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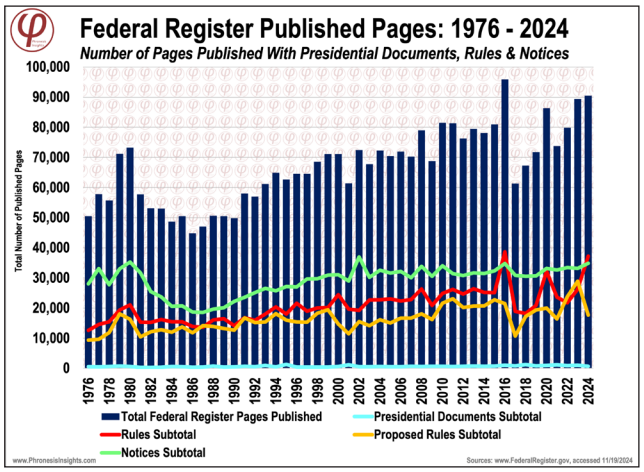
The 2025 Federal Regulatory Landscape

The 2024 election brought the administrative state into focus. With President Trump's re-election, we have a slate of unconventional nominees to lead federal agencies, and a new Department of Government Efficiency (DOGE), headed by Elon Musk and Vivek Ramaswamy. DOGE's title is a misnomer (it won't be a new agency), but it may be a powerful entity if its recommendations are implemented by the Office of Management and Budget (OMB).

Prior to the election, former OIRA Administrator Paul Ray spoke with Phronesis Insights, answering questions about the Supreme Court's *Chevron* decision, and the regulator's mindset at an administration's close. Though the interview took place prior to the election, it offers readers an especially important perspective at present with the Biden Administration winding down and the Trump 47 Administration preparing to launch.



Interview with Paul Ray on Loper Bright and "Midnight" Regulations

Paul J. Ray *is the director of the Thomas A. Roe Institute for Economic Policy Studies at The Heritage Foundation. He previously was confirmed by the Senate and served as the Administrator of the Office of Information and Regulatory Affairs (OIRA)—the federal "regulations czar"—within the White House's Office of Management and Budget. His legal career began with clerkships for Judge Debra Ann Livingston of the U.S. Court of Appeals for the Second Circuit and for Justice Samuel A. Alito of the U.S. Supreme Court.*

DB: *Paul, from your experience at OIRA, and obviously you have experience with the Supreme Court, can you tell us a little about the Supreme Court's recent Loper Bright decision? How far reaching will it be? For instance, does cost benefit analysis fall under Loper Bright in terms of being reviewable, or is that outside the scope?*

PR: *Loper Bright* won't affect cost benefit analysis. I should begin by saying what *Loper Bright* did. *Loper Bright* overturned the *Chevron* decision from 1984. *Chevron* held that courts, when reviewing agency interpretations of statutory terms, should defer to the agencies when they interpreted ambiguous statutory text. The *Chevron* decision was just about interpretation, so *Loper Bright* is about interpretation. Cost benefit analysis is about analyzing policy rather than interpreting the text of statutes.

DB: *Do you have any thoughts on how Loper Bright may affect businesses and the economy?*

PR: *Loper Bright* is going to drive agencies toward less aggressive, less far-reaching interpretations of their statutory authorities. That is because *Loper Bright* restricts agencies' room for creative interpretation and so restricts the space for policy variation. That means fewer major swings from administration to administration, and that gives regulated businesses greater stability and thus greater ability to plan, invest in their businesses, hire new staff, and enhance productivity.

DB: *For those unfamiliar with the decision, could you describe the Court's reasoning in Loper Bright?*

PR: The Court, speaking through the Chief Justice, relied on section 706 of the Administrative Procedure Act, which governs the judicial view of most regulations. Section 706 expressly entrusts courts with "deciding all relevant questions of law, interpreting constitutional and statutory provisions, and determining the meaning or applicability of the terms of an agency action." The Chief Justice reasoned that Congress has been perfectly clear that courts have authority to answer legal questions implicated by agency regulations, but *Chevron* effectively gave agencies a part of that authority.

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About

J. Douglas Branch II *founded Phronesis Insights after 25 years in senior roles in both House and Senate, including the Joint Economic Committee and Homeland Security and Governmental Affairs Committee. He has worked in many areas including federal tax, budget, financial services, monetary policy and economics, and congressional procedure and strategy.*

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Interview with Paul Ray, Continued

DB: *With Chevron reversed, are there any areas that you would anticipate to which regulators might instead pivot to maintain an activist approach through regulation?*

PR: *Loper Bright* only applies to regulatory actions that can be reviewed in court. *Loper* is often described as changing what agencies can do, but in fact it changes what courts must do. It effectively changes the standard of review that courts apply to agency regulations or other regulatory actions. Actions that are not subject to judicial review won't experience any change. For this reason, agencies face incentives to rely more on forms of action that are not reviewable in court, such as guidance documents. Guidance documents lack the force and effect of law, so typically they're not reviewable in court. But they can be highly effective at achieving an agency's policy goals. The reason is that regulated parties mostly just want to stay out of litigation with the agency. So, they're highly likely to follow the advice an agency gives in its guidance documents, even though that advice is not binding.

DB: *The litigation side is a whole other conversation in terms of the punishment being the process itself as opposed to any sanctions. Speaking of litigation, the Securities Exchange Commission (SEC) will soon have to defend some of its regulations before the courts. What arguments do you anticipate that the courts will be interested in, or will be more persuaded by, as current regulations are being litigated under the terms of Loper Bright.*

PR: One that comes to mind is that there are disputes about what constitutes a security for purposes of regulation by the SEC. *Loper Bright* has all kinds of applications for that decision.

DB: *How broad in scope is Loper Bright going to go? Does this open years and years of regulations that were of dubious merit? What do you anticipate on the litigation side?*

PR: The Court was pretty clear that the decision should not be taken to call into question regulations whose validity has already been adjudicated by the courts under *Chevron*. It's not at all the case that every regulation from 1984 onward that was evaluated under *Chevron* will now be reevaluated. New regulations will be subject to the new standard, as will older regulations that were never adjudicated.

DB: *Are there any other comments on Loper Bright that you want to offer?*

PR: It is a really important decision. It makes administrative law better than it was before. It makes government more accountable than it was before because now agencies have to hew more closely to the intent of Congress. Those are good things.

DB: *One of the things that we have seen in the Biden administration is a better awareness of the powers of Congress to curtail administrative actions that take place near the end of a Congress. Hence, we have seen a lot more regulations that agencies are rushing—to get these things out not in the November, December, January timeframe, but instead, the May, June, July, or earlier timeframe. In terms of agency actions and how some of these regulations may be rushed, does this raise any legal issues, any constitutional issues, or anything of that nature?*

PR: You do see in regulations that are hurried that the rationales tend to be weaker. And that matters because the Administrative Procedure Act requires reasonable decision making. A regulation can be held invalid if the agency does not give adequate reasons for its action. Just as any person who's in a rush may not be able to fully explain why they're doing what they're doing, so with agencies. If they have all the time in the world, they tend to offer a fuller, more adequate and intelligible explanation to their action than if they're in a rush. Agencies typically rush at the very beginning and at the very end of an administration.

DB: *That's an interesting perspective. I come at it from the congressional perspective of the Congressional Review Act. Frankly, it's not always easy to get agreement on it. Hence, by rushing could an Administration be putting their regulations in more jeopardy than they would be under the Congressional Review Act?*

PR: Absolutely. Administrations sense the urgency of the CRA timeline and take it very seriously. It's standard practice to move swiftly to finalize regulations before the CRA window opens. That doesn't mean that agencies won't engage in midnight rulemaking at the end of an Administration. They usually do, and I don't expect this administration is any different.