

# CONVERSATIONS

WITH BILL KRISTOL

## Conversations with Bill Kristol

**Guests:** Chris DeMuth, Hudson Institute; Adam White, Hoover Institute

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### **I: (0:15 – 32:38) Our Out-of-Control Bureaucracies**

KRISTOL: Hi I'm Bill Kristol, welcome back to CONVERSATIONS. I'm very pleased to be joined today by two good friends, Chris DeMuth, who served in the Reagan administration, as head of the American Enterprise Institute for a couple of decades, and now a Distinguished Fellow at the Hudson Institute. And Adam White, who didn't serve in the Reagan administration. What, were you in elementary school? He was in elementary school during the Reagan administration. But is also a lawyer; two lawyers here. This is the first time we've ever done that on CONVERSATIONS. It's a problem, right? You're not a Distinguished Fellow?

WHITE: Not yet. Research Fellow.

KRISTOL: Research Fellow at the Hoover Institution, here, in Washington. Two of our leading students and writers on questions of administrative law, the administrative state, the constitutional separation of powers, etc. I thought we would all learn a lot from you today by asking you about that big range of topics.

Donald Trump says Washington is broken, the system is broken. Is it? Is it, and what is the real way in which it's broken, as opposed to very superficial problems? Chris?

DEMUTH: I think he's essentially correct. The system is broken if we think of our constitutional system of Congress writing the laws, making policy, and the executive branch executing the laws.

In recent [years], over many decades, essentially since the 1970s, Congress has delegated more and more effectively law-making power to the executive branch. We now have a Washington establishment where most of the laws that people live under are made by the executive bureaucracy, and the making of the laws is – it's essentially unconstrained. It doesn't face the sorts of constraints that you have in the Congress, where you have to negotiate with many, many different views and come up with some sort of reasonable balance.

We have hundreds and hundreds of highly specialized agencies, and they face few constraints, not only of politics but of others kinds. They're free of many of what we would, most citizens think of as "rule of law" values. If people believe that their rights are being abused by an agency, they have to go before a tribunal that is setup by the agency itself. So that the enforcement officer will be in one office, and the

judge – administrative law judge – is the in next office in the same agency. I'm speaking metaphorically, of course. So you tend to lose –

KRISTOL: But not metaphorically in the sense that this is literally correct: that if you appeal, I don't know, if you don't like an EPA decision, you can *ultimately* get to federal court, I suppose.

DEMUTH: Ultimately, but the courts are very deferential to what happens at the administrative level.

KRISTOL: Most of the people you're appealing to are a part of the same bureaucracy.

DEMUTH: The rules that the agencies lay down are also unconstrained by the usual mechanisms of public finance. Where the government acts, it has to raise taxes., Congress appropriates funds. There are budget constraints. There's lots and lots of people in the agencies that are doing good deeds that are faced with a budget constraint, the way most of us are in our personal lives or business lives.

But the regulatory agencies, now, issue rules that may have hundreds of millions of dollars of costs. No taxation, no budgets, no appropriation controls, it's just an edict.

So we have a situation where there is an enormous concentration of power, in highly specialized agencies, that are doing things that, in general, most Americans are in favor of. Most Americans think that the federal government should look after the quality of the food supply, pharmaceutical drugs, air and water pollution. These are not highly controversial goals.

And the fact that the agencies are exercising all of this power in the name of goals that most people share makes it a highly intractable situation, and one that has produced, I think, a great deal of – I think there's more public appreciation of it because there have many conspicuous abuses of power during the Obama administration. And that sets the stage for what our new president, Donald Trump, will do to try – he clearly wants to reign in the process and reestablish rule of law values. He wants to get the economy going again. He sees overregulation as an important – has become an impediment on economic growth. So, it's one of the big challenges that he's going to be facing.

KRISTOL: And I guess, maybe this is too simple, but if you take the EPA – the Environmental Protection Agency – there is also a problem of agency capture? That's what they call it, I think? Where, "regulatory capture" or whatever – where you either get captured, I suppose, by the environmental activist groups who end up in a collusive effort, sometimes lawsuits, even, with the agency that forces the agency to do something it wants to do. And people go back and forth between the EPA and some environmental public interest group. Or I suppose, on the flipside, captured by industry – where some group or some agency is supposed to regulate oil and gas, gets captured by oil and gas.

But either way, you don't get the normal, I guess is the argument, legislative tradeoffs and deliberation that you would hope to have in Congress. Is that a fair way of –

DEMUTH: The idea of capture goes back to the old, New Deal agencies that were regulating the airlines, and the telephone "Ma Bell." The idea was that the big utilities and regulated companies were capturing the agencies. And there was a lot of truth to that. It's a little bit different in the case of NHTSA, [National Highway Traffic Safety Administration] the highway safety regulator, or the EPA, Environmental Protection Agency. If you went to Exxon Mobil and asked them, "Has EPA been captured?" They'd say, "Absolutely! The Sierra Club and Friends of Wildlife are in charge." If you go the Sierra Club, they'd say, "Exxon Mobil is running the game."

So in fact, the capture idea doesn't quite get you that far, but it's certainly the case that if you the Sierra Club and Exxon Mobil just sit down at a table and come up with some national plan, it's going to be something that favors the fundraising interests of the Sierra Club, or whatever organization, or large

incumbent industries. So, it's a problem in highly specialized law making, such as we have; but it's not quite as simple as –

I do think that EPA, in recent years, has become a national industrial planning organization, especially focused on the energy sector. It wasn't set up to regulate the energy grid, but it is doing that. The energy grid is going to be confined according to carbon dioxide emissions from power plants, and everything has to sort of bend to that imperative. That was nothing that any legislature that created the EPA, or created any of its statutes thought it would be doing. But EPA has just – over the last 8 years of an administration deeply committed to greenhouse gas controls, facing a Congress that, even when it was run by the Democrats, was unwilling to do anything – EPA has sort of been *converted* into an agency that is doing something very different from what its creators envisioned.

KRISTOL: From a textbook point of view, and I'll let Adam chime in here, but yeah, what's sort of disturbing, just in a very obvious way, is you would say, "Okay, what law got passed in 2009 or '10 that gave EPA these additional responsibilities and authorities?" And I think the answer is *none*. That's not healthy from the point of view of democratic accountability. Why does Congress yield all this power, Adam? Isn't ambition supposed to counteract ambition and all that kind of stuff?

WHITE: That's right, and that's the framework that Madison and Hamilton and the Framers expected, what they thought they had created. Each branch pushing its boundaries as firmly as possible. Instead, in recent decades, we've seen Congress hand over more and more power to the administrative state; the courts handing over more and more power to the administrative state. And at times, the executive branch is filling that vacuum, and at other times, the executive branch is ceding power to the administrative state.

KRISTOL: Or the political parts, you mean, of the executive branch are just letting the permanent bureaucracy go?

WHITE: That's right. The White House, while in some respects it oversees what the agencies do, and in other respects, it's perfectly happy to let the agencies go and do what they're going to do, take credit for the good things and disclaim responsibly for the bad.

I think, in some ways, we've reached a point where the modern administrative state has its own sort of gravitational pull on our politics. It is now such a big and heavy part of our government that it's deformed the rest of our politics.

Now, Congress knows, if a legislator knows if he's not going to get his way in his own house of Congress, he has the administrative state to backstop him. The president knows that if he doesn't get what he wants out of political process, he can fall back and let the agencies fill that vacuum. At some point – and I'm sure it was step by step – but at some point, the administrative state took on enough of a critical mass that, like I said, it now asserts its own gravitational pull on our politics.

KRISTOL: And how about Congress? It just seems to me that when people think – They think of the administrative state, and unelected bureaucrats doing things that no one thought they would do, and not much right to appeal, people also just look at Congress and say (and this is used in a partisan way by both parties, but I think it's a fair): they don't pass a budget; it's a continuing resolution. People may not know what that is exactly, but you know, it's as if you just Xerox last year's budget and extend it for 6 to 12 months.

There seem to be no actual legislation, no actual appropriations. The kinds of debates, when I came here in '85, you'd have on "Should we spend *this much* on this part of the Education Department or *that much*?" And there would actually be a debate about, "Well, is the money being well spent? Do they need more?" None of that seems to happen. I'm really amazed by the, maybe I'm wrong, but the degree of congressional breakdown. If I'm right, or whether or not I'm right, how did it happen?

DEMUTH: I think that's true. I agree. One has to be careful because, I mean, in the past year, Congress passed a considerable change in the No Child Left Behind statute [ESSA, the Every Student Succeeds Act]. It had become very unpopular, and they did come together. And you can disagree on the details, but it was traditional legislation. And there were Republicans, and there were Democrats, and people agreed and disagreed and they negotiated a compromise.

They passed a substantial reform to the way EPA regulates chemical substances [the Chemical Safety for the 21<sup>st</sup> Century Act]. That was also traditional legislation.

I think that, in part, because of criticisms of Congress's lassitude and increasing tendency to fob-off hard decisions to the executive branch, they have kind of been coming back to the table. But it is still a considerable problem, and there are two parts to it.

One, members of the House and Senate have learned that they can vote bravely for "clean air," or in opposition to "discrimination against the handicapped," or for "sound finance," and then take credit for that. They haven't really made any decisions. Where they're forced to make decisions, they tend to be statues that face squarely in a lot of different directions so that the discretion goes to the executive branch.

Another larger problem, in my view, is that Congress is faced with so many demands to do so much. It's just fundamentally different from the era going all the way up through the '60s, including the New Deal, when the number of issues on the national agenda were very small compared to what they are today. And when members of Congress are just getting dozens and dozens of demands that the federal government do this, that, and the other thing, what they've learned is, "We don't have time for all this; so, when an issue comes up, we'll just set up an agency to deal with it. We'll just kind of turn it over to the agency."

So they've become in Congress more of a – they're sort of founders of special-purpose, little, unilateral governments around the executive branch. I think that's the ultimate reason for the problems we have, growth of specialized, unaccountable executive government.

There are many things I believe that President Trump can do just as president and the person preceding over this vast empire. But ultimately, it's going to require Congress to become a more responsible legislature. Without that, the courts, the White House and the president's political staff are not going to be able to make more than marginal changes.

KRISTOL: I want to come back to that, but just on the Congress thing, isn't the budget process – which was reformed in a way that a lot of people thought was promising, more rational, more forcing tradeoffs and all that – seems to me now, kind of just nuts. There's never, maybe a budget is nominally passed, maybe some appropriations bills are passed; they're not really conferenced, and they don't become law, usually. And then you're 5 days before the end of the fiscal year and you'd have a government shutdown, or 5 days a debt limit increase, and then you have some frantic, all-night negotiation and basically pass something either that's not been deliberated on by *anyone*, really, or is a Xerox of last year's budget. It's sort of the opposite of what was intended, no? That just seems really broken. I mean you were there, at the Office of Management and Budget (OMB). Is this an unintended consequence? Has reform gone awry?

DEMUTH: I think it is a reform gone awry. If you trace back the history to the early 1970s when Congress passed this budget reform process, it was a time when the old bull of powerful autocrats that used to run the appropriations committees, and other committees, were losing a lot of their power. Congress was becoming more democratic. And what Congress tried to do was to substitute abstract rationality for incarnate power.

I mean, it used to be that so-and-so who was chairman of this committee and that committee and had some responsibility for keeping control over government expenditures. And those guys, they were all guys in those days, they loved to stand up to the president – of their own party, especially. It was not a highly partisan relationship in those days. But they lost power, for complicated reasons. Part of it was that they were all Dixiecrats, and after the civil rights revolution of the '60s, they were in eclipse. Part of it was just the more democratic ethos that has been part of all of our politics for the past 20 or 30 years.

So they passed this law, and it had all of these kind of rules: that in February, the president submits a budget proposal; in March and April, the Congress passes a concurrent resolution – not a law, just a resolution of both houses – setting overall budget totals; and then those go to the appropriations committees.

But nobody had any particular incentives to follow these procedures. They lasted for a while, but they've fallen into utter disuse in recent decades. And we have these ridiculous continuing resolutions in September, as the new fiscal year looms, where the committees have lost a lot of their control.

And it's not just a matter of losing control of the budget process and increasing deficits. Congress used to use the appropriations process to keep a pretty good watch over what *their* agencies were doing.

You worked in the Reagan administration, I worked in the Reagan administration, appropriations riders constrained me. I had these campaigns I was on, on behalf of the public good, and Congress would come in with a rider and say the office that I was running in OMB "cannot spend any appropriated funds on this, that, and the other thing." I'm sure you saw the same things in the Education Department. So, we had to move on to doing some other mischief because Congress had taken us out of particular battles.

It infuriated me, but it was a way that the generalist – sometimes special interest – but Congress itself could say, "the agencies are going to extremes here, there, and the other place," or "they're doing something that is not in accord with popular sentiment right now." I don't want to paint too rosy a picture of it, because sometimes special interest would capture Congress. But at least there was this competition between the two branches, that has essentially gone away.

KRISTOL: Yeah, well there was log-rolling, and ear marks, and all kinds of stuff in the bad days – the good ol' days, it wasn't necessarily good ol', perfect governance.

But I remember being in the Education Department, I was Bill Bennett's Chief of Staff, and we were committed to cutting most of the – Originally, Bennett and President Reagan, of course, were committed to getting rid of the Education Department, that was Reagan's first education secretary. By '85, that was hopeless; so we were committed to cutting programs. And we had real studies that showed that this part of the department did no good, and other parts you actually could spend more money in.

I remember when I was new to Washington, and going with Secretary Bennett to see the chairman of our appropriations committee, or I guess it would be sub-committee of the full appropriations committee, the education appropriations sub-committee, in the House, William Natcher. Remember him? Of Tennessee or Kentucky, something like that. Very courtly, southern gentleman. I had never really heard of him; he wasn't a famous congressman or anything. But this was his bailiwick, and he had strong views. Whether they were based on personal idiosyncrasies or his own staff's study of the issue, or his particular judgements, or lobbying because he had a cousin who liked vocational education.

I just remember – I don't know what part of the department it was, but we said, Bill said, "Mr. Chairman, I think we can really save money here by cutting this, and cutting that," and we had a long presentation, and here's a booklet of all the stuff. I'm sure we had worked with OMB, your agency, on making the case for all this. And Natcher [said], "Mr. Secretary, we'll give you a *good* budget."

“Thank you. Well, what does that mean?”

“We know what we’re doing, we’ve been appropriating for the Education Department for a long time.” And sure enough, they totally ignored all of our studies about how they were spending too much on vocational education. Bill Natcher and his ranking Republican, they believed in vocational education, and they were going to appropriate money for it. It wasn’t a model, I suppose, of enlightened policy making, perhaps, but they were accountable, elected officials.

DEMUTH: So, he was more in favor of vocational education than you were?

KRISTOL: I don’t remember if that was the particular case.

DEMUTH: I think I’m on his side.

KRISTOL: Yeah, no, I know; we were probably wrong. But at least they did have – the bills had to go through Congress, and others had to vote on it so there was an actual chance to appeal and say, “wait a second,” which, really, you don’t have in the modern administrative state, I guess.

WHITE: At least the power of the purse was a tool that Congress could use. I mean, after Congress legislates, the only tools they really have to enforce things through oversight is the power of the purse and the appointments process, the appointments power. And this new sort of world of budgetary brinksmanship just takes the entire appropriations power really away from Congress. The battlefield is totally stacked in favor of the executive branch, at that point.

So, there’s not a whole lot that Congress can do through the power of the purse to enforce its will on the agencies; it really gives that all way.

And among the many problems of the current budget process is the fact that it really doesn’t align with Congress’s interests in reigning in the administrative state anymore.

KRISTOL: I hadn’t really thought about that. So it’s a negotiation between the leadership and the White House, and the fact that you could, in the old days, use a particular education appropriation bill to make sure this did or didn’t happen, tends to go away in that, or there’s no discussion of it, anyway. It gets stuck in or it doesn’t get stuck in, I guess.

WHITE: And there’s downsides to that. I mean, when you have every little committee or sub-committee with its own purse, then nobody is really responsible for the sum total of cost of spending. But by taking it totally away from the committees that are overseeing the agencies, all that goes away.

KRISTOL: And incidentally, that was the argument for the budget reform. Of course, it’s not as if the budget deficit has gone down under the modern system. So, the claim that this was going to control spending and be more responsible seems a little dubious, as well.

What else about these sort of modern – before we get to the remedies, which you all are going to lay out for the Trump administration and beyond; and for Congress, too, and the courts, I suppose. What other characteristics should people know of this “being” that we’re talking about: the modern administrative state. What are the other – ?

WHITE: I mean, there’s a few, but one – we were speaking earlier about capture. Another capture that I think we should worry about is capture of the agency, or the agency’s leadership, or its agenda by the bureaucrats. You have this giant force of employees inside of an agency that can tend to just sort of take things over. They create inertia.

The EPA is perfect example, actually. Whether under a Republican president or a Democrat, the folks inside the EPA know basically what they want to do. My favorite example, of recent memory, had to do with climate change. In the last Bush administration, the Bush EPA's position is, "We don't have authority to regulate greenhouse gas emissions." And some states and environmental activists sued, and it went all the ways to Supreme Court, and the Bush Administration lost.

And one of the EPA officials from that era, she wrote a memoir recently, and she describes the scene on the day the EPA lost. The EPA employees threw a party, and popped champagne to celebrate the fact that their agency had lost and now would have this power and this duty to regulate greenhouse gas emissions. And so, even though the elected leadership and the appointed leaders of the agency were against this, the bureaucracy had its *own* agenda and celebrated the loss of their agency when it gave them more power.

And that's a kind of capture that I think is very important to keep an eye on. And it's difficult, because even when you change from a Democratic president to a Republican, or vice versa, you don't just show up and fire everybody. The leaders change, but the, most of the agency stays the same, and that's a constant struggle trying to turn the agency toward the new agenda.

KRISTOL: Which is one reason, I suppose, that one should be wary of such big, sprawling government in the first place. Almost by definition, you're not going to control – as Chris was saying – a government that does so many things. I remember this today, even in education – which was small department when I was there – there was an awful lot going on. And I was no expert, and Bill Bennet was no expert, and how do you know if they're doing the right thing in some parts of the higher ed student loan process or not? And by the time you figure it out, you're out, and they're still there, you know.

WHITE: One other great example I love, it's in my colleague Niall Ferguson's new book, his biography of Kissinger. There's just this anecdote, it's funny though, Arthur Schlesinger and the Kennedy administration is complaining, just a couple years into the administration – he says, "So much for the new frontier." The new frontiersmen couldn't push pass all the bureaucrats; even Kennedy, and the energy of the Kennedy administration gets bogged down by the bureaucrats.

KRISTOL: Chris?

DEMUTH: One thing that I would add: If you've been in Washington as long as we have, one gets used to something that is very disturbing, that I think most people outside of occasional victims in the country do not understand, and that is the frequency of very serious abuse of individuals and business firms by the bureaucracy.

Now, there are many good, very well-meaning people that work at EPA, and the FDA, and the FCC, but the amount of discretionary power they have, and combined with their zealous belief in the importance of what they are doing, leads them – as a routine matter, not as an exceptional matter – to engage in abuses that I think would shock many people.

Twice during the Obama administration – once EPA, once the Army Corps of Engineers under the Clean Water Act – essentially just kind of squished a couple of innocent land owners, and effectively denied the many hearings on the loss of their property rights that went up to the Supreme Court. We hear about all the divisions on the Supreme Court, these were decided *unanimously* against the agencies.

When I was at AEI, American Enterprise Institute, there was a businessman coming to town, didn't know Washington too well, and he was engaged in a merger transaction that the Federal Communications Commission had authority over, because they had to transfer some licenses, for spectrum licenses. He came into my office, and he after this meeting at the FCC, and he was just ashen faced. He looked like Kurtz. He'd sat down with the commissioner, who gave him a list of things that he should do. I think one was to fund a park in a town in some congressman's district. To agree to comply with certain FCC rules

that did not have any formal, legal status. And he thought he was there to talk about the *merits* of this merger, and they didn't want to talk about the merits – they just wanted to talk about – it was a shake down, frankly. And people in Washington are used to this. It's a very bad state of affairs.

You look at really powerful agencies such as those two, the Food and Drug Administration, and people that operate in these agencies see this sort of thing all the time. And I don't want it to lose its ability to shock.

KRISTOL: That's a good point. When I joined the board of a set of mutual funds – and I'm probably going to say here more than I should; I mean, there's no scandal or anything – but I was struck, they would always report each quarter on what the SEC was up to. It's a well-run company and funds, and there were no issues most of the time, but I was always struck at the beginning, it really shocked me – this was a long time ago – there wouldn't just be, "Well, this new legislation has passed, and therefore we may have to adjust X, Y, Z in our practices and our meetings," etc. It wasn't even, "Well, there's a new rule that's out for notice and comment," is that what it's called? And, "Therefore, if this becomes an established rule in the federal register, we'll have to, we should adjust this or that."

It was, "Well, there's someone who works at the SEC who came in for a review and seems to have kind of a view" – and it wasn't, again, a necessarily foolish view – "that things probably should be run a little more this way, because they kind of think the mutual fund boards aren't quite doing enough here, and maybe they should be doing more there. And we probably should accommodate that and take account of it." I had no idea the merits – it could well be right – but this is how the government now works and how businesses adjust to and work with government? And that's not, really, what one's image of the rule of law and limited government is. That it's kind of a negotiation between a general counsel of a business and a –

And then of course, if things get a little dicey, then you call your Senator and then there's pressure, and again, that's traditional in a way, but none of it is public, none of it is legislation, none of it is deliberation; it's all string pulling, I guess.

WHITE: I think that's key to the current moment, the current debates we're having. Even within the traditional administrative state, we have this vision that they make rules, or they make adjudications. The agency *does* something specific that people have to react to.

But now – especially the agencies that have this all-encompassing reach, like financial regulators, the FDA and others – the more difficult challenge is their sort of passive aggressive regulation. They're not passing a rule, they're not taking a final action, they're just suggesting something or they're issuing guidance.

Or as Chris illustrated, you come to them needing their approval on something and they'll say, "Well, sure – we'll approve this merger or grant this permit, but you need to do all these other things." And it's that aspect of administration that doesn't fit within the old categories of administrative law, and the reform debates now are really focused on how to bring that back within a legal framework where there's a rule of law and accountability, in a way that there just isn't right now.

KRISTOL: I suppose – maybe final point on the diagnosis, then we can get to the solutions. Am I right that this whole system – this is sort of what you hear from people – advantages the very big firms, the very well-connected ones who have a million lawyers they can hire and can stay on top of what this SEC person does or doesn't prefer, and it's the mid-level businessman from the Midwest, who doesn't have a permanent lobbyist in Washington, who suddenly is getting blindsided by something. Is that fair?

WHITE: Yeah. I remember, in the Romney/Obama presidential debates, Romney had a line – he said that "Dodd-Frank is the biggest kiss that Washington ever gave Wall Street." And at the time, there was some chortling about it, especially on the left – "Well, don't you know, of course, Dodd-Frank punishes



Wall Street?” But I think in the last 4 years, there is this awareness that Dodd-Frank and other statutes like that really do favor the big players over the small, that that really is part of the larger crony-capitalism problem.

My friend and old colleague Boyden Gray and I did a cover story for the *Standard* at one point on this, with a picture of the old sort of money-bag cartoon characters giving Obama shoulder rubs. And that was the image of Dodd-Frank, really – this combination of big government and the biggest business. I think Jamie Dimon of JP Morgan gave an interview where he said, “These financial regulations are the moat that keep the smaller competitors at bay and protect our interests.”

KRISTOL: So, it is more – then it gets kind of a European-style corporatist discussion with the regulatory state as opposed to a vigorous, bottom-up free market and all that.

DEMUTH: The European term is *syndicalism*.

KRISTOL: Yeah, I guess so. You should revive that term.

## **II: (32:38 – 1:13:08) What Is To Be Done?**

KRISTOL: So, all is not well in the administrative state, and that means that all is not well in our constitutional structure, and in congressional deliberation, and accountability, and so forth. So what is to be done? Let’s maybe just go through the three branches to start with. President Trump calls you in and says, “Okay, what are the big things I can do to really begin to fix this system?” Not just ‘Make America Great Again,’ but make the government functional and accountable again? Chris?

DEMUTH: I’d say that, first of all, there are some tremendously important things that involve process, legal rules, power relationships between the three branches that need to be done. Most of them are of no interest to the general public, or they’d be, you know, it just takes too much time.

A problem with regulation is that it’s rather arcane, and even individual rules – I mean, Ronald Reagan was the last, maybe the only president who could actually talk about an individual rule and make it interesting. They tend to be so intricate that it’s easier to talk about Medicare reform than it is about a single EPA rule.

So, if we’re talking to the president, we’re talking to a practicing politician and he’s taking over an executive branch, and there is a lot that needs to be done that doesn’t have a lot of political salience. I’ve got three ideas for President Trump that I’ll tell you about, but when he’s coming in, he’s got to think politically. He’s the new president. He has campaigned, in part, about Washington being broken. He’s got to show the public, and also show the Washington establishment who’s in charge. He has to do a couple of big and fairly bold things – these aren’t long-term, but they’re important to establish his credibility.

The first thing Ronald Reagan did, the first act when he got to the Oval Office, was to decontrol oil prices. It got a huge amount of attention; it showed that there was a new day here. It was in dramatic contrast to the Jimmy Carter energy, Goss plan kind of thing. I would think that President Trump would approve the Keystone Pipeline.

KRISTOL: Well, in Reagan’s case, they predicted, I believe, that this would lead to – by mainstream economist and so forth –

DEMUTH: Oh, no – the news that night says, “Ha-ha, this is going to be a catastrophe.”

KRISTOL: “Oil prices are going to skyrocket,” and we had basically 8 years of falling energy prices.

DEMUTH: It was complicated because it was still inflation and so forth, but it was a big success and nobody would question it.

KRISTOL: I forgot that was the actual first thing he did, deregulate oil. Oil and gas.

DEMUTH: And I think that President Trump could do some similarly important things. I think approving the Keystone Pipeline would be one. He wants to renegotiate with the Canadians. He can do that between now and January 20th, and just have a couple of dramatic things to be done.

I think that there are several Obama administration rules that – aside from the Clean Power Plan, which has been much talked about – that should be withdrawn on legal and constitutional grounds or on policy grounds. My list would include the net neutrality rules of the FCC. They have to be withdrawn quickly; they're already beginning to wreak havoc in internet, telecommunications markets.

The Labor Department rule that requires people that are selling retirement funds to be fiduciaries of their customers, a really highly perverse and damaging a rule. There's a lot of Democratic opposition as well as Republican opposition to it. These are rules that are final, and it will require some legal procedures to reevaluate them. But I think three or four, you know, big, important controversial rules that can be, where the reform can be pretty easily communicated. So I think he needs to do couple of big things.

On procedures, you've got to be careful; [in] that we're dealing with air pollution, and safe drugs. And whatever he does, it's going to say that he's going to be "promoting brain cancer in babies." I mean, there will be horror stories, and it will be wildly exaggerated. It will be crazy. But, one has to think of reforms that make a lot of sense for the long run, that can be [communicated], that people will understand that we're addressing bureaucratic abuses while retaining the protections that most people think are important.

So, for rule making, there has been a cost-benefit test, where agencies have to show that the benefits are worth the cost of their rules. It goes back to the Reagan administration, even a little bit to the Carter administration. But it has become weaker, and weaker, and weaker overtime. I think it needs to be seriously beefed up. Agencies have perfected ways of evading it through "guidance documents" and other sub-regulatory measures. There has to be an end to that.

The economic standards have to be taken seriously. They've been used almost as press-agentry by agencies saying, "We're saving billions and billions of dollars." But if you actually look at the data underlying, it it's silly. And the review office in OMB has got to be beefed up and really take charge of the rule-making process.

On legal procedures, he can take some steps on this. It would require legislation; I think it would be very popular. If a citizen of the United States has a legitimate beef with a regulatory agency, they get to take their complaint to an administrative law judge that *doesn't* work for the agency itself. Take all of the administrative law judges out of the FCC and the EPA and put them in a separate agency, and have them ride circuit the way judges used to do. So that they are generalist; they're not beholden to the agency. They're not quite as independent as Article 3, you know, judges under the Constitution, but they would have some *significant* independence. To kind of create honest, open forums for when people have complaints. I think that that would be very, very popular, and it doesn't say that the agencies can't, you know, protect the public health and welfare from unsafe products and so forth. It is just that where there is a dispute, it's handled by an independent person.

Third, I would like Congress to get more into the act. But there's something that a president can do to help revive and to bring Congress out of its legislative torpor, and that is to take this idea of the REINS Act [Regulations from the Executive in Need of Scrutiny Act], which was legislation passed by the House twice in recent years, that would say that major rules have to be submitted for approval before they can take – approval by the Congress – before they can take effect.

These were anti-Obama gestures – because the Senate wasn't going to pass them; the president certainly wasn't going to sign it. But the idea that for *major*, hundred-million-dollar, big decisions, Congress has to be in on the action and should kind of stand up and vote for or against the particular rules, not just the broad legislation, is a very good idea.

I don't know if Donald Trump talked about this during his campaign.

KRISTOL: He talked a lot about regulation in general.

DEMUTH: He's already put a couple of ideas in place, such as you've got to withdraw two rules for every new one. He's obviously thinking about it. But I think that where big rules are concerned, including some rules that *he* wants to do, he should submit them to Congress. Say, "I'm not going to send this to the federal register until we have a vote in both houses, and I ask you to please put this before your members, Mr. President of the Senate, and Speaker of the House, for a vote as promptly as possible."

And I think, in several areas – he wants a big infrastructure program. That's going to require reform of permitting, Davis-Bacon [Act]; if he actually wants to create jobs, it's not so much a matter of federal financing as taking a lot of the regulatory impediments out of the way. He could submit a package to reform all of these rules and say that, you know, this is an essential component of his infrastructure program, right? And he asks Congress to pass it in short order.

Some initiatives from the president, realizing that it's actually good for him to have Congress on record behind big, important, costly and controversial matters, could be, it'd be good for the constitutional order, and I think it would be good for President Trump, as well.

KRISTOL: That's very interesting. One other footnote on that – do you agree that, if he wants to pull the U.S. out of an executive agreement that President Obama has committed us to, I guess the Paris Accords on Climate Change, one way to do that, surely – He could, presumably, withdraw.

DEMUTH: He could withdraw it himself.

KRISTOL: But he could submit it to Congress, and say, "This is something of such seriousness that Congress should act on it. I recommend a negative action, but go ahead, Congress." Right?

DEMUTH: There are a lot of particulars from case to case.

KRISTOL: But you like that kind of idea?

DEMUTH: I like the general idea, and I've heard some very cogent arguments in favor of submitting the Paris Accord to the Congress. You know, President Obama did these things that should have been treaties, by executive order, so there's a certain justice to having the next president come in and [saying,] "Okay, I'm going to pull the plug on them." But on the other hand, taking the treaty power seriously would suggest, "Well, let's submit it to Congress and see what they think."

KRISTOL: Adam, what else?

WHITE: Well, within the executive branch, so much of what the agencies have done in the last eight or more years, it won't be fixed overnight. You know, Rome won't be unbuilt in a day. But there's a lot of things the president can do on day one and the days after that to get the ball rolling. He can issue executive orders directing agencies, individual agencies to begin the process of rolling back a particular rule. He can order all agencies, sort of across the board, to take a look at certain kinds of rules.

But if the president takes firm action through executive orders and really directs the agency heads to take specific actions, within the limits allowed by statutes, then that, I think, will add a certain energy to the agency heads, themselves, turning around and beginning the process of pulling back an old rule. If a rule was finalized through notice and comment rule-making, it has to be *undone* through notice and comment rule-making; so that process needs to begin.

But at the same time, there's a lot an agency can do, in terms of enforcement discretion, to stay its own hand while that process is going. Some of the most ruinous rules the last couple of years, like the Clean Power Plan, they've been frozen by the courts. The Supreme Court blocked the Clean Power Plan from going into effect while that litigation is pending. So, that rule is on ice right now, and it creates space for the next administration to begin undoing that. So, that's the first thing I think that President Trump can do to get the ball rolling.

As Chris said, he referred to OIRA [Office of Information and Regulatory Affairs] – the unit in OMB that oversees the agencies – I think it's important to take another look at that process, beef it up; it needs more people, it needs more funding, and it needs to rethink its basic framework to improve upon itself.

But last, there's a few other spots in the executive branch where the agencies, where multiple agencies come together. OIRA sits on top of all the executive agencies, and it should also reach the independent agencies, but in the White House, you have the Council on Environmental Quality –

KRISTOL: OIRA is a part of OMB, that Office of Management and Budget, which Chris ran OIRA back in the day. It's important, and probably one of the most powerful, least-known agencies in government.

WHITE: It's the most important, I think. But there is also the Council on Environmental Quality in the White House. There's the Domestic Policy Council. Over at the Treasury Department, they now oversee this thing called the Financial Stability Oversight Council, which is a multiagency board that makes some very important decisions.

And I think putting the right people in *those* roles, playing traffic cop for the agencies and making sure that they're all following in-line with the administration's overarching positions, I think those are the key positions. They get too little attention relative to the power they have.

KRISTOL: Do you agree, though, if you put someone in who agrees with the president's instincts and desires but isn't careful about how he runs it, isn't careful about the legal stuff, doesn't have good counsel, general counsel, dotting I's and crossing T's, that can blow up pretty badly? I think we have experience with that in other administrations where – The rhetoric of, you know, "with the stroke of the pen" and all that is a little – They should cool that a little, maybe.

There are some things they can do with a stroke of a pen, but some things will take time because of notice and comment. And other things, you want to just bend over backwards, I should think, if you're taking on all these interest groups – and the media is not going to like it, as Chris said, and they're going to exaggerate, make up problems – you want to be doing this in a very scrupulous way.

WHITE: That's right. It needs to be prudent, and it needs to be transparent.

The other one I should have added, it's very important at this point, is the Office of Legal Counsel in the Justice Department. The sort of in-house, constitutional think tank, or constitutional court inside the executive branch. That needs to be very well staffed and have very careful and prudent lawyers. Also, in the Solicitor General's office, for the same reason. Keeping an eye on what's happening and making sure it's all done lawfully and legitimately.

DEMUTH: I'm all for lawful, and careful, and prudent, but especially at the beginning of an administration, I'm particularly for *bold*. Bold but smart.

There are some very substantial problems; there are some very, very bad rules. There are a host of terrible rules that can be withdrawn, reformed.

And by careful, you don't want to think, oh, you know, it's kind of – sometimes being bold but making it clear that you are deeply committed to the ultimate purposes of the agency. This is not about stripping away air pollution protections, or permitting dangerous drugs into commerce. In fact, what the agencies are doing is often perverse and *counterproductive*, in terms of environmental quality, and safe drugs and products. What we're doing to do is we're going to eliminate the abuses, and we're going to do a much better job at achieving the ultimate objectives.

Because the ultimate objectives are perfectly consistent with economic growth, a healthy economy. The fact that regulation has gotten at loggerheads with ordinary people and businesses – big corporations, small corporations – it's not necessary. It's not necessary. Dodd-Frank has not made our financial system safer, and more competitive, and more attentive to the interests of consumers. That's the rhetoric in Washington, but it's actually been a highly perverse piece of legislation that has made things *worse*.

So you have to be smart. But I think that boldness at the beginning of an administration is a great virtue.

KRISTOL: That's a good point.

WHITE: In Dodd-Frank, and this is a great example, the Consumer Financial Protection Bureau (CFPB). Right? Conservatives, the Trump administration can't just concede that progressivism is the way you protect consumers. Right? In fact, as Chris said, in many ways the CFPB has worked at odds with real consumer protection; and so, having your own sort of philosophy of how best to achieve the ultimate ends for the agency is the right way to go. It's not the rhetoric of shutting down agencies, to use the old line, "it's more like mend it, don't end it."

KRISTOL: But I do think the example of Reagan, I'd sort of forgotten this myself, we all think of the tax cuts and drama of firing the air traffic controllers – which, actually, is not a bad model in some ways – Also, enforcing the rule of law where people thought you couldn't. But, yeah – the actual first action being the decontrol, I suppose –

DEMUTH: Well, there were the first actions that they were things that the president could do himself, and President Trump will also be able to do.

The second step, the new president doesn't have the initiative – Washington challenges the new guy. "We're going to show him who's in charge." And that is what PATCO [Professional Air Traffic Controllers Organization] tried to do with Reagan, and they really underestimated him; and when he crushed their illegal strike, everybody in Washington said, "Oh, this really *is* going to be different." And it really set the stage for everything that Reagan did afterwards.

President Trump, I don't know where it's coming from, but he is going to be, he's going to be challenged and he's going to have an opportunity to show his mettle at some point early on, and I hope that he and his people are thinking about that already.

KRISTOL: I wasn't in Washington in '81. You were already at OMB, is that right? At that point?

DEMUTH: I was not at OMB until later in the year.

KRISTOL: You were nearby?

DEMUTH: I was involved.

KRISTOL: Was it obvious? How clear was it at the time – I’m just curious? These things, after – they take on a life of their own, and then people say 30 years later, “Ohh, it was a big deal, part of winning the Cold War.” Wasn’t someone ridiculed for saying that this past year or two? Remember that? Somehow PATCO was a – Scott Walker. He was actually making a perfectly correct point, I think, that PATCO was sort of part of the dynamic that led the Soviet’s to say “Whoa, this guy’s a little different.” But I think he said it badly, I can’t remember anymore; it was like an issue for two days in the presidential campaign. I’m just curious, was it clear at the time that it was as big as deal as we now think it was?

DEMUTH: Yes.

KRISTOL: It was? It was a huge thing?

DEMUTH: Everybody in Washington thought that, although the strike was illegal, that it was not that different from many other things that public employee unions had done.

And it was about the safety of airplane travel. And I think most smart people in Washington thought that the new president would accommodate himself, that they would come up with some compromise. There were some people in the White House that thought that he should do that, and he would have absolutely none it. I think that there were also people that he was talking to that saw the opportunity to use this as an object lesson for the Washington establishment, and maybe for the people in Kremlin, also. They understood that there were high stakes.

But the idea that we’re going to fire all of the air traffic controllers that don’t show up for work *tomorrow morning*. We’re going to have no airplane travel for a year? Airline travel for a long time. They had contingency plans, and they were able – they got some retired people, they were able to move people in pretty quickly. Public opinion was on his side.

WHITE: One reason why I alluded to the Consumer Financial Protection Bureau is because I think it may end up being one of these flash points. You have an agency that was created by a Democratic Congress, with a Democratic president. It has some measure of statutory insulation from the White House, and its head Richard Cordray has a term that extends into the Trump administration.

And so you may see some pushback from that agency, both in the leadership and in the bureaucracy, pushing back against the Trump administration’s overarching policies. Especially when the Trump administration will surely want to get its financial regulators moving in the same direction on issues. You may see some explicit pushback; you may just see some foot dragging. But that might become a flash point where President Trump has to decide what to do with the leadership of that agency.

KRISTOL: That’s a favorite, that agency’s a favorite of Elizabeth Warren’s, I believe.

WHITE: That’s right. Although, she originally wanted some sort of dull, multimember, regulatory commission. She wanted it modeled on the Consumer Product Safety Commission. And by the end of the process, you had this sort of turbocharged agency not funded by Congress, not directly accountable to the president, it just sort of does whatever it wants.

KRISTOL: So what about Congress? Let’s go to Congress now. So Paul Ryan, Mitch McConnell, or for that matter, Chuck Schumer or Nancy Pelosi say, “Okay, we’re now interested in becoming the Congress that actually deliberates, and legislates, and holds the executive branch accountable.” What do they need to change?

DEMUTH: The early days, we know, are going to be dominated by Obamacare. In traditional regulation, I think Dodd-Frank is going to be the top priority.

So, there are going to be several big, statutory issues. And in both of those cases, the last couple of years, there have been some exceptionally good ideas for reform. So that, I think the people in Congress will – they've got some ideas, there [are] going to be some debates; they'll be able to pick up some Democratic votes, I think, on some of these matters, at least. So those are going to be the big matters.

This is not a Congress that's going to be a rubber stamp for the president of their own party that has a majority. Which has been the case in the latter George Bush administration and beginning of the Obama administration. At times, when we've had unified government, people have kind of gone along because the majority had "their guy" in the White House. The congressional Republicans, everybody's been making nice since the election, and they've been really impressed with how President Trump won. But there are some disagreements, there are some raw nerves.

I think that the prospect of Congress reinstituting a serious budget process is excellent. And they have to get started on that right away. That will make them sort of full; they'll be suited up. They'll be full players in a variety of areas.

Beyond that, people will have their own matters. I think that my two great priorities would be the Federal Communications Commission and regulation of the electromagnetic spectrum, and broadcasting, and the internet. It's a hugely important part of the economy. The FCC has become a real impediment to progress.

The Clean Air Act and the other environmental statutes are *decades* out of date – we've learned so much. If you just think about what would a serious national environmental program look like, it would be radically different from what we have.

And while there are things that the administration can do to move things in the right direction, it requires congressional participation because we have these very, very long, excruciatingly detailed, opaque statutes. Again, there have been programs in the past couple of years where large business corporations, and environmental groups, and academics, and think tankers have tried to think: If we were going to start all over, and we weren't going to just create opportunities for litigation and regulation but actually have a strong national environmental policy, what would that look like? That would my second priority, after the FCC.

So people have their views. We have a doctor who's going to be the Secretary of HHS [Department of Health and Human Services], and I would bet that he will be very acutely aware of the problems we have at the Food and Drug Administration (FDA) – which has fallen far behind actual progress in biomedical research, and pharmacological innovation, and the way things are tested. So that it is actually an impediment to great improvements in public health right now. I don't want to say it makes no contributions to public health, but on the whole, it is a problem. And a lot of doctors and biologists understand that. I'll bet that he'll make, I bet that he'll make a big priority of FDA reform.

KRISTOL: On that issue – which I know nothing about – but I have heard this argument, which seems very compelling, that would make it publicly hard for people to say, critics to successfully carry the day with, "Oh, this is endangering everyone."

What is the one disease that everyone thought, really, would be ghastly and, you know, have horrible effects, not just for years but for decades, in the last 25 or 30 years? AIDS, I would say. I mean, people forget now, but you know, it was killing a lot of people, and then, people thought it's going to keep on killing a ton of people. And that was the drugs that, really, handled it.

DEMUTH: Made a huge difference.

KRISTOL: Huge difference. I believe I'm right. You know more about this, the both of you, than I do, but basically, they just waived all the normal FDA double-blind tests, and endless paperwork and stuff, because there was a very big lobby on this disease, which did think that there were possible cures.

DEMUTH: Concentrated lobby.

KRISTOL: There was a concentrated lobby, but a powerful concentrated lobby. That felt – because of, I think, good conversations with medical professionals, and people in the drug industry and so forth – that you really could make progress. Basically, they made huge progress against the disease by precisely going outside the normal FDA system. That doesn't mean you should always go outside of it, but it does sort of suggest that there's something a little messed up if the disease we've had one of the most successful efforts against is the one that precisely *didn't* go through the FDA process. That would be a good argument, I think.

DEMUTH: I think cancer, we're on the way. Alzheimer's, we're still stuck. Let's take Alzheimer's as seriously.

KRISTOL: How much damage could it do, right? I mean, obviously, I don't mean to be hard-hearted here or something like that, but it's like with AIDs, too, you know – people are dying. If the FDA, if waiving the FDA process leads to a couple of bad drugs getting through, at the end of the day, people have very bad prospects anyway. It's not like you're endangering people who are otherwise healthy. You can make the same argument with Alzheimer's, taking some more risk would make sense.

DEMUTH: Yes, we should take more risks in Alzheimer's. But AIDS did have the "advantage" – it's kind of a bad advantage – that people in the state we were in 20 years ago, people were going to die anyway. So that taking a very risky drug that might be ineffective or might even be harmful, the people that were dying of AIDS said, "Let me have it."

Alzheimer's is a little bit different, but there are many cases [where] we're facing this, and there are a lot of very serious cancers now, where you're kind of in an end stage of one sort or another, where the agency should not be standing in the way of patients taking drugs that they're highly informed about. They've made a study of it, and they want to take those risks, and their prospects are very bleak.

That will be an area, as I was saying before, an area where you can make reforms that people who really care about the government doing a good job, and ensuring safe food products and so forth, people will understand what that kind of reform is for.

WHITE: I was going to say, the FDA is an important case, but I think it's one of several that share an important characteristic. It's areas where the default rule is you can't do anything until the government says you can, right? The FDA, permitting for big energy infrastructure projects or other things, it's not an area where you're doing what you're doing until the government says, "Stop." It's where the government says, "You can't do anything until we say go." And when you have risk aversion on the side of the government, and inertia and all of that weighing, those are the areas that might be in most need of immediate reform.

DEMUTH: I think that's true.

KRISTOL: And easier because it's sort of contrary to the normal premise of a liberal society, that people are free to do as they wish *absent* a statute barring it.



DEMUTH: You have to get Washington permission to do something that's pretty straightforward and almost always beneficial.

KRISTOL: And if it's not, it's not as if there aren't legal remedies available for the federal and state government, or neighbors who have something damaged. I mean, it's not as if you're freeing up businesses to pollute and stuff. They still can be punished for it or be forced to clean it up.

DEMUTH: Very wealthy societies become more risk adverse, so you want to focus on cases such as very grave diseases where the FDA is not permitting people to take [medicines], you want to start there.

But "Mother, may I?" regulation is not uniformly unpopular. You know, you ask a lot of people and they say, "Well, the people in Washington should give permission for this."

The great economist Tom Schelling, Noble Prize Winner – Do you know what the precautionary principle is? Which has a real statutory basis in Europe. You have to be very cautious for anything that is new. Tom Schelling describes the precautionary principle as "never do anything for the first time."

That idea actually does imbue a lot of the regulatory agencies. And it's being extended beyond health and safety to the FCC now, under its net neutrality rules. You can come up with a new pricing scheme for some aspects of offering internet service, and there's no rule about – the rules are very vague about what you can and can't do except for one thing – you just have to go in and see the commission, and they'll tell you whether it's ok.

WHITE: And fixing this, it often doesn't even require radical change. It's not about opening flood gates or something, it's just about sort of flipping presumptions. Right? A presumption in favor of action versus a presumption against it. Let the agency justify stopping something rather than putting the burden on the public to convince the agency in the other direction.

KRISTOL: And it does seem as if most technological process – again, an argument someone could use – has happened in the areas that are least regulated, where there isn't a precautionary principle. Now, you could say that the internet and, you know, iPhones, and Gmail, and Facebook, and Twitter are not things that ever endanger. There was no reason to have a precautionary principle because you're not polluting anything, or harming anyone's health.

But still, it is striking that that area of the economy – which, I guess, basically grew up outside of traditional regulatory structures, really – it was pretty unchecked right? When they introduce a new iPhone, do they really have to go to anyone to get permission to do it? Not much. I guess they have to prove to someone that it's not going to blow up, you know, and that's about it.

DEMUTH: There have been a couple of tangential issues but not many. That's one reason to focus on them. There's an enormous amount that can be done. But in a very wealthy society, where people take health, safety, things very seriously, there is this difficulty with –

Innovation comes largely from failure. It's not that somebody has a great idea. It's you do something and it doesn't work, you do something else and it doesn't work. If you look at the fracking revolution, if you look at the internet revolution – there was a lot of that going on. It's also true in medical research. It's just, it is a problem; it would be nice if there was a more widespread appreciation of the importance of failure. Trial and error for progress in important areas, such as Alzheimer's, so that we could have a faster rate of experimentation than we have right now. That's just a deep, underlying problem.

If President Trump is successful in curing 50 percent of the problems of the regulatory state, then we'll be dealing with those deeper, underlying issues. But there is so much to be done before we get to them.

KRISTOL: So low-hanging fruit. In a sense, things that can be done that will pretty quickly have results is what you're saying.

DEMUTH: And that virtually everybody outside of the agencies and their "stakeholder groups" could understand pretty quickly and easily why this would be a step forward.

WHITE: You asked at the beginning, "What can Congress do?" I mean, we've already mentioned the budget process, and oversight, and appointments. But just in terms of legislation, I think if you step back, there are three basic types of legislation that are needed, and they're all important.

The first, which Chris already touched on, it's the statutes that delegate power to the agencies. Rethinking what powers we're giving to agencies.

The second are the laws that structure the agencies, because those are very, very important. We saw that in Dodd-Frank, and Obamacare and elsewhere.

Then that third set of statutes that need to be looked at are the procedural statutes. The statutes that govern the way the agencies carry out their business, and the way the courts review what the agencies have done. All three of those forms of legislation are going to be important in the next Congress.

KRISTOL: Congress is aware of this, in your judgement?

DEMUTH: I think so.

KRISTOL: Might begin to consider some of these things? Are we – I guess the way I'd put this to end this part of the discussion – I mean, this feels to me, more than I would have expected, actually, as things that serious people in Congress or around Congress, at least, are thinking about as opposed to, "Here's a great idea that, unfortunately, no one in Congress is going to act on for the next 15 years."

I do feel like we've hit a point, maybe, an inflection point, where people are kind of aware – maybe Trump is a part of this, you know, the Trump victory – people are aware of the problems of a big-government administrative state in terms of not taking appropriate risk, and slowing everything down, and crony capitalism, crony administration, and crony government. All these sets of problems, maybe we've hit a point where people are open to reform? An ambitious, young politician might think this is in his interest to be associated with this as opposed to, you know, a career-ending, suicide move, where you're going to be –

DEMUTH: I think so. Congress is capable of some great acts of common sense. There was the Delaney Clause – that made illegal any food additive shown to cause cancer in laboratory animals – that we had on the books for, I think, many decades. And Congress incrementally reformed it, and then essentially eliminated it. "You're in favor of cancer causing food additives?" And Congress said, "Well, we're not going to ban everything," because if it causes – there was an education process. That it causes cancer in rats doesn't necessarily mean, you know, that there are a lot of problems, and it was not a pro-public health policy. And evidence accumulated and Congress reformed it.

There have been many regulatory reform ideas in Congress in the past couple of years that I think have suffered from "Obama derangement syndrome." It's just been proposals to just throw sand in the gears of the regulatory apparatus. Nobody thought they would ever become law, so everybody could just, could take their shots at the regulatory state.

I think that there's going – now that Congress and the executive branch are in the same hands, at least for the time being and possibly for some considerable period of time, people will take things seriously. And I think that they can make durable reforms. They have that prospect.

KRISTOL: I was talking to a senator the other day – we’re now, we’re having this conversation at the end of November – and he said he had called his staff together when they got back in a week or two after the election. He’s a younger senator, and he’d been here only in the Obama administration – and he said, “You know, we proposed plenty of legislation, we believed in it, we thought it was good, but honestly, we knew there was zero chance that it would probably make it through the Senate, which was first Democratic, and then at least had enough [Democratic] senators to filibuster. And anyway, there’s President Obama. So we didn’t sweat the details, you know?” Because I mean – There are some showboat stuff in it because it wasn’t going anywhere anyway, and it was easier to explain to our constituents what we’re doing.

He said I told my staff, “Now we’re shooting real bullets. If we pass legislation out of the committee I sit on, and then it goes to the floor, and gets passed to the White House by the next, President Trump is probably going to sign most things that a Republican Congress passes.” You still have to get some Democratic votes in the Senate, perhaps, but that might be doable in the current climate, and some of these issues are more bipartisan anyway. “So we really need to actually be very careful about this legislation we’re dropping in the hopper.”

So it’s an interesting change, actually, and it’s been a while since people have had that attitude. Except for those two years of Obama with the Democratic Congress in ‘09 and ‘10, Bush, really, in ‘05, ‘06, but he was so weak then already, I’m not sure when the Republicans – I guess there was a little bit in the first term where people thought they were doing real things, but even there, there was a huge deference, I think you said, to Bush, President Bush by a Republican Congress, which I don’t think they’ll feel with Trump. So, this is the first time in a long, long time, I would say – then you had divided government under Clinton for the last 6 years – where a senator in the majority, or a senator in the minority who has allies in the majority, might really feel, “Gee, I’m going to initiate something, and it could law 6 or 12 months from now.”

WHITE: I’m very bullish on a lot of the bills that the House passed. In all three of those categories I mentioned earlier – for example, on procedure, something they called the Regulatory Accountability Act, I thought it was very well done. You’ll see a lot of those bills come back.

But even on the Senate side, even with the Senate in a standstill, you saw some interesting discussions. I was lucky to participate in a hearing, a regulatory reform hearing, chaired by Senator Lankford [R-OK] on the Republicans and Ranking Member [Sen.] Heitkamp [D-ND] from the Democrats. And they were both very thoughtful, sort of in dialogue, about how you come to practical reforms to fix a lot of these agency problems. I think Senator Heitkamp is going to be very, very important in this, and a few others who come from purple states and who have to think really seriously. In Heitkamp’s case, who had worked at the state level and grappled with regulation, so she gets a lot of these things. I think she and a few other Democratic senators are going to be extremely important and, in the end, very productive in coming to solutions.

### **III: (1:13:08 – 1:26:40) The Courts and the Administrative State**

KRISTOL: There’s a third branch of government we haven’t discussed as much: the courts. I mean, how big a role can they play, should they play in this reform of the administrative state and correcting its problems, deficiencies, perversions, etc.?

WHITE: Well, the courts have an important role to play, and in fact, in the last few years, you’ve seen some discussion among the Supreme Court Justices, among the lower court judges, thinking through the appropriate relationship between courts and agencies, in terms of monitoring their procedures, the agency’s procedures, and in terms of the extent to which courts should defer to the legal interpretations of agencies.

Some doctrines that have been settled for a long time, like the doctrine of, they call it *Chevron* deference, deferring to an agency's interpretation of a statute, those had been pretty well settled; there's some debates at the margins. And in the last few years, both inside the Supreme Court, people like Justice Thomas, and people outside the Court, like [Charles Murray](#) and Philip Hamburger, and law professors and others, have started to ask some tough questions.

The relationship between the courts and agencies, they're not just defined by the courts. Congress also has a strong role to play here.

Congress passed in 1946, the Administrative Procedure Act, which really helped to formalize and systematize the relationship between courts and agencies. And that's something that should be reconsidered. When Congress passed it in 1946, they were trying to map law onto the administrative state as it existed at the time. Today, administrative law really just bears no relation to administrative reality.

And so some of the bills that have been passed in Congress and some theories that have been debated among policy wonks and law professors, they're out there, and it's up to Congress to figure out how to readjust this relationship between the courts and the agencies.

KRISTOL: Now, am I right in thinking that the sort of standard conservative position was: some judicial restraint, the Court shouldn't do too much to overturn agency decisions? And there's been a change of thinking among conservative jurists and law professors? Is that right?

WHITE: I think that is right. I think the courts in the 1980s, they corrected for some of the problems that existed in the '70s and '60s. In the '70s and '60s, you had the DC Circuit and other courts really micromanaging agencies in a problematic way. You got into the '80s, one of the Democratic appointees on the DC Circuit, a judge named Pat Wald, she said, "We considered ourselves the trustees for the ghosts of old Congresses." But what that really meant, in effect, was trying to lock President Reagan and his agencies in from even – Chris knows this better than anybody – to even make marginal improvements and some big improvements.

And so, from the '80s on, we did have a lot of judicial deference among judicial conservatives. But now, I think a lot of us have seen how that now, the pendulum has swung too far in the other direction. Some have been saying this all along, like Justice Thomas, but even thoughtful conservative judges like Justice Scalia, who's probably the most important administrative law mind on the Supreme Court in the last century, even he was changing things a little bit. And after his passing, it came out that he was rethinking even bigger things – like *Chevron* deference, which he had always really promoted – even he realized that it was time to recalibrate things.

KRISTOL: Will the courts be a major player in this for the next few years, you think, Chris?

DEMUTH: They will be, I think. The next couple of years will be quite interesting. The courts have begun to move back to closer supervision of the administrative state. They are essentially three issues.

The first is how far can Congress go in delegating decision-making power to the executive branch. There is something called "the non-delegation doctrine." Some people may remember the *Schechter Poultry* case. That and one other case decided in the same year have been the only time it's turned out that the non-delegation doctrine has actually decided anything. So it's sort of a dead letter.

The second, which has become really interesting in the past couple of years, is where the president or the executive branch does something without any statutory warrant, they *weren't* delegated a question, and they just sort of decided. The Clean Energy Plan involves issues like that. That was the issue on

which the courts voided President Obama's immigration policy orders. It wasn't that Congress had delegated too much – they hadn't delegated what he actually did.

Then the third is how much do they defer? In questions where they clearly are given discretion, it's constitutional, to what extent should the Court simply leave the agencies alone in making their legal and policy decisions.

The non-delegation doctrine, I think, has not changed. But the question of the presidents proceeding against statutory authority, and the question of how much deference they get in interpreting the law and policy, the courts have begun to move back.

You still see a little bit of a partisan split, so the fact that President Trump and the Republican Senate are going to have a lot to say about the next justice, maybe more than one, on the Supreme Court and many lower court justices, that will have an effect. I see even in judges on questions of the 14<sup>th</sup> Amendment, gay rights, that we would put on the liberal side, there's been a lot of rethinking of the extent to which the administrative state needs independent oversight.

So I think it's going to be moving back, and there will be some big cases in the Supreme Court, in the DC Court of Appeals on some legacy Obama administration issues, just in the next couple of months. And the administration is going to have react – whether they're approved or not approved – the administration may want to go back and reconsider things that the courts approve.

The courts may – I think in several cases, the courts are going to hold that regulations exceeded statutory authority, so that the administration will basically be starting over and it will be able to do whatever it wants to do.

So, there's going to be a lot of movement between the courts and the administrative state. And the courts are becoming more assertive. As Adam says, there are things that will be done when Congress gets around to reforming this hoary, old Administrative Procedure Act, where Congress can be more explicit on matters that have grown up in the past decades without Congress taking positions. But in the meantime, the judges themselves have begun to move.

WHITE: The Supreme Court nomination fight, the confirmation hearings – they're going to be a forum for this. I mean, every Supreme Court confirmation process re-litigates a lot of the most recent battles. When Justice Alito was nominated, everybody was talking about war powers, and surveillance and that sort of thing. So I think these hearings, you'll hear a lot of talk about the relationship of the courts and the administrative state. Some of the prospective nominees, like Neil Gorsuch of the 10<sup>th</sup> Circuit, Brett Kavanaugh on the DC Circuit, a number of those judges have already staked out pretty principled and vocal positions on these issues; so naturally, those will come up. But even if it's somebody totally different, Steve Colloton from the 8<sup>th</sup> Circuit, or somebody, they will be, I think, pressed on these things.

In that respect, I think it's fitting that we're talking about the seat vacated by Justice Scalia because he was, as I said, the most significant administrative law mind of the last century. His approach should be a good example for all of us to follow. He had some very fundamental constitutional principles, especially about the separation of powers, but for the rest of it – for this relationship between the administrative state and the rest of government – a lot of it is practical. There's room for play in the joints. The idea is, how do you design rules that work best? So you have a lot of discussion of procedural reform. You have discussion about deference doctrines.

I've got a report coming out from *National Affairs*, with Oren Cass, and Kevin Kosar, and others, where we try to noodle through these things. Even just in reforming administrative law, we really stress that you need to look at how it all hangs together. Right now, there are debates over agency process and then totally separate debates on deference, court deference to agencies. We say you need to look at how these things hang together. Maybe don't look at judicial deference as an all or nothing. Find ways to use

it as a carrot to get agencies to go through the right process, make it a reward for increasing procedural requirements elsewhere. My concern is that we'll stovepipe a lot of these issues. I think the important thing is that we have them all hang tougher and try to figure out what ultimately makes the agencies the best version of themselves.

KRISTOL: I suppose – I mean, life does sometimes stovepipe, nonetheless. There will be confirmation not just for Supreme Court justices but, of course, for all federal judges, and some – usually those are not big shows or big hearings, but DC Circuit, some of these issues could come up, I suppose.

And there will be confirmations – this only happens once every 8 years if you have two-term administrations, as we have had recently – for a ton of cabinets and cabinet officials. And it's not as if the EPA administration is not going to get asked about clean power and stuff. I do think this is chance, when I now think about, for these different – and the hearings will be before the relevant committees, of course, and the committee's jurisdiction over these agencies and then it goes to the floor. You could have much more public debate than we're used to – I guess, is what I'm thinking – of some of these issues, because that is a moment where it's somewhat dramatic. There is a nominee, people can follow it; and he or she will be asked, "Where do you stand on this controversy, this Obama administration executive order?" You could say, "I don't have an opinion yet," I suppose, like a Supreme Court justice, "I don't want to comment ahead of time." But it's a little different if you're being appointed to a political position in the executive branch. "Why don't you have an opinion, you know? Are you going to withdraw it or not?" There could be much more publicity around this, public attention to these sets of issues.

DEMUTH: For administration positions. The judicial hearings, it's just the nominees; they're just going to mumble. And there'll be no opportunity for public education of any kind.

KRISTOL: I meant the executive branch.

DEMUTH: But the administrator of the EPA, the head of the Department of Energy, are we happy with Bush administration ban on incandescent light bulbs? Is that something that we want to stick with? Some of these issues about the Food and Drug Administration. They'll be a robust difference of opinion among members of the committee, and if we have good nominees, good witnesses, it could be a – there could be tremendous forward progress.

There could also be backward steps. But there could be tremendous forward progress in the hearings themselves.

I don't want to hold myself out for an example, but when I was working on regulatory policy for President Reagan, whenever John Dingell or Barney Frank asked that I testify on something, the staff would all be in a panic, "Oh, this is going to be terrible."

But I thought, "This is what I came to Washington for." Because these are very, very smart people, and we're going to have – most of what I do is sitting in an office and having meetings with people and agencies. Here is going to be a big opportunity for public debate about automobile safety or labor market regulation. And I enjoy doing it, and I hope that the people in the Trump administration we'll see going up to Congress and mixing it up with the members as an important part of their job.

WHITE: I think one of the real benefits, especially with the original Tea Party movement, is it taught a lot of these younger congressman to think about these issues at both levels. Right? Not just the policy details, but against the backdrop of broader constitutional principles. Over the last few years, I've been involved in a lot of fights over financial regulation. And sometimes the congressman is talking about the policy details, but then it comes back to how does this agency fit within the constitutional scheme, what should we in Congress be doing? I think, I hope, that will shine through. We'll sort of reap the benefits of that in a lot of these confirmation hearings.

KRISTOL: On this surprisingly hopeful note, I think we should close; don't you think? Thank you, Chris DeMuth, Adam White for joining me today, and thank you, for joining us on CONVERSATIONS.

[END]