper Bright changes the, changes some of the rhetoric.

Certainly, it, it's, it's certainly one front in an active debate about the regulatory state that, that, that people are happy to take up in that fight. But I'm not sure it's really changed anything about drafting practices so fundamentally. You know, when you go over to Capitol Hill, they have a lot of things they're worrying out, about before they're getting to worry about the deference regime in the courts.

**TENPAS:** Thank you. That was a really good introduction, and we'll get to more specific details on this in our, in our next round. Rachel, what about you? Talk to us about sort of your perspective on this issue.

**POTTER:** Yeah. Well, I'm excited for the conversation today to kind of think both big and small about the impact of Loper Bright.

I would just agree with something that Phil said, which is rulemaking has been so important to the functioning of the US government for a long time now. And so it's worth unpacking this and thinking, what has Loper Bright done, or what will it do? But I fear that we're at this point where it's really, really hard to under- to unpack what's happening with Loper Bright because it's a b- what we call a bundled treatment, right?

And that means that so many things, we're giving so many medicines to this patient that we don't know what the Loper Bright medicine itself is doing. And so just to think about, like, all of the changes that have happened in the last couple of years To the administrative state, as we think of, like, this broad entity and what it's doing, we can think about, like, the major questions doctrine really coming onto the horizon and saying, like, "Okay, this is limiting the scope of what agencies should probably be doing."

We can think about the recent Slaughter decision, right? And saying, "Are agencies-- Should they be independent? Probably not." Right. And so we also have this Corner Post decision that came out with Loper Bright that says, "Oh yeah, you can sue agencies about for a long time. There's no more real statute of limitations anymore."

So that's like the court medicine, and then we have all of the other medicine that's happened from the executive branch, right? So we all know about all the Trumps that the, the Trumps, the cuts that Trump has made to the ex- to the workforce, which is, like, about twelve percent by some estimates. Right, so we're down about twelve percent of workers.

Those are very indiscriminate cuts. They're not systematic. We're not thinking about where we need capacity and not. We're moving agency headquarters, which might have consequences we haven't really thought through, I don't think. And we're also doing things to the rulemaking process itself, right?

And so this is, like, when I think of, like, why have we seen so few proposed and final rules in this administration, which we really have. 2025 was the lowest number of proposed and final rules since the Reagan administration. So that's-- I put that maybe that's a Loper Bright consequence, but I think it probably has a lot more to do with the deregulatory regime that Trump is pushing in with a ten-for-one executive order, right?

So every new regulation is supposed to come with ten attendant deregulatory actions. It's a lot. So that's really slowed the flow of new regulations. So I think it's gonna be very hard for us as observers to say this is exactly Loper Bright and not any of those other things. I think there are some things we can talk about today that probably are happening as a result of Loper Bright But one thing I, I wanted to point out was just thinking about, what has this done to the presidency, right?

And so, we have this article from Elena, Elena Kagan way back when, when she was a Lily Law professor, right? And she says presidents work through the bureaucracy, right? They have presidential administration. And what we've seen now is maybe a little shift, and this might be a Trumpism, it might be a presidency change in the sense of what presidents do.

But there's some scholars who are talking about presidential regulation, which is like when presidents just do it themselves rather than going through the bureaucracy. And this is like an, a direct exercise of presidential power that could be the result of Loper Bright and some of these other things that's make it harder for agencies to do stuff.

But right, this means like things like Trump and just saying what tariffs are or making a deal with NVIDIA or making a deal about TikTok, right? He's fundamentally making policy himself, not even through the executive branch. That might be one kind of interesting consequence of Loper Bright or some, all of this medicine for the patient.

But it, it's, it's a lot happening at once and I, I, I think seeing our way through what comes next is, is gonna be really interesting and worth thinking through.

**TENPAS:** Yeah. That's a really interesting analogy about the medicines, and it's also really interesting to think if Harris had won in 2024 What would we be seeing in the regulatory process?

Yeah. I didn't you know, when sort of thinking about this case and its impact, I didn't think so much about the tremendous influence that the chief executive has or can have in regard to this. Yeah. So that's a great point. Nick, let's, let's, let's get it to you. What about thinking about the courts and the judicial branch?

**BEDNAR:** Yeah. So, when you think about Loper Bright and Chevron, what you're really talking about are two cases that are about the standard of review that judges are going to apply when they decide what is the right interpretation of statutes. And Chevron kind of stood for the proposition that agencies have expertise, and to the

extent a statute is ambiguous, maybe we should let the agency decide what that statute means.

And Loper Bright's the 180 of that. Loper Bright's really saying it is the court's job to decide what the law is, and therefore the judges need to use kind of the standard legal toolkit to determine the best reading of the statute. But to understand how judicial decision-making has changed as a consequence of Loper Bright, or may have changed, I think you need, like, a little bit of background on what was happening with Chevron empirically.

So from about 2001 till Loper Bright gets decided in 2024, you have these two different standards of review that I'm gonna talk a bit about throughout today. You have Chevron, which we're all kind of familiar with, but you also have this other standard called Skidmore, and Skidmore is supposed to be this kind of lower level deference that courts are going to apply when Chevron doesn't apply.

And I won't get into the weeds as to why one applies over the other, but you need to know Chevron is, like, major deference and Skidmore is, like, a little bit of deference. And Chevron works pretty well in the beginning, but there's a lot of disputes among the judges about what Chevron means, and it never really gets applied with much consistency for the 40 years that it's alive.

So at step one, Chevron is a two-part test, and at step one, the court's supposed to ask, "Is the statute clear or ambiguous?" But this has always raised the question, well, how clear is clear? Does ambiguity mean that we're looking for 50% probability the agency's right and 50% that the litigant's right? Does it mean 75% chance the agency's right?

Does it mean 25% chance? And judges always kind of disagreed. Justice Scalia always thought that he didn't need to usually reach the second part of Chevron. He thought, "I could use the tools of statutory interpretation, and more often than not, I will find the correct answer, and I don't need to look at the agency."

Meanwhile, there's a DC Circuit judge who is famous for saying that some judges will find ambiguity in a stop sign. So there's kind of all these different ways that Chevron's getting applied. But empirically, we see some recurring trends with it. So the first trend we see with Chevron is that judges are super deferential to agencies.

Agencies are winning in the Chevron era about 75% of the time when courts are applying Chevron. Now, when they're applying Skidmore, we see about a 10% decrease such that they're winning maybe 60% of the time, okay? And there's a bunch of literature that Chris Walker, Kent Barnett, and Christy Boyd have developed showing that Chevron did a good job of constraining judicial ideology.

More often than not, courts were deciding cases in favor of the agency regardless of whether the judge agreed with the decision, and that was kind of a big buck to the attitudinal model that we sometimes talk about in political science where judges just decide things based on their policy preferences.

But Loper Bright changed a lot of this, or at least ostensibly could have changed a lot of this, right? And we can talk about how much it changed. So first, it tells judges, "Well, now you need to decide cases independently." And there's a question of, well, how much variation is that gonna still result in?

Because judges never really agreed how to interpret statutes anyway, and so we still have that problem even in the post-Chevron era. The second most obvious impact is you would expect judges to defer to agencies less. They're being told not to defer to these agencies. And third, you would expect ideology to creep into their decision-making a little bit more.

So to conclude, I just kinda wanna echo something Rachel said, which is this is also a bundled treatment with the judges. It's hard to know exactly what about this is driven by Loper Bright versus other changes in the court. When Chevron gets decided, you have a very different Supreme Court than when Loper Bright gets decided.

These circuit court judges are very, very different. The Trump administration starts in the first Trump administration interviewing judges, asking them, "Would you decide cases using Chevron or not?" And that shapes substantially who's on the court. And like Rachel alluded to, you also get things like the major questions doctrine.

You have an overall sense of skepticism towards administrative agencies being expressed by the Supreme Court, and you have cases like *Corner Post* that are allowing many more challenges. And so it's hard to disentangle here what is the effect of just Loper Bright versus an overarching trend to the way that courts are applying administrative law more broadly.

**TENPAS:** Yeah. So, not only is it difficult to assess the impact of a Supreme Court case in the course, over the course of two years, but it seems like in this case, it's further complicated and will be in the years ahead because there are so many different... It's just different to disentangle the various factors that are affecting the implementation of that decision.

Okay, let's move back to Phil. Phil, I'm wondering if you could provide some context about the current Congress, how it compares to, say, Congresses during the early '90s and then the 2000s, and then share your thoughts on what the institution might be capable of doing in response to Loper Bright. So not the reality of what it may or may not do, but is the institution capable of maybe tightening up the drafting process or, or could there be any changes in that respect?

What do you think? And, and tell us a little bit about kind of the historical evolution of the body of Congress in regards to lawmaking

**WALLACH:** Well, it's an important question to ask because the Congress does not stay the same. Congress is a constantly evolving institution, and from, from time to time in its history, it has looked quite different. So the Congress of the 2020s is exceptionally ideologically differentiated along partisan lines.

It is exceptionally leader-dominated in both chambers And I think it's fair to say that in the precise current moment, it, it is sort of legislatively challenged i-in that just getting anything through Congress o-of much import is very difficult i-in-in part because the both parties have goals that they want to fulfill that, that do not necessarily involve cooperating with the other party and do not necessarily require them to pass legislation.

And there's an awful lot of individual legislators who have grown up in a Congress that is not really oriented toward deal-making and legislation, that is instead oriented toward a certain kind of showmanship and social media virality. That's sort of more and more a path open for young, ambitious people who come into Congress to follow.

So, you know, one, one way of framing this in, in political science terms, these prominent political scientists of the 1980s who had some Brookings and AEI connections back in the day. Th-this was McCubbins, Nolan, Weingast, who wrote under the name McCubbins/Nolan/Weingast. Th-they had this series of papers that were collectively known as the Congressional Dominance Hypothesis.

So this is back in the '80s, and the idea is, well, executive branch does a lot of stuff, but at the end of the day, what does it do? It does what the relevant congressional committees want it to do. And there's all these mechanisms in place that allow the, the legislature to get its way e-even, even without having to pass new laws.

And that was plausible back in the 1980s. I mean, you, you could argue about-- But there was the ser- the sense that really the agencies were very closely in touch with the c- relevant committees of jurisdiction on the Hill, that the chairmen were, were listened to quite a lot and that an agency would really have to be rather foolish to just go diametrically opposed to what folks on the Hill wanted.

If you fast-forward through the, the sort of transitional era of the '90s and early 2000s and toward the present, you, you get to a situation where committees are, are just much more subordinate today to the partisan leadership. There, there's much less of a sense that committee chairmen are independent power centers And there's just much less investment in committee work today, I think you'd say, in general.

I-i-if members feel like the work they do on committees doesn't actually feed into policymaking, they tend to direct their energies elsewhere. And so it's not that committees are unimportant today. I wouldn't wanna give that impression. And it's not that agencies never listen to them. But relatively speaking the relationship has become much l-less tight between these two bodies.

And so we live in an era now where the executive branch kinda sees what it can get away with vis-à-vis Congress, and it assumes that the answer is quite a lot. And it's kind of always daring the Congress to go and show just, "What are you gonna do about it if you don't like what we're doing?" And again, oftentimes the answer is, "We will send you some angry letters."

And, and everyone sort of understands that that's really the extent of the threat. And if that's the extent of the threat, then the executive branch may start tuning, tuning out what's happening on the Hill to a greater extent. So I think you've seen, especially in this second Trump administration, but really it, it is a trend.

This is a big jump up, but it's an upward trend through other administrations too. Really a sense that the executive branch is pretty high-handed b-i-i-in regard to the way it acts toward Congress, does not feel the need to give it a lot of advance notice. You know, what Rachel said about policymaking by direct pronouncement, you know, p-part of, part of what's unique about that is the way that it cuts out formal channels that we're more familiar with.

But part of it is just the instantaneousness of it, right? If you, if you literally are making policy by tweet that, that can take a lot of people by surprise. Executive branch officials used to be quite wary of, of taking the Hill by surprise for fear o-of how they might express their resentment at being kept out of the loop.

I think that's much less the case today. So generally speaking, you find a Hill at more of a disadvantage a-and in part because a lot of the members in either chamber see their job as supporting the president, right? If, if your party's got the White House, then the most important part of your job is supporting the president, and that, that limits your ability to, to act as a practical check.

So when we think about taking advantage of, of the Loper Bright re-regime that we now have, how has, how has this changed? You know, s-some of, some of what I wrote two years ago when the decision first came out is that this is a big opportunity for Congress to reassert its constitutional prerogatives, but it doesn't happen automatically, right?

It's, it's a matter of the ball's in your court and what are you gonna do about it? And you know, it would require some institutional wherewithal, right? So ability to think about how do we actually make Congress work better? How do we think about our legislators' interest collectively as legislators?

And this is just not characteristic of the political moment we're in, for the most part. We're thinking about the next election. And so we've seen again, a number of shots fired in Congress sort of invoking Loper Bright. Senator Schmitt in the Senate especially has, has, has gone out of his way to s- to sort of say how much he thinks Loper Bright changes everything and, and how Congress ought to react in response.

But in terms of things actually changing on the ground, I would say we've not, we've not seen a lot of action. And

I wouldn't, I wouldn't expect that to change in the next six months as we go toward, toward this election in the fall, for sure.

**TENPAS:** Yeah.

And just a quick follow-up. Is there any evidence about whether one party might be more inclined to alter legislative rule drafting approaches or, or are both parties kind of more focused on reelection and less on kind of the institution of Congress and protecting its powers?

**WALLACH:** Well, the other problem is just disentangling this from the larger fights about regulation. A-and right? We, we in the 2010s saw almost every question of institutional reform around regulation sort of become just part of the tug of war about more or less, right? And so for instance, the REINS Act was one of the big celebrated reform efforts of that era, but it just-- it, that would've made Congress have to approve every big regulation before it would take effect.

That would've been a massive change in, in how our administrative state functions. So I think that there's a lot of merit in, in something like that, but in point of fact, the s- the bills being advanced were branded as Republican deregulatory efforts, and there were certainly reasons why that was the case.

And you kind of never got very far past this question of like, if we push through this reform, are we really just trying to chip away at the regulatory state in general? And I'd say the same problem now attaches to discourse around what to do about Loper Bright. You know, are we able to step back away from our individual positions on the wisdom of regulation in general and whe-whether the regulatory state is too powerful and to say, actually, just as sound legislative drafters, let's think about how we ought to act together.

I think you can get some, some quiet conversations in some quiet back rooms about that, but actually getting from, from there to pushing through reforms that become law or that actually change the, the processes by which legislators operate i-is a far stretch that we haven't seen.

**TENPAS:** Yeah. And, and just one final question.

Anybody aside-besides Senator Schmitt who speaks up about this issue or thinks it's important in a public manner? To your knowledge? The best of your knowledge? I

**WALLACH:** would say quite a lot of the House Freedom Caucus folks h- make noise about it as well. You know, and interestingly, many of them are leaving the Congress as of, as of this election cycle.

So, so folks like Chip Roy from Texas. A- again, I, I think you mostly get a lot of very strong declarations that Loper Bright ought to change everything rather than efforts that are clearly changing how things happen on the ground.

**TENPAS:** Great. Thank you. Let's move on to Rachel. The same question to you, but focusing on the bureaucracy, bureaucracy and agency expertise.

If you were a staff attorney, what changes might you have witnessed? And post Loper Bright, what does the bureaucratic landscape look like? I guess you also have to take into consideration DOGE cuts and changes in personnel policy that have been initiated, and you mentioned that in your first round of remarks as well.

So this is particularly difficult question for you because you're not only just trying to kind of examine it from the perspective of Loper Bright, but there's all of the executive branch's efforts to impact the bureaucracy in major ways. So that kind of makes it difficult to pinpoint, but you can do your best.

Go ahead.

**POTTER:** Okay. I'll do my best then. So regulation rulemaking remains really important, right? It-- We haven't-- I think if you just get the tenor, if you're just listening to the tenor of the Loper Bright conversation, it feels like, well, rulemaking is over. Well, it's not over yet. And so I think that's kind of, for me, the headline is that this is still happening.

We are still writing rules. They might be a little bit different, and it's worth thinking that through. But in terms of Chevron, it's not as if, like, so our best evidence Chris Walker at Michigan Law has, like, surveyed agency rule writers and says, like, "How much are you relying on Chevron when you're-- before when you were writing rules?"

And, and they know about it. Over ninety percent of the respondents knew what Chevron was. These are, like, attorneys in agencies writing rules. But they weren't, like, crafting the whole shebang because of Chevron. That wasn't the guiding principle. Like, the goal of rulemaking, kind of going back to Phil's earlier point, what's the goal of lawmaking?

The goal of rulemaking is to make public policy, right? Public policy is very complex. It has a lot of constituents. And so the audience for a preamble is not just the courts, it's not just Congress, it's also all these people in the American public that are going to have to comply and do all this w- like, compliance work, right?

And so there's a lot going on with rulemaking that's not about the courts, it's not about Chevron. It's one part of what's happening in that space, right? And like I said earlier, we also have, you know, a lot of constraints on what rulemaking is right? So kind of coming to the point of the courts as the audience there's work by Goodson And all the recent data set that came out that shows that 77% of major rules are unchallenged, right?

So most of these things are not getting litigated. So again, then that takes the court out of the vast majority of even the important set of rules. And so, yes, Loper Bright is going to change the way agencies write rules. Like, when you think about what is a staff attorney doing differently, well, right, some evidence suggests that they would, you know, in the Chevron era, they could bring a menu of options and say, "Here's,

like, some things that could work, you know, program team, which do you think we should do?"

And then they would say, "Well, we're trying to f-fix a public policy problem. Which of these items on the menu addresses that best?" Now, right, we have one best interpretation, and so that might limit the menu or make only one option on the menu. So that might be one way we could see, sort of if we could get under the hood and really understand what was happening with an agency and a rule, m- it might be different, right?

In some cases, that might be different. We also are gonna just see a lot more of, like, that's like the, the main prediction, right, is like longer preambles that are more justified. This is what the statute said. This is how, why this is the best interpretation. All this sort of audience of the court, like paying more attention to the court audience than I think previously we saw in rulemaking.

**BEDNAR:** Yeah.

**POTTER:** So that's kind of like the big picture, but there's one also interesting thing the administration has done because of Loper Bright, which is issue an executive order and then guidance by the Office of Management and Budget that says, "Hey, agencies, if you can find rules that are not the best interpretation, go ahead and start repealing those.

Also, you might not have to follow the Administrative Procedure Act. You might be able to skip the proposed rule if you want." All right? And we, we see the agencies are looking around, right? And so this is, like, kind of a way to bring a political agenda to Loper Bright and sort of get some, some of the party's work done or Trump's work done.

**WALLACH:** Could I just follow up with Rachel? Sure. Is your understanding that we've seen a, a lot of deregulatory rulemakings go forward on that rationale since the executive order, or what?

**POTTER:** No, no not a lot, but there's some high-profile ones. So most recently, like, like even this, well, last week the Endangered Species Act the definition of harm.

That's like a high-profile example. But I mean, I suspect that people are looking around and thinking about what they could do, but I don't think it's been a, like a major push. It's just an interesting sort of interpretation of what Loper Bright could do for an administration.

**TENPAS:** Thank you. Nick, same question to you.

You focus on federal courts. Tell us a little bit about the changes over time and what this new responsibility might mean for federal judges.

**BEDNAR:** Yeah. So I, I mean, Katie, you shared a beautiful data set with me to help me kinda look at what happened post Loper Bright with respect to the judges, right? So, Katie and the Brookings team have been collecting data on the two years following Loper Bright, what have the consequences been in terms of the caseload, and also the sorts of decisions we're seeing.

So y- let me kind of pick up where Rachel left off though before we get to the judges even, because litigation's a long game and the judges are the end of the game to some degree, right? And one thing we have seen a lot more, Rachel talked about how there's this executive order instructing courts to, or not courts, agencies to repeal rules that might not be the best interpretation of the statute, and maybe you don't need to go through notice and comment rulemaking.

The other thing we're seeing is this trend of sue and settle, where effectively what happens is someone brings a lawsuit, they say, "This rule is impermissibly adopted for X, Y, Z reasons. We don't think it complies with the statute." And the Department of Justice in several cases has agreed and basically said, "We're gonna settle this case and say we won't enforce the rule anymore."

So there's this kind of silent repeal that's happening in the background here as well. But in terms of the judges, what happens once it actually gets to court? Well, we know that Loper Bright there was a long conversation before the case got decided about whether it would result in an uptick of lawsuits.

We know that there's been about 217 cases citing Loper Bright since it was decided. That's more than some of the other big administrative law decisions we've seen in recent year- years but it's far less than some of the other big procedural changes we've seen. So, Booker was cited over 2,000 times, Iqbal over 1,300 times.

These are kind of other big procedural cases that were perceived to change the way the courts would operate. Then the next question is like, well, are judges changing the way they're deciding these cases? Did Loper Bright actually cause them to, search for the best meaning of the statute. And the, the answer is, like, a little complicated and hard to disentangle, in part because it's only been two years, but in part because judicial decision-making in some respects is kind of a black box.

It's really hard to know why judges are deciding what they're doing. So I told you early on that under Chevron, you-- agencies had about a 75% win rate. Well, post-Chevron or post-Loper Bright they have about a 65% win rate. So they're still winning, right? It's not like agencies are suddenly losing at really high rates.

They're still winning at higher rates, and part of that is what Rachel talked about, is you have staff attorneys who are thinking about, "How do we craft these rules to survive judicial review," right? Most of the major rules, as Rachel suggested, aren't challenged. Those that are challenged some of them are just kind of strategic decisions by the litigants hoping to get something out of the administration or hoping to force a change or delay implementation of the rule for quite some time.

One interesting thing that's happened, though, is the courts themselves are applying Loper Bright in different ways. I think the best example of this is the Fifth and Ninth Circuit. For those of you who don't really know your circuits, the Fifth is kind of like Texas, Louisiana, that area much more conservative.

The Ninth, California, Oregon, much more liberal, right? The Ninth Circuit has taken a pretty liberal interpretation of Loper Bright and said, "Actually, we're still allowed to consider some aspects of deference." That weaker deference I told you about, Skidmore still lives. And we see that in the Ninth Circuit, agencies are still winning at much higher rates.

In the Fifth Circuit, they're losing more often than they're winning, and part of that is the Fifth Circuit adopted a very conservative interpretation of what Loper Bright meant and said, "No, we decide, and we no longer need to consider the agency's interpretation at all." So one thing we're seeing is more cleavage in circuit splits as to how judges are going to apply this, and we're gonna have to wait for the Supreme Court to kind of give judges more guidance to see what this ultimately shakes out to be.

**TENPAS:** Interesting. Thank you. Let's, let's get back to Phil. Phil, what are your major concerns about the future of Loper Bright in a Congress that does not see an urgent need to alter legislative drafting or anything else in response?

**WALLACH:** If I'm being honest, insufficient reaction to Loperbright is pretty low down on my list of worries for the, for the current Congress. Current Congress has a lot of troubles. Like just keeping the lights on is a struggle. Passing spending bills that have a long history of bipartisanship that's, that's gonna be a, a, a real struggle in the coming months.

It was a dicey proposition last, last time around, and the year before that we just completely punted and did full year continuing resolutions. So this is an institution that's in some ways having a difficult time sticking to its core functions. So, listen, i-in my ideal world, Congress would look out at, you know, all of these fights about administrative agencies and think to itself, "Boy, it sure seems there's a lot of important issues that need to be revisited with new legislation or big amendments to old legislation."

Right? You know, and this is our job and our responsibility, and the Loper Bright decision makes it even more important that we write these carefully and sort of not just assume that it'll all come out in the wash. We live in a world where a lot of, a lot of actions, a lot of programs are unauthorized.

Congress is not supposed to do things without first authorizing them, but it can waive that rule, and it does waive that rule. So we, we sort of have a, a, a pretty severe deliberation deficit going on in general, where we're just not bringing the legislative deliberation into policymaking in an effective way as much as we should be.

That, again, they-- I, I always say things could be worse, and they probably will be.

**Speaker:** Yeah ...

**WALLACH:** you know, there's-- it's not that there's nothing good and important happening on the Hill right now. I, I'm not, I'm certainly not saying that. But, you know, when I look at a a pro-- you know, w- we did see one big change to a re-regulatory regime in the big, beautiful bill passed about a year ago now, right?

We, we set the penalty for violating CAFE standards. This is auto tailpipe emissions. We set the penalties at zero. So that was, like, a case where the Congress decided to s- to settle some long-standing issue by, by acting in a, in a clear deregulatory manner. And so from my point of view, that's fine.

You know, I think that was actually a, a, a troublesome policy for all kinds of reasons. Clearing it away is probably a good idea, but you can think it's a bad idea. In any case, Congress actually took some responsibility in this particular partisan form of legislating. It uses the reconciliation bill, right?

In terms of doing bigger kinds of institutional renovations for different regulatory statutes, we're, we're kind of not making a lot of progress on, on most fronts. So, Yeah, I'd like, I'd like to see Congress take the Loper Bright decision as a kick in the pants to say that it needs to get back in the game of, of, of opening up these regulatory statutes and figuring out how they ought to be changed after many decades, right?

In many cases where they've just... You know, to the Telecommunications Act or w- or whatever, you know. You're working with a 30-year-old statute in a field that has changed lifetimes, you know, several times over. So, this, this is, this is the opportunity. But, The reality, the reality is just keeping the lights on i- i- is hard enough right now.

So what's gonna change all that? What's gonna make us enter into a, a new brighter era? I, I've-- ever since I worked at Brookings, which is many years ago now, I've been, I've been waiting. I've learned not to hold my breath in the

**TENPAS:** mean- Yeah, but there are efforts to try to improve congressional capacity and to get them to think about some of the more fundamental features of the Congress itself.

It's just that it's really tough to get those off the ground, right, in a meaningful way.

**WALLACH:** Yeah. I, I-- and for me, it's most, it's mostly not a capacity problem. It's, it- it's a, it's a do we wanna shoulder this responsibility or not? A- and if the answer is not, then all the capacity in the world doesn't really make a difference.

So-

**Speaker:** Yeah ...

**WALLACH:** I, I honestly think there's a lot of able people over on Capitol Hill, on, on the staff side, among some of the members in the support agencies. They, they can get things done when they, when they want to, and we do every once in a while see something move in a hurry. So the-- it's, it's still an institution capable of surprising us.

We'll, we'll... You know, it's mostly gone in other directions where, where people have been applying their energies lately.

**TENPAS:** Thank you. Rachel, what about the future of agency expertise? What does that look like to you?

**POTTER:** Okay. So I can think about that in both a short and a long-term way. And so in the short term, right, I think the implication of Loper Bright is that lawyers are going to have more sway within agencies.

Whether that means more hiring of lawyers, that's I think a bigger question that kind of points to the long term. I don't see that as a good development. I love lawyers, Nick. I love them, right? Yeah but these are public policy problems, right? That is again, returning, what is the goal of this?

It's to solve a public policy problem, and it is... Are these the right people to solve it? Maybe not. Maybe, maybe not. But that is the push we're getting from Loper Bright, is to have those people sort of make the calls because that's what it's gonna need to survive as a policy. So that's sort of like the short term, like what would we expect to see if all else equal.

In the longer term, I think this comes to, to Phil's point, is like, well, is Congress gonna get it together and make an active workforce plan given that we've sort of deconstructed a lot of what we had? Right? We don't see Republicans getting out there and saying, "Let's build it back." Some of them are saying, "Hey, let's fix the VA so client services are okay," or, "Let's fix this one little area that's important to me."

But they're not saying, "Let's build it back." We see some Democrats saying, "Let's build it back." Probably we're gonna have to meet somewhere in the middle, or we're just gonna go with a default rule, which listening to Phil's explanation of what's happening in Congress feels like probably what's gonna happen, is we're just gonna kind of skate from here and see what we can get by with without like a real plan in place.

What that means, I think, is a real de-emphasis again on problem-solving, which is the-- what we want these agencies to do is they face h- problems, they prevent bad things from happening, so we want them to be able to have the kinds of people they need, whatever that might be in a really proactive way and shape that.

But that's probably not gonna happen. So probably what we'll see, you know, is a lot more reliance on contractors. Contractors are really, really important, and they fill

gaps when there are gaps, and right now there are a lot of gaps, and they're really easy to hire compared to new s- career civil servants.

So I think a lot depends on what happens in this election and a lot happen in, in twenty twenty-eight as well. And so I don't think there's a clear path out of like what is expertise going forward is m- maybe worse from here. Like, maybe we continue to degrade 'cause we-- a lot of the experts left.

So, yeah. I don't know that we ha- I have a clear rosy case either. Yeah. But yeah.

**WALLACH:** Can I just say one quick word? Y- you know, Loper Bright was not a sweeping non-delegation decision that some people m- might have wanted it to be, right? So I, I think that's important just to throw out there that if we had had the Supreme Court come and say, "Actually, most of the allocations of power that Congress has taken and put it in, in the executive branch over the last century are all illegitimate, and we have to go back to the drawing board," like, that would have been an earthquake presumably that, that would have forced us to renegotiate an awful lot of things on the fly you know, whether anyone liked it or not.

But that's not what, that's not what Loper Bright said, right? It, it was actually fairly tolerant about the idea of delegation, maybe to Justice Gorsuch's chagrin. But you know, it mostly said we have to think about these delegations in a slightly different light going forward. And so, you know, that has to...

all the consequences we've been talking about. But I, I just wanted to put that out there that, you know, these agencies are not out of a job- Mm-hmm ... because, because of Loper Bright.

**POTTER:** No, not at all. Yeah. But I do think, you know, if we look at Gorsuch's concurrence in Slaughter, right, there is a lot of talk about non-delegation, a lot of vibes, I guess I would call it, that are in the, in the ether that everyone can see and feel.

And I do think those vibes, even if they're not totally real have a way of shaping people's willingness to do-- take certain actions or not take certain actions.

**TENPAS:** Nick, I want to turn to you and, and ask you less about the future of judges. You mentioned that when, you know, when they make decisions, it's a black box. We're not really sure what's influencing their independence. But I did share two years of data with you that not only sort of accrues the number of cases that meaningfully cited Loper Bright, but we've also looked at kind of the distribution across the country of those cases compared the number of cases to other Supreme Court decisions that sort of passed a burden onto federal judges or changed the way that things were done.

Was there anything that popped out to you, or any observations about Loper Bright, just from kind of a, a quantitative standpoint?

**BEDNAR:** Yeah. Just to kinda echo back what I was saying a little bit earlier, right? Like, agencies are still winning at pretty high rates. Like, th- they are not losing to the extent some people thought they would, and part of that is just agencies tend to be pretty good at their jobs.

And so, you know, we're still seeing win rates in the 65% range. You do see a lot of variation geographically. So, some circuits are very deferential to the agencies still. Those tend to be kind of the more liberal circuits that are pro regulatory governance or they have a lot of judges who are pro regulatory governance.

And then the kinda more conservative anti-regulatory judges, particularly those appointed by the Trump administration, either the first or second, have been much more reluctant to side with the agencies in these cases. And I think that kind of tells us two things looking forward to of what to watch.

The first is- One benefit of Chevron, regardless of what you thought about it, is it imposed some uniformity on the application of regulation within the United States. So you know, the EPA adopts a rule that does something. I don't know. Changes Clean Air Act requirements, right? Well, if you are a company subject to those requirements, you feel a little bit more stable, perhaps under a Chevron regime, where you know that rule's gonna be applied the same way in the Ninth Circuit and the Fifth Circuit, right?

And some of that instability could end up causing problems. Now, it might also be that Loper Bright is used as a intense deregulatory rule in a way that actually companies or regulated entities prefer, right, and that these agencies lose more often. So I think that geographic variation and the internal variation within how judges are deciding these cases is gonna be super important going forward.

I wanna kind of just piggyback on something Phil and Rachel were talking about with respect to the non-delegation doctrine. Rachel brought up the concurrence in Slaughter, and I highly encourage everyone, if you haven't read it, to read it, because it's, it's, like, labeled as a concurrence, but it really almost reads like a dissent in which Gorsuch warns that, like, what we have done is we've given the president all of this power, and we are now allowing him to remove all these officials who are, officials who are tasked with implementing this power.

And Gorsuch warns, like, Congress doesn't seem to be willing to deal with this problem, so maybe it's the courts that need to step in. And so I think Rachel's right that there's this kind of sense that the non-delegation doctrine might be the next frontier. Now, I, it's unclear to me whether there are nine votes, or not nine votes, five votes on the Supreme Court to reinstate the non-delegation doctrine.

We've had two non-delegation cases in the last decade or so. Both of them have, upheld the agency's action in both cases. One case Gundy, was a criminal case where people thought if the non-delegation doctrine still exists, this is the case where they will revive it, and they didn't. The major questions doctrine has really stepped in for the court as kind of its new non-delegation doctrine.

**TENPAS:** I just wanna pause for a second there. I'm wondering if you can... A lot of the audience is non-lawyers. Can you talk a little bit and explain the non-delegation doctrine and kind of what it means in, in light of separation of powers and the issues that we're talking about?

**BEDNAR:** Yeah, so, you know, Article One of the Constitution says that Congress has the legislative power, and so Congress is the one who writes statutes that get enacted into law.

And so there's always been this tension of, well, how much policymaking can the executive branch exercise? And there are these kind of two cases from the 1930s in particular in which the court kind of discusses this idea of the non-delegation doctrine that Congress cannot delegate its legislative authority to these federal agencies.

And so if you take a broad approach to that, right, it kind of looks like that what the non-delegation doctrine would prohibit is a lot of the rulemaking that executive branch agencies currently engage in. But we haven't seen the court apply the non-delegation doctrine since the 1930s. It's more or less allowed it to kind of go away for a variety of reasons.

There have been efforts to revive it several times. Justice Thomas was very active in several cases in the early 2000s in dissents arguing that this is really a non-delegation case, we need to revive it. There's a cadre of scholars who have been very active in arguing for a robust non-delegation doctrine, and a lot of those folks kind of embrace the major questions doctrine, which is an analog to this, which just basically asks, is this policy too significant for the executive branch to decide?

Is there something about it politically or economically that means Congress really has to be the one to answer this question? And so that's kind of been the substitute in the last five years for people who want the non-delegation doctrine, but it's pretty clear Gorsuch really wants to push the non-delegation doctrine further.

**TENPAS:** Interesting. And those are the vibes that you were talking about, Rachel, that there's this kind of seems to be a, a movement that's not really visible, but present.

Thank you. Phil, what are you gonna be watching in the months ahead, or what concerns you with regard to the demise of Chevron as it relates to Congress? I mean, your earlier answers seem to think that, like, there's so many problems that Congress is confronting, and the mindset is really not about focusing on some of these smaller issues, so to speak.

But what are you, as a scholar of Congress, what are you keeping your eyes on day to day?

**WALLACH:** Well, the, the truth is that this appropriations question is the thing that I would rank as, as the biggest one, and, and that is a question of is Congress

capable of exercising one of its core constitutional duties rather than sort of letting it fall into disuse and allowing the Office of Management and Budget maybe to pick up the slack?

I think that's sort of goes to the question of whether Congress is an important and vital branch going forward in a very fundamental way. So that's, that's mostly not a Chevron There's still interesting- Loper Bright area because Congress-- When the Congress writes appropriations, those are some of the few laws that the-- at least the, the, the money amount parts are not, are not so hard to interpret, right?

The, there-- Certain amounts of money go to certain places and, and that's, that's that. Yeah. So whether Congress can exercise that level of lawmaking i-is what I'm most focused on r- at the moment. You know, on these bigger questions, there are, there are some regulatory issues where, like, I think there may be some prospects.

And so the way that I would hope the, the sort of Loper-rite-- Loper Bright regime would, would find its way in would be if the drafters could be intelligently changing h-how they would act on these, on these issues because of Loper Bright considerations. So, you know, there's still cryptocurrency regulatory stuff floating around.

And I th- I think looming- AI

**TENPAS:** probably

**WALLACH:** too. AI is the, is the big one, right? I think there's a very strong bipartisan sense that Congress had better do something, because if it doesn't, we're going to see an ad hoc regulatory regime fashioned through a bunch of negotiations between the White House and these industry leaders, and that's troubling in all kinds of ways.

So I think, you know, we see s-some progress. I, I think there's a, there's a discussion draft being circulated by Representative Obernolte and Trahan, if I'm not mistaken, in the House that, that people think has a lot of promise. So I th- I think there are a few areas where legislating looks like it has a chance that it could happen on a bipartisan basis a-and that's not that's not beyond sort of the realm of real possibility.

And, you know, if the 119th Congress could get one of those things done i-in a way that showed some, some real attention to the drafting, that, that itself would sort of-- It's the muscle memory kind of a-as much as anything. I would like Congress to build the muscle memory of just making itself the decision maker for major questions, like as the court would also like to see.

That, that would be my big hope.

**BEDNAR:** Yeah.

**WALLACH:** Again, the, the, the, the fear is much easier to articulate, which is just like inertia in American politics right now just suggests we're all holding-- We're all in a holding pattern until the next election or maybe the one after that. And, you know, I think there are some, some reasons for that.

A- and in some ways there's a lot of uncertainty about what would happen after 2028. Nobody knows. But yeah, cer- certainly sort of i- i- inertia tending toward inaction and self-pity i- is, is the fear. And,

**TENPAS:** and let's just fast-forward for a minute here to think about four-and-a-half months from now after the midterm elections.

If majorities change in any way, does that impact your current sort of idea-- set of ideas and thoughts?

**WALLACH:** You know, I think the biggest thing is who has control of these committee gavels for the purposes of directing staff investigations, issuing subpoenas. That's a big, that's a big deal. That can change the discourse.

You know, I think those are likely to have very sharp partisan consequences if one or both of the-- You know, if, if we saw both houses go Democrat I think that does kind of throw things wide open in terms of exactly how would the Trump administration and the Democratic Senate find a way to live with each other.

That, that would be a sort of a new adventure. We haven't had a Senate and president of different parties since 2016. And, and just in terms of how the executive branch would operate in terms of getting nominees through you, you might see Congress trying to use more of its leverage more aggressively, in part because it would have that, that weapon.

And maybe that would ramify into the sort of how are you-- what are you doing o- on, on these regulatory fronts? Do you need to be more consultative instead of high-handed? So that's definitely within the realm of possibilities. But you could also imagine things just becoming extremely standoffish or sort of- Under

**TENPAS:** what conditions would

**WALLACH:** it be like that?

You know, let's say you have a Democratic House, a very tight Senate that's still Republican-controlled. And you know, I, I think you could see- You, you could see things churning pretty nasty ev- even relative to the present. So, yeah. Well, we'll have to see. We, we've not en- You know, the House hasn't-- The House Democrats were in the Nancy Pelosi era for a long, long time, and we don't know exactly what the post-Nancy Pelosi era will look like should they return to the majority.

That, that leads to a lot of open questions for those of us trying to find reasons to be hopeful for the, for the House. So, so we'll see. You know, Nancy Pelosi also found ways to make deals with Donald Trump in, in a, in a lot of areas. We'll see if, if a Speaker Jeffries would be able to do the same.

**TENPAS:** Okay. Thank you. Rachel, what about you? What are you watching and what are you most concerned about in the, in the months ahead? What are you-

**POTTER:** Well, we've given the patient a lot of medicine. Like I already said, like, there's so many treatments going in right now that I think we just have to wait for the dust to settle a little bit.

Like, what's going to happen with agency independence? Okay, like we're not doing it, but what are we doing now instead? I don't know that we're-- we've really figured all these things out. We've moved a lot of programs from one agency to another. We've cut agencies. We've cut personnel. We're introducing AI in all these new ways to agencies, and it's just, it's gonna be different in a year, in two years.

Even if, you know, there's no congressional intervention, no big legislative acts to sort of steer agencies one way or another, it's gonna be different. And so I think, you know, if you c- cut a big part of your workforce, it takes a while to, for everyone to figure out, "What's my new job?" And how... So I think I'm waiting to see what happens, especially with agency independence.

I'm worried about sort of what we call, like, the fifth risk, the thing we're not anticipating that could happen because we did kind of treat the patient so heavily that we don't know what the outcomes are. So I'm hoping nothing like that happens. But you know, government does a lot of really important functions for us.

And so, hoping we can kind of figure out ways to do it better.

**TENPAS:** Yeah. And earlier in the conversation, you mentioned that there have been roughly sort of 20 per- 12% of the workforce has been cut, and I'm guessing the answer is no, but is there any way to determine which agencies have gotten the most cuts and within that, which, which jobs tend to be cut?

Or, I know that a lot of the cuts were just like a hatchet and kind of indiscriminate, so maybe there isn't an answer at the moment, but do you have any sense of where the cuts occurred and-

**POTTER:** Well, so I can't say off the top of my head, but the OPM's website does have some of this information, which is what the administration is giving out.

And so I don't know how current it is. A lot of the reductions in force are still unrolling, so we don't even re- really know exactly what's gonna stick and land, and there's so much litigation happening about all of that, too. So I mean, if anyone's interested, it is on the OPM Federal Workforce site now.

I forget what they call it now. But that data is available on there. But yeah. Okay. So, and a lo- again, a lot of these exits ended up being- In some way voluntary, right, with, like, the de- deferred resignation program, so it's not like everyone's getting, you know, I, I said fired, but not everyone has been fired.

Yeah.

**WALLACH:** That is not- And for, for what it's worth, the 1990s personnel cuts were pretty comparable in magnitude, so this would be- They were about

**POTTER:** 10% in Clinton, yeah. So a little bit higher now, but- And

**TENPAS:** that was the Reinventing Government program- Yeah ... which was methodical, systematic, yeah.

**BEDNAR:** And it was over eight years as opposed to one.

**TENPAS:** Mm-hmm. Oh, that's a good point. Yeah. So Nick, toss it to you. What are you watching?

**BEDNAR:** So y- you know, I think what I'm watching is similar to what Rachel's watching, but just on the kind of court side of this, which is, y- you know, as Rachel said, most of these major rules don't get challenged. When they do get challenged, often you're talking about really technical rules that are based in policy that judges just don't wanna decide.

So if, if you've ever worked in the courts by chance, particularly in a judge's chamber, you get handed a case from the Federal Energy Regulatory Commission, and the last thing you wanna try and do as, like, a law clerk is understand utility policy. And you're sitting there trying to think, like, "Well, what is the effect if I rule one way versus the other way?"

And so often what you do is you just tilt the scu- the thumb in favor of the agency, assuming it's probably right, and I don't wanna kill utility policy in the United States. So I think, you know, a lot of what we're gonna have is just kind of deference without calling it deference of, in these cases that are not seen as politically consequential and are highly policy-sensitive areas and really technical areas, judges are just gonna tip the scale in favor of the agency anyway.

But even if the judges were to say Loper Bright is really anti-deference, that agencies should always lose, that would be death by a thousand cuts, right? It'd be overturning rules one by one. What I'm more concerned about, and what I'm watching heavily, is a lot of the more structural cases. So there's a case in the Federal Circuit right now that will basically...

It, it'll probably end up in the US Supreme Court. It's called Jackler. But it's effectively the tee-up of the challenge of can we have a civil service at all? Is it the case that-

Federal employees can be protected from removal. There have been some challenges by the Trump administration seeking to basically get away or get rid of some appointment requirements for qualifications of federal employees.

And so it's, for me, less which policies can we have and more of a what kind of administrative state can we have. And, you know, if the court decides that we can't have expert governance anymore or makes it much more difficult to acquire that, Loper Bright doesn't matter all that much, right? Because you wouldn't have deference to these agencies anyway if the people issuing these regulations are not particularly skilled at policymaking.

So, you know, I think that's kind of the existential threat, and really what to watch right now is kind of what's gonna happen with all these structural cases. Mm-hmm.

**TENPAS:** And are there any recent Supreme Court cases that were handed down in the past few weeks that you're paying particular attention to do, given your realm of expertise with personnel and bureaucratic politics?

**BEDNAR:** Yeah, Slaughter is the big one. So just in case people are not aware Slaughter is this case involving the removal of the Federal Trade Commission. For a long time, there was this kind of rule that Congress could impose removal restrictions on members of multi-member commissions. So the Federal Trade Commission, the Federal Reserve, the Federal Reserve's is still alive for reasons we cannot and will not get into in the next five minutes.

But Slaughter basically said the president has authority to remove subordinates exercising executive power. And the fact they, they use the word subordinates is really terrifying because all of these cases have previously used the phrase principal officers, so we're talking the highest people in government.

But subordinates implies something much deeper down, and so the courts are gonna have to figure out what subordinates means and what the court thinks or what they think the Supreme Court meant by it, and that's gonna be what decides who gets to continue to work for the federal government.

**TENPAS:** Wow. There's an audience question.

And whoever would like to answer it could. It's how does the panel read the Trump administration's use of Loper Bright Chevron for the recent removal of harm from habitat protections in the Endangered Species Act? Anybody, any takers for that question?

I'm gonna pick on Nick because he's the lawyer here. Tell us a little bit about... Can you provide some background for people who are less familiar with it, and then tell us your thoughts on it?

**BEDNAR:** Okay, so I'm gonna be honest. I cannot provide background 'cause I haven't been following the harm rule. Oh.

Rachel, you mentioned it. Do you r- I know, like- Go ahead, Rachel.

**POTTER:** Oh, I, I mean, I don't have deep knowledge of the case either, but the, the essential the nut of the case is that they're using the best interpretation, meaning and saying, "We weren't interpreting, interpreting ... interpreting harm the best way, and so we're actually removing that definition."

And so how does this tie back to little bird, right? Well, they're leveraging it, right? This is a, a bro- probably con- consistent with a broader administration goal, and so it is a way to kind of take something that's on the books and, and take it off with presumably less of a fight with the courts afterwards.

But they didn't skip notice and comment there, which is one of the the things they could have done, in theory.

**TENPAS:** And have they been doing that a lot compared to other administrations?

**POTTER:** Skipping it. Well, that comes back to the executive order, which encouraged them and, and the guidance from the Office of Management and Budget that said, "If you find stuff that's not the best interpretation in the existing regs, go ahead and skip notice and comment."

So they were sort of green-lighted. In this case, they didn't go ahead and do that. But presumably they could have.

**BEDNAR:** I'll add one thing to what Rachel said, which is i- in terms of are they doing this a lot. So they're doing it a lot in the personnel area. So the personnel statutes are kind of different than a lot of regulatory statutes.

A lot of regulatory statutes give the rulemaking authority to the Secretary of the Interior, Secretary of Defense, like a specific officer. The personnel statutes since the 1870s have allowed the president to engage in that rulemaking authority, and consequently, the, the president and the executive branch has always taken the position that the president is not subject to the Administrative Procedure Act and therefore doesn't need to go through the rulemaking process to implement those changes.

Now, they have done so in some cases. So a good example is scheduled policy career. They have a ... There is a section of the executive order basically saying like, "Hey you don't have to go through notice and comment rulemaking." OPM still did. I think it was a big enough rule that they were worried that they

Well, they knew it was getting challenged in court. The litigation was filed on day one of the administration. So they kind of crossed their T's and dotted their I's a little bit.

But the OPM rule has a whole passage about our hands are tied. The president has instructed us we have to do this, and therefore it doesn't even think, matter if we think it's wrong.

There was also ... I'll, I'll just throw in one more executive order. There was one early on from the depart- or it was an executive order repealing a shower head rule from the Department of Energy. And it, it was... Like, it struck a lot of administrative law professors as kind of strange because it was one of the first times we'd ever seen a president, by executive order, assert the repeal of a rule, so...

**TENPAS:** Yeah. So it was just Trump, Trump's sort of pet topic that he wanted to deal with? Uh-huh.

**BEDNAR:** Yeah. It's something about low-flow shower heads. Like, I'm gonna be honest, I'm not, like, up on shower head technology these days. I'm fairly certain the shower heads in my-

**TENPAS:** Shocked ...

**BEDNAR:** --put in in the '70s. But you know, yeah.

**TENPAS:** Yeah. Well, thanks to all of you for sort of tackling a really broad topic that is difficult, especially for poor Phil studying Congress. Hang in there, Phil. So thanks to all of my experts today, and thanks to the audience for tuning in and listening to us. And we hope to have this up as a recording soon.

Thank you very much.