



THE RULES & REGULATIONS

The Post-Chevron Era of Regulation

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Agenda

The End of *Chevron* Deference: *Loper Bright v. Raimondo*, U.S. Supreme Court, 2024

Echoes of Major Question Doctrine

Loper Bright's Impact on Agency Power

Loper Bright's Impact in Regulatory Areas

Statute of Limitations Overhaul: *Corner Post v. Bd. of Governors of the Federal Reserve System*, U.S. Supreme Court, 2024

Incoming Trump Administration: what to expect vis-à-vis regulations

Public Affairs Response

The End of *Chevron* Deference: *Loper Bright v. Raimondo*, U.S. Supreme Court, 2024

Old Rule

VS

New Rule

- “*Chevron deference*” required courts to defer to agency regulations interpreting ambiguous statutes, so long as reasonable.
 - For 40 years, litigants and courts followed *Chevron’s* 2-step test:
 - Step 1: Is statute’s meaning clear? If yes, follow statute. If no, go to step 2.
 - Step 2: Is agency’s interpretation in regulation reasonable? If yes, defer to agency interpretation.
- Federal courts must decide the “best interpretation” of ambiguous statutes.
 - Courts do not defer to agency interpretations.
 - “Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority.”
--Chief Justice Roberts.

The End of *Chevron* Deference, cont'd

“Best interpretation” rule only applies where a statute’s meaning is not clear from its plain text.

Courts continue to defer to agencies in some circumstances:

- Agency factfinding
- Agencies’ interpretation of their own rules
- Respectful consideration of agency statutory interpretations based on the agency’s expertise and experience

Loper Bright says regulatory interpretations upheld using *Chevron* framework remain valid, *but*

- Not a guarantee
- Based on “stare decisis,” and courts can depart from precedent where warranted

Echoes of Major Question Doctrine

West Virginia v. EPA (2022): to regulate on “major questions” of great “economic and political significance,” an agency needs “clear congressional authorization”

- *West Virginia* addressed EPA’s authority to regulate greenhouse gas emissions from power plants under Clean Air Act

Major question doctrine reflects concern about agency overreach, similar to *Loper Bright*

Subtle difference: major question doctrine can be seen as focused on congressional authority, while *Loper Bright* focuses on judicial authority

Loper Bright's Impact on Agency Power

Without *Chevron* deference:

1. Administrative agencies are weaker

- Lessened ability to shape policy through rulemakings
- Regulations are more vulnerable to challenge

2. Congress has more responsibility

- Must give agencies clear instructions or expressly delegate authority to agencies
- Lobbying strategies should ensure important legislation is drafted with specificity, to survive challenge

Loper Bright's Impact in Regulatory Areas



Environmental

E.g., EPA designation of PFAs as hazardous substances under CERCLA is challenged in D.C. Circuit Court of Appeals



Labor

E.g., Dep't of Labor rule expanding overtime eligibility vacated by Texas federal court



Telecommunications

FCC's net neutrality rule (classifying broadband as a telecommunications service) under challenge in 6th Circuit Court of Appeals



Employment

E.g., FTC rule banning noncompete agreements set aside by Texas federal court



Financial

E.g., SEC climate disclosure rule is challenged in 8th Circuit Court of Appeals



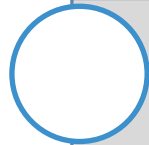
Healthcare

E.g., HHS rule prohibiting gender-identity discrimination in health care, based on Affordable Care Act, blocked by three federal courts (in Mississippi, Texas, Florida)



Transportation

Dep't of Transportation rule mandating disclosure of fees when airline quotes an airfare stayed by 5th Circuit Court of Appeals



Fill in the blank

Statute of Limitations Overhaul: *Corner Post v. Bd. of Governors of the Federal Reserve System*

Default 6-year statute of limitations period for challenge to federal regulation (28 U.S.C. § 2401) begins when a plaintiff suffers injury

- Before *Corner Post*, 6-year limitations period for Administrative Procedure Act (APA) claims typically began when regulation was first issued
- Now, even if a regulation was issued decades ago, injury restarts clock and injured party has six years to file suit

Statute of Limitations Overhaul: *Corner Post*, cont'd

Only applies to default 6-year limitations period

Does not apply where statutory scheme includes a specific SOL, for ex.:

- CERCLA sets 90-day period after promulgation for challenges to regulations
- Clean Air Act sets 60-day period
- Agency orders generally must be challenged within 60 days (Hobbs Act)

Incoming Trump Administration: what to expect vis-à-vis regulations

First-day freezes

- Withdraw proposed rules and final rules that haven't been published
- Suspend effective dates of published rules not yet in effect

Changes to existing regulations

- If rule went through notice-and-comment, same for revision
- Must explain change
- Must account for reliance interests of regulated parties

Limited ability to effect change through regulation

- What's good for the goose is good for the gander
- *Loper Bright* challenges to Trump Administration regulations

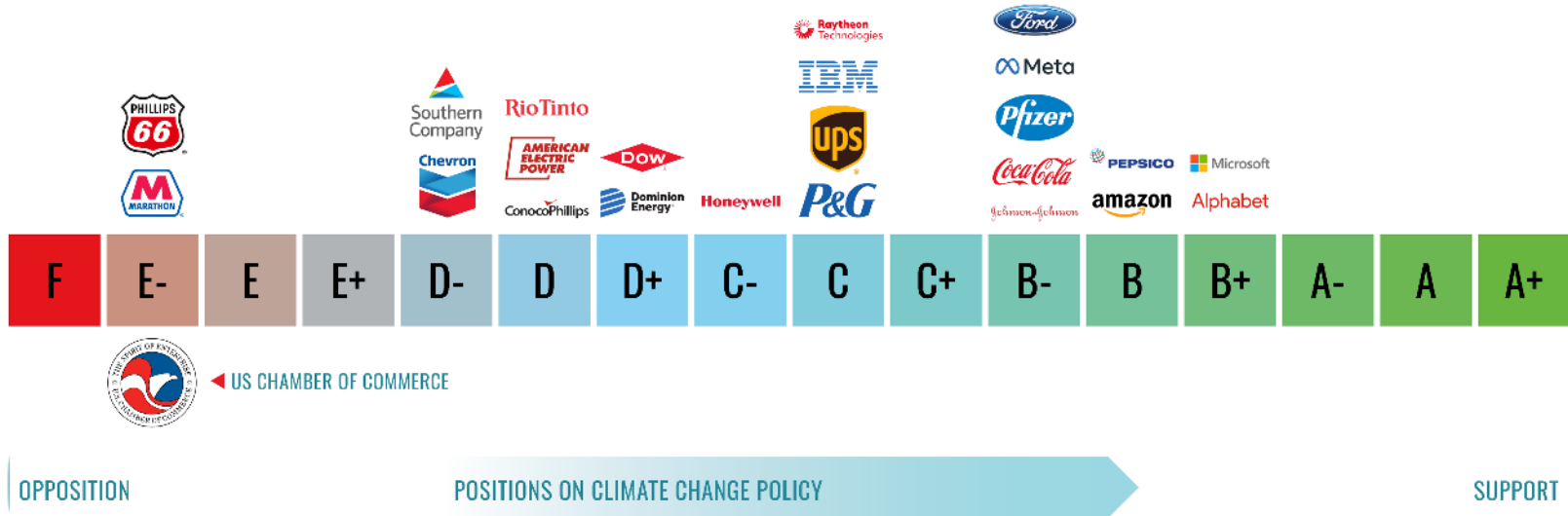
More Executive Orders

Pressure Points



Can you avoid the spotlight?

THE US CHAMBER VS. ITS MEMBERS ON CLIMATE POLICY, FEBRUARY 2023

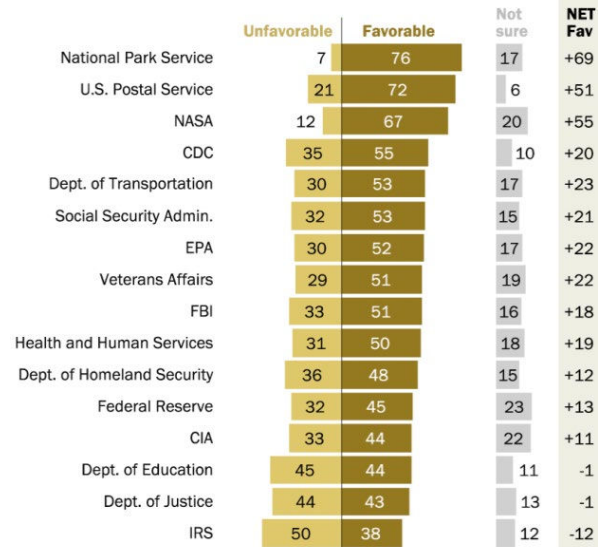


The public's view

- Public perceptions of government agencies are not as negative as one may expect, though partisan divisions are clear
- Polling also shows “big business” has a 53% negative approval rating with the public (Gallup)

Large majorities of Americans see the National Park Service, U.S. Postal Service and NASA favorably

% who have a(n) ___ opinion of each federal agency

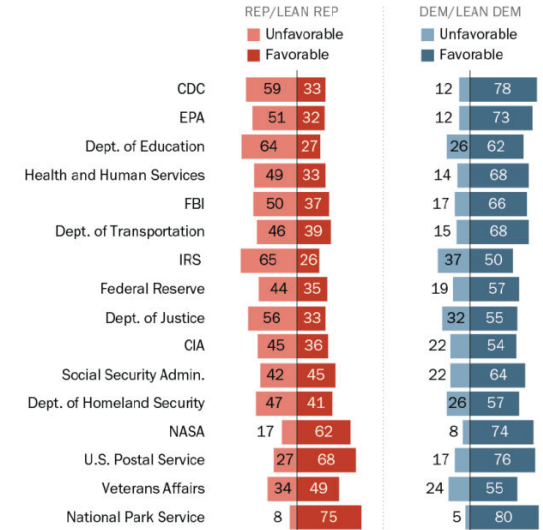


Note: The “NET Fav” column is the percentage favorable minus the percentage unfavorable. No answer responses are not shown.
Source: Survey of U.S. adults conducted July 1-7, 2024.

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Wide partisan differences in views of most federal agencies, but Americans in both parties view National Park Service, U.S. Postal Service and NASA favorably

% who have a(n) ___ opinion of each federal agency



Note: “Not sure” and no answer responses are not shown.
Source: Survey of U.S. adults conducted July 1-7, 2024.

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Planning for the unknown

- **Audit of company disclosures** and public-facing materials; including annual report, company goals, memberships, position statements, policies and general communications
- **Assessment of stakeholder priorities** (investors, peers, etc.) and analysis of “hot topics” in traditional and social media
- **Summary of identified vulnerabilities** with analysis and recommendations on how to mitigate



Questions



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