Humane Society v. USDA: D.C. Circuit Precedent Establishes Regulatory "Point of No Return" Occurs Before Publication, Reducing Executive Withdrawal Power

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I. OVERVIEW

Horse soring is a form of animal cruelty where horses are cut, burned, and otherwise harmed in order to induce a distinctive gait for purposes of showing horses in competition.[1] In an effort to stop the practice, Congress enacted the Horse Protection Act of 1970 (HPA), which prohibited horse soring and authorized the Department of Agriculture (USDA) to conduct inspections as necessary to enforce the prohibition.[2] The USDA, however, lacked the resources to perform these inspections and thus the abuses continued unabated.[3]

When a 1976 amendment to the HPA again failed to stop the mistreatment, the Office of the Inspector General (OIG) proposed an inspection system comprised of USDA-accredited veterinarians.[4] The USDA published notice in July 2016 of a proposed rule consistent with the OIG's recommendations.[5] On January 11, 2017, following a five-month comment period, the USDA posted a signed final rule on its

1. Humane Soc'y of the U.S. v. U.S. Dep't of Agric., 41 F.4th 564, 566 (D.C. Cir. 2022).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

website that substantially adhered to the proposed rule.[6] Also posted was a press release announcing that the final rule would be "published in the Federal Register in the coming days" and that some provisions would become effective thirty days after publication.[7] After the USDA transmitted the rule to the Office of the Federal Register (OFR) for publication, the OFR made the final rule available for public inspection on January 19, 2017, and scheduled it for publication in the Federal Register in accordance with the OFR's regulations.[8]

The next day, on his first day in office, President Trump directed the executive agencies to withdraw all regulations sent to the OFR but not yet published to the Federal Register.[9] The USDA subsequently withdrew the rule.[10] The Humane Society sued the USDA, asserting that the agency unlawfully repealed the rule without the notice and comment procedures required by the Administrative Procedure Act (APA).[11] The United States District Court for the District of Columbia disagreed and granted the USDA's motion to dismiss, concluding that because the rule was not published in the Federal Register, it was not a final rule, and therefore the withdrawal did not amount to a "repeal" requiring notice and comment under the APA.[12] In a reversal, the United States Court of Appeals for the District of Columbia Circuit *held* that an agency must provide notice and an opportunity for comment when withdrawing a rule that has been filed for public inspection but not yet published to the Federal Register. *Humane Society of the United States v. United States Department of Agriculture*, 41 F.4th 565 (D.C. Cir. 2022).

II. BACKGROUND

A. Agency Rulemaking and the Administrative Procedure Act

Administrative agencies are congressionally created federal authorities responsible for regulating within their areas of expertise based on statutorily prescribed parameters.[13] Agency rulemaking parallels the legislature's passage of laws in that the end product imposes formal legal

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6. *Id.* at 566–67 (explaining that during the comment period, the USDA held five public hearings and received over 130,000 comments).
7. *Id.* at 567.
8. *Id.*
9. *Id.* at 565, 567.
10. *Id.* at 567.
11. *Id.*
12. *Id.*
13. *See generally* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 5 (9th ed. 2022).

effects on the agency's regulated community.[14] Because agencies wield significant power to create rules that affect the rights and obligations of the people, agencies must adhere to the procedures outlined in the APA when engaging in rulemaking.[15]

The APA defines "rulemaking" as the process of "formulating, amending, or repealing a rule."[16] "Rule," in turn, is defined broadly to include "statement[s] of general or particular applicability and future effect" that are designed to "implement, interpret, or prescribe law or policy."[17] When an agency action falls into the category of a "rule," the decisions the agency makes in the process of making that rule are subject to procedural requirements that, if skipped, can render the final product void if challenged in court.

Of those requirements, among the most important is the incorporation of the public as participants in the rulemaking process.[18] Except in limited circumstances, the APA requires that agencies afford notice of a proposed rulemaking and an opportunity for public comment prior to a rule's promulgation, amendment, or repeal.[19] Providing for notice and comment prior to *repeal* of a *final* rule ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal.[20] However, the APA does not specify when a rule becomes "final."

B. Rule Processing Procedure

Enacted in 1935 and codified in 1968, the Federal Register Act (FRA) mandates publication of agency regulations with general applicability and legal effect.[21] To begin the publication process, agencies

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14. *Id*. at 55.

15. *Id*.

16. 5 U.S.C. § 551(5) (2011); *see also* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 95 (2015).

17. 5 U.S.C. § 551(4) (2011).

18. Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980) ("the essential purpose of § 553 notice and comment. . .is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies").

19. 5 U.S.C. § 553; *see also* Humane Soc'y of the U.S. v. U.S. Dep't of Agric., 41 F.4th 564, 568 (D.C. Cir. 2022) (quoting Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987)).

20. *Bowen*, 834 F.2d at 1044; Consumer Energy Council of Am. v. Fed. Energy Regul. Comm'n, 673 F.2d 425, 446 (D.C. Cir. 1982).

21. 44 U.S.C. § 1505; *see also* 1 C.F.R. § 1.1 (clarifying that "regulation" and "rule" have the same meaning).

must transmit any document that requires publication to the OFR.[22] Upon transmission, at least one copy of the document "shall be immediately available for public inspection in the OFR."[23] More specifically, OFR regulations dictate that once the OFR receives the document, processes it, and schedules it for publication, the OFR must file the document for public inspection.[24] The day and hour when the document is made available for public inspection must be noted alongside the document.[25] Taken together, the FRA and OFR regulations set forth three key steps in the publication process: first, the agency submits the proposed rule to the OFR. Next, the OFR files the document for public inspection. Finally, the OFR publishes the document to the Federal Register. The OFR executes each step according to a regulatorily prescribed schedule: for example, if the OFR receives a document before 2:00 PM Monday, the OFR must file the document for public inspection Wednesday and publish the document to the Federal Register on Thursday.[26]

The FRA sets forth two legal consequences connected to the public inspection step. First, a document requiring publication in the Federal Register is not valid as against a person who has no actual knowledge of it *until* the OFR makes it available for public inspection.[27] Second, unless otherwise specifically provided by statute, and except in cases where notice by publication is insufficient in law, filing for public inspection is sufficient to give notice of the contents of the document to a person subject to or affected by it.[28] In contrast, there is only one legal consequence associated with publication in the Federal Register. The FRA states that publication in the Federal Register creates a "rebuttable presumption" that the rule was duly issued, prescribed, or promulgated; filed with the OFR; made available for public inspection at the day and hour stated in the printed notation; and complied with all regulations.[29] In other words, if a rule appears in the Federal Register, one can infer that

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22. 44 U.S.C. § 1503 (2014); *see also* 1 C.F.R. § 1.1 (defining "document" to include "any rule, regulation . . . or similar instrument issued, prescribed, or promulgated by an agency").

23. 44 U.S.C. § 1503 (2014); *see also Understanding Public Inspection*, FEDERAL REGISTER, (last visited Nov. 3, 2022), https://www.federalregister.gov/reader-aids/using-federal register-gov/understanding-public-inspection (explaining that public inspection is when a preview of the document scheduled to appear in the Federal Register is posted on FederalRegister.gov).

24. 1 C.F.R. §§ 17.1–17.2; *see also* 1 C.F.R. § 1.1 (defining "filing" as "making a document available for public inspection at the [OFR] during official business hours").

25. 44 U.S.C. § 1504 (2014).

26. 1 C.F.R. § 17.2(c).

27. 44 U.S.C. § 1507.

28. *Id.*

29. *Id.*

the published rule underwent the publication process according to the APA, FRA, and OFR regulations.

C. Repealing a Rule

The APA states that an agency must provide notice and opportunity for comment before repealing a rule.[30] The D.C. Circuit has held that the definition of an agency "rule" is not limited to regulations published in the Federal Register.[31] Additionally, publication to the Federal Register is not dispositive in determining whether an agency action may be classified as a "rule."[32] For example, in *Arlington Oil Mills, Inc. v. Knebel*, the Fifth Circuit held that the USDA violated the APA when it revoked an unpublished agency press release without providing notice and opportunity to comment, because the Secretary was "required to provide adequate notice that reconsideration was underway" and to "give all interested persons a reasonable opportunity to participate and present their views" before revoking the announcement.[33] In *Knebel*, the USDA announced a peanut price support differential scheme on March 19, 1976 following a notice and comment period.[34] It subsequently revoked that decision on July 6, 1976 and reinstated the preexisting price levels.[35] The USDA provided no notice to the public that it was considering rescission of the March 19 order, nor did it solicit comments or conduct hearings.[36] In holding that this action amounted to a repeal requiring notice and comment, the court determined that the USDA's failure to publish the March 19 announcement in the Federal Register did not preclude the announcement from being legally effective.[37] Furthermore, public participation in rulemaking becomes "meaningless" if, after announcing the rule, the USDA may "closet its intent to reconsider and completely undo the rule first made."[38]

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30. 5 U.S.C. § 553; 5 U.S.C. § 551(5) (2011).
31. *See* Batterton v. Marshall, 648 F.2d 694, 710 (D.C. Cir. 1980) (holding that an agency's adoption of a methodology for developing unemployment statistics, which was the agency's "considered response to over a decade of criticism over its prior methodology," constituted a "rule" requiring notice and comment because the agency action "jeopardize[d] the rights and interests of parties").
32. *See generally* Arlington Oil Mills, Inc. v. Knebel, 543 F.2d 1092, 1099 (5th Cir. 1976).
33. *Id.*
34. *Id.* at 1098–99.
35. *Id.* at 1099.
36. *Id.* at 1097.
37. *Id.* at 1099.
38. *Id.* at 1100.

However, the D.C. Circuit addressed the question of whether withdrawal of an unpublished rule requires notice and comment and came to the opposite conclusion.[39] In *Kennecott Utah Copper Corp.*, the OFR received proposed regulations from the Department of Interior and internally approved the draft.[40] Before it was made available for public inspection, the OFR received an order to withdraw the document.[41] The court held that withdrawal without notice and comment was not a violation of the APA because an internally approved draft version of final regulations was not a "rule" subject to repeal.[42] The decisions in these cases suggest that while publication is not the only measure of whether or not an agency action is considered a "rule," the point of rule "finality" is not reached by mere submission to the OFR.

D. Midnight Rulemaking

"Midnight rulemaking" refers to the practice where an outgoing president promulgates regulations in the final month of their administration.[43] Presidents may engage in midnight rulemaking out of a desire to extend their administration's agenda into the future or to minimize the political consequences associated with potentially controversial actions.[44] Delaying positive regulation until late in the president's term may boost public opinion of the president, and as a result help either their own reelection bid or the election prospects of the incumbent party.[45] Midnight rulemaking is also a practical consequence of a rulemaking process that takes years to complete.[46]

Incoming administrations, particularly where there is a change in party control, are not fans of midnight rulemaking.[47] To curb the practice

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39. Kennecott Utah Copper Corp. v. U.S. Dep't of Interior, 88 F.3d 1191, 1200 (D.C. Cir. 1996).

40. *Id.* at 1209.

41. *Id.*

42. *Id.* at 1201, 1208.

43. B.J. Sanford, *Midnight Regulations, Judicial Review, and the Formal Limits of Presidential Rulemaking*, 78 N.Y.U. L. REV. 782 (2003).

44. Jack M. Beermann, *Combating Midnight Regulation*, 103 NW. U.L. REV. COLLOQUY 352 (2009).

45. *Id.*

46. *See* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 480 (2011).

47. Beermann, *supra* note 44 at 369 ("the general view is that midnight regulation is an illegitimate vehicle for projecting an outgoing administration's policy agenda beyond the end of its term"); *see also* H.R. 21, 115th Cong. (2017) (detailing the "Midnight Rules Relief Act" which, if passed, would have allowed an incoming president to bundle multiple regulations issued within the last year of the previous presidential term into one disapproval resolution).

and "roll back" the previous administration's regulatory agenda, incoming presidents make use two common tools: withdrawal orders and suspension orders.[48] Withdrawal orders command agencies to withdraw regulations that have been sent to the OFR but have not yet been published to the Federal Register.[49] Suspension orders require agencies to suspend the effective dates of rules that are published in the Federal Register but have not yet gone into effect.[50] In both cases, the President bypasses notice-and-comment requirements.[51] While midnight rulemaking is largely disfavored, these orders have, in contrast, faced minimal scrutiny and in fact have been affirmed as a legitimate extension of executive power.[52] Indeed, the use of "rollback tools" has been a common practice since the Reagan Administration.[53] However, recent administrations facing heightened congressional gridlock are "aggressively" relying on these tools to make policy.[54]

It is in this context that President Trump came into office. Like prior presidents, he assumed office with plans to roll back his predecessor's regulations.[55] Unlike prior presidents, however, he did not simply postpone the effective dates of final rules or use notice-and-comment rulemaking to repeal regulations.[56] He also made use of other "rollback tools" such as disapprovals under the Congressional Review Act (CRA),[57] abeyances in pending litigation, and suspensions of final regulations to target more of the prior administration's regulations than had been the case in previous transitions.[58] While none of these tools are novel in isolation, the Trump Administration used them "far more aggressively" than previous administrations had, targeting many significant

48. O'Connell, *supra* note 46, at 473.

49. *Id.*

50. *Id.*

51. Humane Soc'y of the U.S. v. U.S. Dep't of Agric., 41 F.4th 564, 568 (D.C. Cir. 2022).

52. Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981) ("The authority of the President to control and supervise executive policymaking is derived from the Constitution").

53. Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 10 MINN. L. REV. 3, 5 (2019).

54. *Id*. at 3.

55. *Id*. at 2.

56. *Id*.

57. 5 U.S.C. § 801 (stating that under the CRA, Congress can disapprove of a regulation, which renders the targeted regulation "of no force or effect." When Congress begins a new term, as it does after a presidential election, any rule published within the last sixty days of the previous Congress becomes subject to review and disapproval by the new administration's Congress for an additional seventy-five legislative days).

58. Davis Noll & Revesz, *supra* note 53, at 2–3.

environmental and financial regulations from as far back as 2015.[59] The broad range of "rollback tools" that are currently available to incoming presidents combined with the historically unchecked practice of using such tools reflects a reality where the modern President has significant rulemaking power during an administration change. [60]

III. COURT'S DECISION

In the noted case, the D.C. Circuit held that an agency must provide notice and an opportunity for comment when withdrawing a rule that has been filed for public inspection but not yet published to the Federal Register.[61] To reach this holding, the court first established that the plain meanings of the relevant provisions in the APA, the FRA, and OFR regulations confirm that a rule may prescribe law *before* publication to the Federal Register.[62] The court followed the logic that: 1) a rule is a statement of general applicability prescribing law with future effect; 2) an agency document of general applicability prescribes law with future effect when it is made available for public inspection, and therefore; 3) notice and comment is necessary before repealing a rule that the OFR files for public inspection.[63]

To establish that a document prescribes law at the point of public inspection, the court began with the statutory language that a document is "not valid against a person who has not had actual knowledge of it until . . . it is made available for public inspection."[64] The FRA goes on to say that making a document available for public inspection is "sufficient to give notice of the contents of the document to a person subject to or affected by it."[65] Since a document that is filed for public inspection is sufficient to put someone on notice of its contents, the contents of a regulation become valid against a person, and thus have legal effect, at the point of public inspection.[66] Once the document is made available for public inspection and becomes valid against those affected by it, it meets the requirements of the APA's definition of a rule: it is a statement of

59. *Id.* at 3.
60. *Id.* at 100.
61. Humane Soc'y of the U.S. v. U.S. Dep't of Agric., 41 F.4th 564, 566 (D.C. Cir. 2022).
62. *Id.* at 569.
63. *Id.* at 569–70.
64. 44 U.S.C. § 1507.
65. *Id.*
66. *Humane Soc'y*, 41 F.4th at 569.

general applicability that prescribes law with future effect.[67] Notice and comment are therefore required to repeal it.[68]

In addition to the statutory language that specifically dealt with notice, the court also pointed to supplemental language to support the conclusion that a document becomes a rule once it is made available for public inspection. For example, the FRA requires that the day and hour when the document is made available for public inspection must be noted alongside the document.[69] The court interpreted this provision, and the absence of a comparable provision for the point of publication, to mean that the day and time a document is filed for public inspection is the "critical date" where a rule becomes valid against the public.[70]

In contrast, publication to the Federal Register serves an evidentiary rather than legal function.[71] Publication to the Federal Register only "rebuttably"—and not conclusively—establishes that a document was duly prescribed.[72] The court inferred from this word choice that publication merely creates a rebuttable presumption that the published document is a true copy of one already "duly issued, prescribed or promulgated."[73] In other words, while publication to the Federal Register may be used as evidence to show a rule has been duly prescribed, publication is not dispositive. Publication confirms all other procedural steps were followed but is not the "critical date" that a rule prescribes law.[74] Furthermore, that a rule may prescribe law before publication forecloses the argument that a rule prescribes law only once it is published.[75]

Next, the court relied on contemporaneous executive branch opinions and legal history as evidence to support their "straightforward" reading of the statute. An opinion by the Attorney General written three months after the FRA was promulgated stated that publication to the Federal Register is not essential to validate a regulation.[76] Rather, it

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67. 5 U.S.C. § 551(4).
68. *Id.* § 553.
69. 44 U.S.C. § 1504.
70. *Humane Soc'y*, 41 F.4th at 570.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* (pointing out that the USDA conceded that a rule can be issued, prescribed, or promulgated without publication to the Federal Register. If an agency can prescribe a rule without publishing it, then publication "cannot mark the point at which the requirement to undertake notice and comment before repeal attaches").
76. *Id.*

becomes valid when it is filed for public inspection.[77] Additionally, the first regulations governing public inspection and publication under the FRA promulgated in 1938 designated some agency documents of general applicability and legal effect to be made available for public inspection but not published.[78] Lastly, shortly after the FRA was codified, the Office of Legal Counsel wrote that "under the terms of [the FRA], it seems clear that filing with the Federal Register constitutes promulgation of a regulation even though publication may not occur until a later date."[79] The common thread between these accounts is that the publication date is not statutorily enforced, not consistently required, and therefore a formality. The documents support the conclusion that the drafters of the FRA contemplated not only that prescribing law and publication were separate concepts, but that filing for public inspection was in fact the point in which a rule definitively becomes "valid."

Lastly, the court pointed out that the government has repeatedly and successfully enforced unpublished, substantive rules of general applicability in legal proceedings, undermining USDA's argument that unpublished rules are not final and may be withdrawn without notice and comment requirements.[80] In a somewhat scathing indictment, the court accused the government of acting as a hypocrite; treating unpublished rules, like Schrödinger's cat, as simultaneously law and not law based on whether it was in the government's interest to enforce it as such.[81] Such a construction of enforceability conflicts with "even the most impoverished notions of due process."[82]

The dissenting opinion agreed with the D.C. District Court and concluded that a rule does not have legal effect until publication, and therefore withdrawing a rule before it is published in the Federal Register is not a "repeal" requiring notice and comment.[83] The dissent began its analysis by citing the effective date provisions in the APA[84] and the

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 570–71; *see also* United States v. Ventura-Melendez, 321 F.3d 230, 233 (1st Cir. 2003) (affirming criminal conviction on the ground that defendant had actual notice of unpublished rule); United States v. Bowers, 920 F.2d 220, 222–23 (4th Cir. 1990); United States v. Mowat, 582 F.2d 1194, 1201–03 (9th Cir. 1978); United States v. Aarons, 310 F.2d 341, 348 (2nd Cir. 1962).

81. *Humane Soc'y*, 41 F.4th at 571.

82. *Id.* at 571.

83. *Id.* at 575–76 (Rao, J., dissenting).

84. 5 U.S.C. § 553(d) ("the required publication or service of a substantive rule shall be made not less than 30 days before its effective date").

CRA.[85] In its view, these provisions are evidence that the governing statutes "strongly suggest" finality at the point of publication.[86] The majority rejected this argument for two reasons: first, a requirement that certain rules be published thirty days before their effective date or that a rule may take effect sixty days after publication "if so published" says nothing about when those rules become rules; second, many rules are exempt from the APA's requirement that substantive rules be published thirty days before their effective date.[87] Therefore, publication cannot be the prerequisite for a rule to become effective.[88] To support this point, the court cited multiple examples of agency rules published after their effective dates.[89]

Next, the dissent concluded that the holding in *Kennecott* compelled a finding that repeal is triggered only after publication to the Federal Register. In *Kennecott*, the D.C. Circuit rejected a document that "*had not yet been published,*" and therefore "*never became a rule"* subject to repeal.[90] The dissent took from this language that the *Kennecott* court did not contemplate public inspection as the point of rule finality.[91] The majority disagreed that the lack of contemplation was dispositive. Public inspection was not contemplated in *Kennecott* because the rule was withdrawn before it reached that point.[92] *Kennecott* merely held that documents submitted to the OFR are not final, and did not reach the question of whether rules filed for public inspection are.[93] Furthermore, what was controlling in *Kennecott* was not that the rule had not been published; what mattered was that an internal, confidential draft rule was not "available" to the public and thus could not be considered final.[94] The court did not need to overrule *Kennecott* or undermine the general understanding that a published rule is final in reaching its conclusion. The decision in the noted case is compatible with both principles.

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85. 5 U.S.C. § 801(a)(3) (stating that a major rule may take effect sixty days after the later of when Congress receives the required report or when "the rule is published in the Federal Register, if so published").

86. *Humane Soc'y*, 41 F.4th at 578.

87. *Id.* at 572.

88. *Id.*

89. *Id.* at 573.

90. *Id.* at 576–77.

91. *Id.* at 577.

92. *Id.*

93. *Id.* at 574.

94. *Id.* at 574–75; *see also* Kennecott Utah Copper Corp. v. U.S. Dep't of Interior, 88 F.3d 1191, 1206 (D.C. Cir. 1996).

Finally, the dissent made policy arguments of judicial burden and historical practice to support its conclusion. The dissent saw publication as a bright line, whereas the reliance on "notice" could lead to confusion, increased litigation, and unclear remedies.[95] Additionally, the dissent claimed that the majority's decision undermines political accountability because it interferes with the current president's authority to control the regulatory agenda of his administration.[96] The majority responded to these concerns by first emphasizing the limits of the decision.[97] Most relevant here, the court declined to decide whether APA procedures attach to rules not yet filed for public inspection but enforceable against those with actual notice.[98] Next, the court clarified that the remedy in this case is like any other in which an agency repeals a rule without notice and comment and a court holds that it was wrong to do so.[99] And as far as logistical difficulties and political agendas go, the majority was clear: these considerations do not relieve agencies of their procedural obligations.[100] The government must follow the law."[101]

IV. Analysis

The noted case answers a fundamental question in administrative law: when does an agency rule become final? The D.C. Circuit answers definitively that a rule becomes final when the OFR files the document for public inspection.[102] By so concluding, the court attached the procedural requirements associated with repeal at an earlier point in the rulemaking process than previously assumed. In most instances, the practical effect of this distinction is inconsequential.[103] The "point of no return" adopted by the majority is only one business day earlier than the point advocated for by the dissent. Furthermore, the limitations of the holding and of *Kennecott* leave the overall rulemaking process virtually untouched by the D.C. Circuit's decision.

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95. *Humane Soc'y*, 41 F.4th at 584 (Rao, J., dissenting).
96. *Id*. at 585.
97. *Id.* at 575.
98. *Id.*
99. *Id*. at 585.
100. *Id*. at 575.
101. *Id*.
102. *Id*.
103. See 1 C.F.R. § 17.2(c); see also When is this Document Going to Publish?, Federal Register: Blog, (last visited Apr. 15, 2023), https://www.federalregister.gov/reader-aids/office-of-the-federal-register-blog/2015/02/when-is-this-document-going-to-publish (explaining that the typical publication timeline is "3 business days").

However, as the noted case demonstrates, the distinction has real consequences whenever there is a change in administration. The Trump Administration withdrew forty-two public inspection documents.[104] One of them was the rule at issue in this case: a rule that sought to end an abusive practice, that suffered from nearly fifty years of ineffective enforcement, and went through decades of studies, reporting, hearings, and comments, to ultimately reach a final rule that complied with all procedural requirements. And yet, in less than twelve hours, the president was able to "undo all that [the public] had accomplished through its rulemaking."[105] Until this case, this kind of executive policymaking had been virtually unconstrained by the law.[106] Extending the midnight rulemaking period, even by just a few days, minimizes the control the incoming administration has over rules filed for public inspection.[107] The holding blocked future presidents from using withdrawal orders and therefore made it more difficult for newly inaugurated presidents to undo the regulatory agenda of the previous administration.[108]

But beyond merely influencing political agendas, the noted case sends an important message on the limits of presidential authority. In a balanced system of government, Congress creates expert agencies tasked with creating rules. Those agencies wield legislative power but are limited, importantly, by the boundaries set by Congress in statute and by the notice and comment procedures set forth in the APA. Far-reaching, unconstrained use of "rollback tools" threaten this system by transforming rulemaking from a reviewable, bounded exercise of delegated power into a discretionary, political act.[109] The D.C. Circuit was able to seize a rare opportunity to apply judicial review to executive policymaking and end this decades-old virtually unchallenged "political act."[110]

That being said, the limitations of the holding leave much of the rulemaking process intact. The court declined to decide whether APA

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104. Mark Febrizio, *Quantifying the Effects of Humane Society v. Department of Agriculture*, YALE J. ON REGULATION (Oct. 8, 2022), https://www.yalejreg.com/nc/quantifying-the-effects-of-humane-society-v-department-of-agriculture-by-mark-febrizio/.

105. Consumer Energy Council of Am. v. Fed. Energy Regul. Comm'n, 673 F.3d 425, 446 (D.C. Cir. 1982).

106. Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353, 356 (2021).

107. Mark Febrizio, *Court Decision Extends the Period for Issuing Midnight Rules*, GW REGULATORY STUDIES CTR. (Aug. 11, 2022), https://regulatorystudies.columbian.gwu.edu/court-decision-extends-period-issuing-midnight-rules.

108. Febrizio, *supra* note 104.

109. Sanford, *supra* note 43, at 804.

110. *Id.* at 791.

procedures attach to rules not yet filed for public inspection but enforceable against those with actual notice.[111] The concept of actual notice *justified* the holding that the filing date is the critical date. However, the general concept of notice does not, according to this court, *on its own* exist as the governing legal standard for determining whether a rule is final.[112] Rather, it is the regulatory step that controls.[113]

For example, in the noted case, the USDA posted a press release on its website announcing the impending rule on January 11, 2017.[114] On January 19, 2017, it was filed for public inspection.[115] The press release arguably gave the regulated community actual notice of the rule, but the press release did not render the proposed rule final, because it had not been filed for public inspection. The President therefore could have, under the holding in this case, withdrawn the rule without notice and comment on January 12 but not on January 20. Contrary to the dissent's concerns over ambiguity, the majority did not eschew a bright line in deciding that finality occurs at public inspection, nor did it impose greater restrictions than the APA commands. Rather, the court merely concluded that the line exists at an earlier regulatory point than publication.

The application of the holding is further limited by *Kennecott*. The *Kennecott* court concluded that a rule submitted to the OFR and held for confidential processing but not yet filed for public inspection is *not* final and *can* be withdrawn without notice and comment.[116] The noted case concluded that a rule filed for public inspection *is* final and *cannot* be withdrawn without notice and comment.[117] There are no steps in between, leaving no room for ambiguity.[118] Together, these cases thus set forth clear boundaries governing when repeal procedures are triggered.

Concededly, *Kennecott* recognized that there are valid reasons for allowing agencies to withdraw rules easily: permitting agencies to correct mistakes until "virtually the last minute before public release" helps "assure that regulations appearing in the Federal Register are as correct as

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111. Humane Soc'y of the U.S. v. U.S. Dep't Agric., 41 F.4th 564, 575 (D.C. Cir. 2022).

112. *Id.* ("Because a rule made available for public inspection prescribes law with legal consequences for regulated parties, the APA requires the agency to undertake notice and comment before repealing it").

113. *Id.*

114. *Id.* at 567.

115. *Id.*

116. Kennecott Utah Copper Corp. v. U.S. Dep't of Interior, 88 F.3d 1191, 1201, 1208 (D.C. Cir. 1996).

117. *Humane Soc'y*, 41 F.4th at 575.

118. *See* 1 C.F.R. §§ 17.1–17.2 ("Upon receipt, each document shall be held for confidential processing until it is filed for public inspection.").

possible in both form and substance."[119] *Kennecott* was trying to avoid the "needless expense and effort" of amending regulations through the public comment process.[120]

Once "released" to the public, however, administrative ease gives way to agencies' procedural obligations. Even so, the value *Kennecott* placed on efficiency is not absent from the decision in the noted case. The rulemaking process is not short. It takes on average over three years to publish a rule.[121] The most generous reading of this timeline suggests that single-term presidents will only manage one major regulatory cycle.[122] Certainly, if "needless expense and effort" was what *Kennecott* was trying to avoid, that value is not served where incoming presidents have the authority to, at the point a rule is one day away from becoming effective and after years of processing at considerable cost, pull the plug with no input from the public. It should be hard to undo regulation properly promulgated.[123] The holding in the noted case is consistent with this value.

V. CONCLUSION

The noted case conclusively answered a long-standing question in administrative law: when does a rule becomes final? The court relied on a plain reading of the governing statutes and regulations to ultimately conclude that rules filed for public inspection are final and require notice and comment procedures to be repealed. This outcome is consistent with the applicable body of caselaw, is supported by contemporaneous documentation, does not raise *stare decisis* concerns, and promotes a spirit of efficiency in the rulemaking process. Most importantly, the court upheld the values of public participation and fairness which underlie the notice-and-comment requirement. The effect of the decision is likely to have little impact on rulemaking in most contexts, with one exception: presidential transitions.

Until now, incoming presidents have taken advantage of the ambiguity surrounding rule finality, issuing sweeping executive orders to undo the previous administration's regulatory agenda. Despite bypassing notice and comment procedures, such orders have been unchallenged in the courts. Incoming presidents faced with Congressional gridlock are

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119. *Kennecott*, 88 F.3d at 1206.

120. *Id.*

121. O'Connell, *supra* note 46.

122. *Id.*

123. *See* Yale-New Haven Hosp. v. Leavitt, 470 F.3d 71, 80 (2d Cir. 2006) (stating that "an agency is free to change course . . . But such a flip-flop must be accompanied by a reasoned explanation of why the new rule effectuates the statute as well as or better than the old rule").

relying more heavily than ever on these orders. By the sheer numbers, the Trump Administration withdrew more regulations than any other recent administration. Reports show that President Trump withdrew 469 rules as compared to 156 by President Obama and 181 by President G.W. Bush.[124] The noted case demonstrated that this power is not limitless by foreclosing withdrawal orders as an available "rollback tool." But withdrawal orders are not the only way newly inaugurated presidents can block midnight rules. The noted case left intact other "rollback tools," including most notably the President's power to suspend the effective dates of newly published rules. Whether suspension orders and other delay tactics will continue as a permissible extension of executive power is an open question. It remains to be seen whether the noted case will trigger broader review or future litigation on other executive policymaking practices during presidential transitions.

The noted case cast a spotlight on a previously unchecked display of presidential power. It is now up to future courts—or Congress—to pick up the baton handed off by the noted case to ensure that the people have a say in the rules that affect their rights.

Charlotte Phillips*

124. Claire Krebs, *The Trump Administration's Hasty Environmental Rollbacks*, 48 TEX. ENV'T L. J. 313, 314–15 (2018).

* © 2023 Charlotte Phillips. J.D. Candidate 2024, Tulane University Law School; M.S. Childhood Education 2016, Touro College; B.S. Psychology 2015, Lafayette College. The author would like to thank Professor Adam Babich for his guidance and feedback. The author would also like to thank the *Tulane Environmental Law Journal* editors for their support throughout the writing and editing process.