Bennett Nuss (BN): Hello and welcome to another episode of A Hard Look, an Administrative Law Podcast brought to you by the Administrative Law Review, Washington College of Law and the American Bar Association. My name is Bennett Nuss, the Senior Technology Editor of the Administrative Law Review, and supporting me in the booth is the inimitable Anthony Aviza ALR's Technology Editor.

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Soldiers returning home from tours of duty do not come home unscarred. We've known about this phenomenon for as long as modern testimonials about war have existed in the United States, from photographs of amputees of soldiers fighting the Civil War, silent film of World War veterans experiencing shell shock, fallout from the use of chemical agents in Vietnam, and now the visceral toll of combat that US soldiers face in the wars following 9/11, the United States as a part of its administrative bureaucracy has taken on the burden of supporting these soldiers as they acclimate to civilian life, even decades after their active service has expired.

This support is effectuated specifically through the US Department of Veterans Affairs, however, the VA now faces extreme institutional burdens. In 2022 1.7 million disability compensation and pension claims were processed with a million claims pending at some points during the year. As of the end of 2023 over 300,000 claims for VA disability are overdue with the number expected to peak at 400,000 this year. The reason for this delay is attributed to various sources from understaffing basing efficiency and a swell of claims following the passage of the PACT Act which expanded the benefits for veterans exposed to burn pits, agent orange and other toxic materials during their service.

However serious these delays are our discussion lies in the more theoretical today, specifically how issues in the theoretical bleed into real problems for those who rely on the system's effectiveness and operational security. As our listeners know from our past podcasts, administrative law doctrines are in a state of extreme flux. Specifically, issues surrounding how to address legislative ambiguity as highlighted in Gil Bright in this episode, we hope to go into the problem of interpreting legislative ambiguity under the current doctrines of interpretation and then see how these issues with ambiguity can deserve those that need agency help, perhaps more than anyone else.

Here to discuss this topic as our guest for this episode, Professor James D. Ridgeway is a professorial lecturer on veterans law at the George Washington University. Mr. Ridgway's father was a decorated air force fighter pilot who flew F-4's for two tours in Vietnam. Mr. Ridgeway's career in veterans law began when his father passed away from a service-connected heart condition and he spent his second year of law school successfully disputing V A's denial of his application for educational benefits. After graduating from the University of Virginia Law School in 1997 Mr Ridgeway clerked for the honorable Kenneth B. Kramer, an original member of the United States Court of Appeals for Veterans Claims after spending five years away as an assistant

state attorney for Illinois. Mr Ridgway returned to CAVC clerking for the honorable Alan G. Lance of the second generation of the court for almost eight years. He then served as a Veterans law judge for the VA Board of Veterans Appeals from 2017 where he was the Chief of Policy and procedure, working to coordinate the work of the board with other parts of the agency and with the stakeholders and the court. Since leaving the agency, Mr Ridgway continues to pursue VA benefit claims at Bergman and Moore, a Maryland based VA disability law firm.

In addition to his professional career, Mr Ridgway is the author of one of the leading textbooks on veterans' law and has written multiple articles on the subject, some of which have been cited by the Solicitor General to the Supreme Court, as well as the Secretary of Veterans Affairs. Mr Ridgway has also served as president of the CAVC's Bar Association, co-chair of the Federal Circuit Bar Association's Veterans Appeals Committee and the editor in chief of the Veterans Law Journal. He's also the founder, administrator of Veterans Law library.com and a co-founder of the National Veterans Law Moot Court Competition. Thank you so much for coming on.

James Ridgway (JR): Oh, thank you for having me. I'm a big fan of the Administrative Law Review and published one of my early articles there. So I'm very happy to be here.

BN: Yeah! Well, we really appreciate it! And just as a bit of context for our audience, some of the items that we're going to discuss in this episode were covered in part in our discussions with Daniel Cohen and Dan Sullivan earlier this season. For more context than what we're speaking on, feel free to take a listen to those episodes before listening further on this one.

So, moving to the topic at hand…According to the Pew Research Center in 2022 about 6% of all United States adults can be classified as veterans and active-duty military accounts for around 1% of the US adult population. While this number is the smallest as it, as it has ever been in recent memory, this distinct population still requires specific legal attention simply because their concerns are so comparatively unique to practically every other legal concern in the country.

To get our audience sufficiently familiar on what we're going to speak on today.

If you had to condense an entire courses worth of information into a quick answer, what's veterans law and what jurisprudence does this discipline generally cover?

JR: Veterans law is the field of administrative law that deals with claims for veterans benefits and the process for deciding those claims veterans law has this reputation for being a weird outlier that is still unknown to many because veterans benefits decisions were not subject to judicial review for nearly two centuries, until the passage of the Veterans Judicial Review Act of 1988. I could spend hours talking about why there was no judicial review for so long, but I'll just note that if you read Marbury v. Madison carefully, you'll see that the court points out that it isn't the first time the federal courts declared an Act of Congress unconstitutional.

Previously, the Invalid Pension Act of 179, the original Veterans benefit system, had been invalidated, so Marbury wasn't doing anything that hadn't been done before. And this continued for 200 years.

Initially, the courts didn't want to be overwhelmed with cases and Congress didn't trust the courts to keep benefits costs down. So they assigned decision making to the Department of War and the reasons changed over time.

But ultimately, during this 200-year period, which is now called the Splendid Isolation. VA developed the substance and procedure of how veterans claims are decided largely free of influence from mainstream American Administrative law. This was a system that was run by non-attorneys for non-attorneys and really didn't involve lawyers the way most parts of administrative law did when they began. And so as a result, there's a lot of unfamiliar terminology and some special concepts, you know, as there are in most any form of administrative law nonetheless, you know, it's not really that foreign.

Once you learn it substantively, the vast majority of benefits claims that are disputed involve disability compensation. These are very much like tort claims, the veteran is trying to prove that a present disability is related to a past event in service and how severe the resulting disability is. There's many other benefits, but most of them are very black and white, and so they don't end up being disputed. 95% of what comes to court is, where did this disability come from and how bad is it? And so procedurally, it's just about gathering and weighing evidence to prove or disprove these claims.

And ultimately, it's a form of administrative law because it's administered by the Department of Veterans Affairs which operates under statutes regulations and sub regulatory authorities to provide reasoned decisions for its adjudications. And this is what ends up getting disputed at the court of appeals for veterans claims.

What these authorities mean for me, what I think is really special about veterans law is that it's the perfect laboratory for studying the problem of system effects in the administrative state.And this is because there's no partisan divide in veterans law, neither party hates veterans and wants to make them suffer. Nobody campaigns on making veterans benefits worse.

In most areas of administrative law, you have the complication that many partisans are dedicated to particular outcomes and this results in inconsistent positions on process rather than loyalty to underlying concepts of how the administrative state should run. The veterans benefit system is the problem of complexity in its purest form. Everyone wants it to work well and efficiently. But getting it to do that is still very, very difficult because we are functionally trying to make the World War I disability system continue to function over a century later.

Even though Veterans Law law, information technology and the military are radically different in this regard.

I highly recommend the JB Rule and James Saltzman seminal 2003 article: “Mozart and the Red Queen”, has a fantastic analysis about the problem of complexity in making administrative law function in a good way. They summarize it is what do you do when you have 10,000 individually good rules, but they interact in ways that cause confusion and delay.

It's not as simple as removing the bad rules because few, if any rules are bad in isolation, it's the unpredictable effects of trying to follow them all that leads to maddening results. That's really what veterans law is all about.

BN: And for those of you that are curious, we will include the rule in Salzman article in the description of this episode. Now that we have a background for veteran's law, Let's take a pretty sharp left turn and talk about admin law broadly as we can, about Chevron and ambiguity. Before we start, and this may seem a bit of a trivial question, but what is legislative ambiguity in the context of an enabling statute?

JR: So, ambiguity is when a statute does not provide a clear answer to a question, it's important to understand that ambiguity is a creature of context. A statute can be perfectly clear as to what happens in situations A B and C but ambiguous as to how scenarios X, Y, and Z turn out.

Indeed, many problems of ambiguity arise precisely because statutes very often have much broader impacts than the drafters were thinking about. Statutes are generally drafted to respond to specific identified issues, but it is often impossible to imagine every situation where a particular rule might have potential impact.

The systems of laws are like networks, the number of possible interactions in a system increases with the square of the number of rules in the system.

So a system of 10 rules has 45 possible interactions. But a system of 10,000 rules has almost 50 million possible interactions, and so you can see even though most rules don't interact with each other, anticipating all the possible interactions by introducing just one rule is often just not humanly possible, right?

BN: Which leads us kind of directly into how we know whether or not these implemented rules are going to interact well or in expected ways, which leads us right into Chevron. As a quick recap, the steps of Chevron are, at the time of recording, the checks that a reviewing court will take to determine whether an agency action is in accordance with a piece of delegated authority. Step one of Chevron is to determine whether a statute is ambiguous, and then if the court determines that the statute is ambiguous on the question before the agency, whether or not the taken action or the proposed agency action is a reasonable interpretation of that ambiguous language (Step Two).

However, is there an issue here in that every piece of legislation can be ambiguous for different reasons which may require a different approach from courts and agencies?

JR: I think so everyone agrees that what to do in the face of ambiguity is a separation of powers problem. The core question is who decides?

I think the first problem with the Chevron framework that we have today is that step two is a one size fits all solution. It gives the agency primacy and interpretation. No matter why ambiguity exists in reality, you can easily have different opinions about who should have the lead in resolving ambiguity depending on the reason why the statute doesn't answer the question. First,

why should the balance of power between courts and agencies be the same for substantive and procedural rules in general?

Congress makes the substance of the laws but it frequently gives agencies very broad discretion as to how the system is administered in veterans law. You have § 501 of Title XXXVII, which basically gives the agency the power to make whatever procedural rules it deems necessary in order to administer the system.

And I believe, you know, many agencies have the similar broad grant of authority on rulemaking process. You could easily think that courts have a better case for interpreting substantive statutes and agencies have a better case for deference.

When it comes to the procedural rules, they've created to administer their systems. You could also have buckets for jurisdictional statutes and funding questions separately. Each of these has special implications that might lead you to different conclusions about where the separation of powers balance should lie.

Even for any one type of question there can be ambiguity for a whole host of different reasons. In some situations, Congress tries to answer a question but fails to do so clearly. In this situation, you could say the bread and butter of judicial interpretation is analyzing text and structure and language to resolve ambiguity.

But suppose it's quite clear that Congress intentionally used vague or subjective language in order to make a compromise possible or because it was uncertain about what the outcome should be in that situation. Congress is essentially kicking the policy ball to another branch. So should the branch that receives the ball be the agency, which is the democratically accountable branch or the courts which aren't supposed to be making policy?

We also frequently see situations where a statute was designed to address situations A, B, and C but it turns out to impact situation X that nobody thought about at the time the statute was drafted as I mentioned before. This happens all the time because of complexity is the interpretation problem there more like closely reading text or more like developing policy where Congress simply failed to do it.

What about the situation where a statute is drafted at time one and then decades later, somebody invents the internet or some other context changes? And now you're applying statutory language to things that the drafters could not possibly have imagined when they wrote the words at issue.

The options here aren't just to give power to the courts or power to the agency. In this situation, you could also say there's a presumption that big new issues ought to be decided by Congress and kick the ball back to the original branch by having a rule that says in these situations, we're gonna presume the statute just doesn't even apply at all.

Of course, that sounds nice. But it's also a hard rule to implement because it depends on how quickly issues get to the courts context and technology change incrementally over time. If you wait decades, then it may seem like something entirely new has happened. But if litigation is

frequent over time, then the incremental rulings will disguise the effect of change and you could reach different conclusions about what the balance of power should be.

BN: You touched on this slightly in your answer, but if we're looking at agency interpretation of these old statutes, like the ones that, for example, originally empowered the now non-existent Veterans Administration back in 1930, we can see that they have much the same responsibilities as the current Department of Veterans Affairs, just without a century of refinement, reorganization and specification. To some extent, should we be more deferential towards agencies that are trying to operate in a sphere where they traditionally operated under the same enabling statute, even if there isn't an express statutory delegation on specific matter?

Or should we look to Congress to take more of an empowering role and adapting the enabling legislation for departments in response to current events?

JR: Yeah, this is a very important point and we've seen it play out both ways in the courts. You, you have cases like *Gardner* where the court has said that old age doesn't matter in veterans' law because many regulations aged very nicely without judicial review.

But then you see other doctrines and cases where the courts have said that the fact that we've done something for a very long time is an important factor because if that wasn't right, then probably Congress would have intervened by now. But more importantly, I think it's important to realize that it's not like agencies are only involved once a statute has been written. In many cases, there's an ongoing dialogue between agency staff and congressional staff. Does it make a difference if the text of the statute was drafted by the agency and then handed over to Congress to pass?

For example, when I was at VA I was very heavily involved in working with stakeholders to draft what became the Appeals Modernization Act of 2017. In that instance, the agency drafted the complete statutory language and we went over it line by line with the stakeholders in multiple phone calls to make sure that there was broad agreement before the text was handed over to Congress. At that point, it was passed with only a few very minor and specific changes.

You can certainly make the argument that when the agency's involvement in the drafting of a statute is well known, it has a larger position to claim deference.

To take another example, in 1957 there was virtually no statutory authority defining veterans law, instead, the agency operated pursuant to detailed regulations that have been issued by FDR under the Economy Act of 1933. However, in 1957 Congress became very concerned because of the Bradley Commission that Eisenhower put together to revisit veterans benefits that the president was going to make sweeping changes to the system based upon the existing broad grant of authority from 1933. Now to prevent Eisenhower from doing this, Congress literally took the existing regulations that have been promulgated by the past president FDR put them into a public the law and turn them into a statute without any changes to this day.

Very large portions of title 38 are still provisions that were enacted this way in 1957. Now, given that context, does the agency have a claim for special deference because it wrote and administered the text for years before it became a statue?

When you hear that question, you tend to think that maybe VA does have a special claim.

However, of course, this instinct is based upon an implicit assumption that when an agency represents a position to the court, it will be based upon some special knowledge of history that comes from decades of experience. Unfortunately, most agencies today, they're reacting to whatever the current issue that goes not just for VA but for many other agencies and their incentives in litigation are more driven by their problem today than their historical knowledge of what might have happened decades ago.

And there's also other practical concerns. Sadly, VA has gotten rid of most of its library of historical material and even its own attorneys have little or no way of accessing the past knowledge that you would want them to in order to make that claim for special deference based upon historical knowledge, what should these considerations indicate as to how we deal with these kinds of delegations?

Because cases like the one you just mentioned, calls into question the projection of expertise that agencies engage in when challenged on a policy or delegation. I think that this teaches that in many ways deference is a very human question. What the humans did to bring us to the point where we have this language that applies to this question really matters.

One of the truths that Chevron acknowledged was that judges are not experts in whatever topic an agency is administering the Platonic ideal is that agency positions are informed by expertise, but that is often just not the case. I don't think it's a stretch to say the Supreme Court's major Administrative law rulings on greenhouse gasses and tobacco were motivated at least in part by a strong suspicion that agency positions were not based on front line expertise, but rather by political decisions coming down from the top.

I mean, that's not to say that there's something fundamentally wrong with that. But I do think that whatever the Black letter law says, the human beings who wear robes are influenced by their perception of whether the agency position is more or less free from politics.

The current Chevron framework is explicitly based on, in part on expertise. So it's natural for agencies to claim expertise and say and say that it supports their position. It also helps them claim that their decisions are not political, regardless of whether they truly are.

But right now, this question of whether an agency position is political expertise really lurks in the background and there's no reason why you couldn't have more transparent discussions about where an agency position comes from. And this brings me to what I think is the second real great failure of Chevron that is it failed to operationalize incentives for agencies to be transparent. You want courts to clearly be able to see and identify the analysis to which they're supposed to be deferring.

BN: But that's very often not how Chevron analysis plays out today, right? And so what kind of operational impact does this have on the day to day agency action? Because one can imagine that they would be incentivized in the direction that they want to rely on this presumptive deference without showing their homework in order to achieve the goals of an administration or agency

policy and relying on this broad grant of deference in Chevron Step Two to kind of cloak their actions somewhat.

JR: Yeah, there, there's a strong incentive for that. The less an agency can say to get to a favorable outcome, the better because there's less that they can then have thrown back in their face when they want to try and do something different. And so some agencies including va with quite a bit of frequency treat deference as abdication.

They think as long as they can win the fight to declare ambiguity. And that's the end of the battle. Once you get to step two, deference means they win, but that's not the way it should be Deference means that an agency needs to articulate a clear theory of why it is doing what it is doing. So the court can evaluate whether it is reasonable.

Unfortunately, the courts never developed a Chevron step 1.5 where they examined whether the agency had set forth a well-articulated explanation of its position before moving on to the question of whether that interpretation was reasonable.

And so long as agencies can win by not being transparent, that's exactly what many of them are going to do. When I think empirical studies bear this out, agencies that are transparent, often because they administer highly technical areas that are not controversial, publish clear reasons for their interpretations and have less trouble winning in court agencies that aren't transparent for whatever reason, fare less.

Well, I think that Kent Barnett and Christopher Walker covered this to some degree in their 2017 article, “Chevron in the Circuit Courts” where they did a big empirical analysis. And I, about that time I got to attend a symposium when they were presenting the article where that was discussed in some detail. And that, that just strikes me is exactly my experience being someone working inside an agency.

BN: Once again for the recommended reading, we will include that article as well. Looking to Congress itself, it's made great use of this intentional ambiguity within delegations to generally provide the executive with enough leeway to act within the bounds of reason, but also without enough specificity for the bill to be bogged down in committee or held hostage in a legislative package. We know that the court is generally deferential to agencies in the case of especially intended ambiguity, but should we be skeptical of this general stance, and if so why?

JR: I do believe that there are many examples of Congress being intentionally ambiguous. I'm not sure how often this is done with the intent to provide the executive with leeway. There are a huge number of reasons why legislation could be intentionally ambiguous.

Organizational theory teaches us that coalitions are frequently built upon ambiguity. The way that large groups can co-operate is by working in a gray zone where each faction can think that what is being produced will work towards the outcome that they want clarity threatens coalitions because as soon as is, as it's clear which factions are actually losing, they will defect and the coalition falls apart.

So sometimes legislation is ambiguous because it is the only way to keep a coalition together. At some point, you can reasonably invoke the non-delegation doctrine to say that hunting a problem to the executive without sufficient guidance really is not valid legislation.

Unfortunately, with our Congress today, that is often the only way that they can claim to have solved a problem. But let's take the best case scenario. Sometimes Congress really is legislating in the face of uncertainty and it's directing the agency to figure out a solution within some broad but reasonable constraints.

I think this is the type of problem justice Jackson was getting at and some of her questioning in Loper Bright, when Congress leaves it to the executive to come up with the “best solution.”

That is not a type of interpretation where courts are in a better position than agencies because you can figure that out by applying rules of grammar. In any event, you could easily think that the balance of power between the branches plays out differently depending on.

Let’s say Congress tells some agency to take reasonable steps to prevent A I used in critical infrastructure from threatening the lives or health of large numbers of people. That sounds great. It's an area where maybe we really don't expect much more detail than that because the problem is really unsolved. But what exactly should an agency do?

You could imagine that it initially interprets the statute to allow it to do X and that seems reasonable on judicial review. But then five years go by and we have enough information to now know that X is not a reasonable approach. Should courts apply stare decisis and say that only Congress can revisit the agency's authority or should the court say that stare decisis doesn't apply?

Because we can now see this interpretation is no longer reasonable. The normal expectation is if courts are saying what a statute means and they're wrong. Well, Congress can always come back in and change that. But that doesn't really change over time. The problem is for Congress to fix.

But if the reason that an interpretation turns out to be unreasonable is some sort of uncertainty that existed when the first review was done once that uncertainty has been resolved, should courts have to wait for Congress to step in or since they're closer to the problem?

Can they now look back and say, “oh, what we thought was ok, then we now realize was not ok”. And, and that's not a cause for concern, that's not courts being inconsistent or the rule of law not applying, that's just uncertainty having been resolved.

We now look at things differently, but of course, you want courts to say that explicitly so that we can be comfortable that the rule of law is being respected. And it's not just a different court with a different approach or a different attitude towards a particular issue.

And ultimately, the reasons for ambiguity, not only suggest different ways to balance of separation of powers, but also that other aspects of judicial review of interpretation need to be rethought, right?

BN: And so we've been discussing kind of the best case scenario for Congress in terms of that, they address the problem and they developed a reasonable solution with some delegator language to an agency. But on the other hand, we also have instances where bills are drafted without much committee review, they're included as a part of an omnibus package or even just poorly worded with far too much legalese in them for even your average government lawyer.

How does this kind of ambiguity affect agency action? And how can we avoid issues that these clearly present?

JR: This certainly happens too. If you look at the history of the Veterans Judicial Review Act of 1988 it was a last minute compromise between two radically different visions, one from the house and one from the Senate staffers were directed to iron these differences out at the very end of the session when they didn't even know exactly when the last day of business would be.

And so when those two things were melded together, the CAVC ended up with the unique statutory authority to hear cases by a single judge in an appellate court. Now, I've argued with some co-author, but this appears to have been an accident of combining one model based upon the tax court, which is primarily a trial body with another model based upon article three appellate review.

But this wasn't some intentional new feature that Congress meant to try out in creating the CAVC. What do we do with that? Who knows? But that's the way it is.

As I noted, above statutory language can come from the agencies themselves. It can also come from lobbyists or a whole host of places that don't result in the most careful vetting to anticipate all the implications. I mean, in fact, the US code is by definition complex.

There are simply too many parts to fully and accurately anticipate what the addition or subtraction or modification of any one provision of law will do in practice in this regard. I again, highly recommend the work of JB rule on the problems of statutory and regulatory complexity.

This is of course, another reason why a statute could be ambiguous and it's not at all clear how to balance separation of powers in determining how to resolve problems of complexity.

BN: While there are some instances where agencies may be perniciously seizing authority from some vague language, there are certainly instances where regulators may believe even rightly that they have no choice but to rely on statutory vagueness and deference offered by Chevron Step Two to operate efficiently in the face of changing conditions on the ground that were unthinkable at the time of the drafting of legislation in question. What effect does this reliance on Chevron Step two have on agency activity and where can it go wrong in terms of our broads spanning constitutional structure?

JR: If there is one thing that I saw up close when I was a senior leader at B A, it is the political leaders are not there to play constitutional games of chicken just for the sake of principle, they are accountable to solve problems.

Most agency leaders are not lawyers and they don't care about the niceties that we discuss. They're more interested in giving orders that can be executed now to solve problems than what

some court will say years later when they have moved on and somebody else is running the agency. This leads to the mentality that if the statute does not clearly mandate or prohibit some type of action, then they will use whatever latitude can be argued to get a job done.

And that's what the people expect. They expect agencies to do the people's business and to produce results. Now, in practice, they will ask the lawyers whether they can do something. And under Chevron, the agency lawyer will tell them, well, the statutory language is arguably ambiguous and therefore the courts should defer to whatever you decide to do. And so they do whatever it is they decide is needed to solve the problem of the day.

BN: And I think we've noticed that it's exactly that it's this kind of mindset that seems to get agencies into legal trouble though, especially in recent years, with big examples being items like student debt relief, environmental regulations and the response of the COVID-19 pandemic. So when faced with such institutional hurdles as a hostile court system, why do they continue to act in this way without altering course?

JR: At some point, what agencies are doing is so significantly different from what they've done in the past that it does look like a policy change that ought to come through the legislature or at least through the notice and comment process and not the executive acting by fiat. But yet this is another situation where you can have different views about how separation of power should play out.

Ultimately, our government is structured for Congress to make the big decisions and for executives to implement them. Unfortunately, many big decisions are very hard to make because the right decision is unpopular or any decision at all has political downsides that can be avoided by kicking the can down the road or doing something really vague and then saying there it's fixed, this leads to incredibly tough questions about when and how to hold Congress's feet to the fire to do its job of providing the broad guidance to agencies that constrain them to just execute the will of the legislature.

But so long as the courts do not do this, then it's the agencies that are holding the bag to make government work regardless of whether Congress has created the conditions to make that possible.

BN: This vagueness also brings us to non-delegation doctrine in some sense, in which laws which attempt to empower agencies without an intelligible principle are unconstitutional as a breach of separation of powers. Considering that Chevron, as we know, it seems to be very much on the chopping block, do you think that we may be approaching an era of strict application of non-delegation doctrine or something else?

JR: I do certainly think that that's within the realm of possibility. The problem is that any tool powerful enough to invalidate significant acts of Congress is really dangerous to unleash.

However, the weapon is used initially, it will probably have a partisan balance and then there will be pressure at some point in the future to direct it in the other direction, developing a robust non delegation doctrine that doesn't feel like it's being applied in a partisan way, but rather is being used to call out Congress's inability to really solve hard problems. That itself is a hard problem.

Nonetheless, it's not at all clear how the country continues to survive in the world where Congress does not fulfill its constitutional role because doing so, it makes it too hard to get re-elected. Furthermore, even if Congress were much more inclined to normal function than it is today, it may well be true that the modern world is simply beyond the capacity to manage without broad delegations to agencies to diagnose and deal with problems as they emerge. Both modern legislative and regulatory processes are notoriously slow.

And again, I would recommend the work of JB Rule on trying to find ways to construct laws that allow for flexibility and rapid change rather than ossification.

BN: I also think that there's an interesting question here, if the United States, or hell, even the world, has become far too complex for Congress to adequately respond to or regulate. Some would argue that this is a reason for even more delegation, even if it undercuts the balance of power and democratic controls of the government. However, the only solution in the other direction would be democratically electing more responsible and engaged and informed representatives, which can be something of a pipe dream. So what's the best way that we can balance these interests while still keeping true to our constitutional way of life?

JR: Well, the best way to handle complexity is iterative learning. Don't even pretend that you're going to be able to figure out the right answer to hard problems through years of study and theorizing.

That's not how we build complex software or complex businesses. You try something reasonable. You watch carefully to see what goes wrong. You don't waste a bunch of time pointing fingers and blaming. Instead, you make changes and try again and you do that over and over and over again. And you assume that it never really stops because the world never stops changing.

That is how you tackle complexity intelligently. But can we bring that to government? That's really hard because it is more than just our ossified systems for legislating and regulating the whole administrative state is burdened by processes for acquisitions, hiring performance evaluation, it, transparency, public input and everything else that are rooted in notions of making big decisions slowly to get the right answer and avoid mistakes and all these rules are rooted in real concerns.

We shouldn't just let them all without thinking about the values they represent and how to protect them in a system that is premised on rapid iteration.

They exist for a reason. I mean, this is yet another example of the problem of complexity. What do you do when you have 10,000 rules and every single one of them looks good in isolation, but the interactions between them all lead to something that's unworkable?

Now, in fact, there are little laboratories throughout the federal government trying to do each of these things better. One of the best examples is how the US digital service was stood up after the healthcare.gov website launched fiasco to bring Silicon Valley talent and approaches to rapidly solving it issues for the federal government.

The big question is scaling these projects up and integrating them in agencies dominated by careerists who are very cautious because they get almost no credit when things go well and have their lives ruined. When Congress decides to make an example out of some failure, you can't have a workforce terrified of failure and expect them to embrace a radical new paradigm based upon failing rapidly and learning from mistakes.

I know that sounds kind of bleak. But where does that leave us? I think that many modern problems are too complex for Congress to hope to legislate a successful program in detail. I think we need to recognize that agencies need some breathing room to try different approaches.

Congress should be in charge of goal setting and oversight, but it needs to leave a lot of details to agencies to experiment and figure out what works and what doesn't work. Unfortunately, today's hyperpartisan environment makes it really hard for agencies to trust that they will be treated with good faith when they try something and it doesn't work the very first time, I mean, maybe no hyperpartisan government can hope to be functional.

And the best we can do is design for a future that where that problem recedes, and we hope that our government, you know, is going to ultimately survive to see a better day.

BN: And so turning from kind of the realm of the theoretical and back down into the realm of practical, you've worked on every single side of the veterans law question, and so you're also be more intimately familiar with how issues surrounding bigness and imprecise legislation regulation may affect all parties. Can you expound a little bit on the effect that the current holes in Chevron that you've identified have on the practice of this specific realm of law?

JR: There's been a huge gap in our understanding of how to interpret veteran statutes under Chevron. There's a long-standing interpretive canon that veteran statutes are supposed to be liberally interpreted in favor of claimants. This dates back to at least *Boone v. Lightner* during World War Two, if not earlier today, it is frequently called the Gardner Canon after *Brown v. Gardner*, which was the first Supreme Court case after the creation of the CAVC to endorse this principle.

BN: And so does this create an issue of competing judicial doctrines in which you're meant to be deferential to both claimants and agencies simultaneously?

JR: Exactly. It's not at all clear how you can reconcile the notion of deference to the agency when there is statutory ambiguity with this principle of veteran friendly interpretation. I mean, of course, this only comes up in veterans cases when a claim has been denied because the veteran and VA disagree about how to interpret a statute. Does the veteran win under Gardner? Does the agency win under Chevron? Is there some way to split the baby upon a clear, predictable rule?

This uncertainty is just bad for the system because it creates unpredictability and litigation for any given question. Neither the agency nor veterans can accurately predict what is going to happen when it gets to the courts.

Given the massive backlog of the Board of Veterans Appeals, a veteran can expect to wait five years there before getting a decision that is even appealable outside the agency to the Court of

appeals for veterans claims. Of course, the board isn't going to declare a regulation invalid based upon its own interpretation of the statute. That's just not what agencies do. They don't declare their own regulations invalid. So it can be a very long slog to get an answer.

BN: Yeah, you've indicated that these kinds of complex legal questions can take years in court to settle for some claimants. So with a little bit more specificity, how does this doctrinal conflict impact claimants?

JR: This is really unfortunate for veterans whose real lives continue to move on even when the law is paralyzed by uncertainty if it takes 5 to 7 years to get an answer on an issue from the federal courts. A veteran can't put on hold questions like, where can I afford to send my child to college or what kind of retirement home can I afford? Even when the answer comes back, favorable, there's no way to unwind these life decisions.

I once read an article examining how courts dealt with this tension and the punch line was that they talk about whichever canon they're going to apply and ignore the other one. In fact, courts have been so loath to deal with the problem that you just find numerous examples of divided panel opinions where both the majority and the dissent swear that the statute is unambiguous in favor of their position so that nobody has to wait into the swamp of seemingly conflicting interpretive canons.

Many years ago, Justice Scalia spoke at a CAVC judicial conference and basically said that he didn't see how Gardner could be valid in light of Chevron even though it was decided after Chevron. However, this finally came to a head recently at the Federal Circuit in a case called Kaiser, the famous one that we know from interpretation of regulations when it was back down at the Federal Circuit on remand, the en banc court issued an opinion that was divided 6 to 6 on this issue.

Half of the court basically said that Gardner is not a traditional canon of statutory interpretation and therefore applies only after you've tried all the textual Canons and then look to see if the agency's interpretation is reasonable. The other half of the court said that this is nonsense.

This relegates the application of Gardner to the bottom of the ninth inning after there are three outs and the players are already headed to the showers, you know, in effect, it does nothing. Now, this conflict was raised by amici in the pending Supreme court case of Rudisil v. McDonough, I argued on behalf of one of the major veteran service organizations that Gardner is a traditional canon of statutory interpretation that applies at step one of Chevron. And this was reinforced by an amicus brief from Senator Tim Kaine and a dozen other legislators saying that they are aware of the canon and do legislate with it in mind.

However, I will bet money that Rudisil is going to be decided on plain language and structure grounds without addressing this issue. There was basically no mention of it at oral argument and this doesn't surprise me given that the court is revisiting Chevron and Loper Bright/Relentless

It only makes sense to see what happens there before later, turning to the question of how the veterans can and interact with agency deference.

BN: So zooming out a bit, how can we expect an overturn of Chevron to impact these issues of concurrent deference because it seems like on at least under current law, it's a bit of a gridlock where you can't really move without touching either agency or, you know, claimant deference?

JR: Yeah, I think it's important to stress that this isn't just an issue for veteran's law. Other areas have what are called substantive canons which indicate a particular policy direction where an issue of ambiguity arises.

The one that is most often mentioned in the same breath as the Veterans canon is the so-called Indian canon. This is the one that indicates statutes dealing with native Americans ought to be interpreted liberally in their favor.

If you listen carefully to the Loper Bright argument, you hear Justice Gorsuch suggesting that overruling Chevron would be beneficial to veterans. He's notoriously pro native American and I think he's very likely going to try and position substantive cannons like the Veterans canon and the Indian canon to make a resurgence after whatever the court says in Loper Bright for me, the big question is whether Loper Bright is going to simply move us to a different one size fits all solution that doesn't really work in practice.

Moreover, I don't think that even a good solution to what deference analysis to use is going to work unless courts force agencies to be transparent, there really needs to be four steps. Is the statute ambiguous? Why is it ambiguous? What is the agency's homework showing how it reached the interpretation that it did and what deference should the court give to that analysis?

On the one hand, you could really say this is just a return to skidmore review, but it doesn't have to be the decision in Kaiser admonishes lower courts to take the question of ambiguity very seriously. What I think we need to do is also take seriously the questions of why ambiguity exists and what is the agency's complete rationale for the position that it is taking? Maybe then we can make real progress on judicial review of agency interpretations in an ever more complex world.

BN: It seems like that kind of question is going to have to be resolved at a later date once we actually know what the court's going to do. Thank you so much for Professor Ridgway for joining us, we really appreciate it.

JR: Thank you, I very much enjoyed the conversation.

BN: All of the cases and journal articles that Professor Ridgeway mentioned as well as some recommended reading can be found in this episode's description. Thank you all for listening to this episode of A Hard Look and we'll see you next time.