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Major Rules in the Courts: An Empirical Study of Challenges to Federal Agencies' Major Rules

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MAJOR RULES IN THE COURTS: AN EMPIRICAL STUDY OF CHALLENGES TO FEDERAL AGENCIES' MAJOR RULES

*by: Libby Dimenstein, Donald L. R. Goodson & Tyler Szeto**

ABSTRACT

Since at least the 1990s, presidents have seen the administrative state as a key tool, if not the primary one, for achieving policy objectives. At the same time, the administrative state has faced growing scrutiny, particularly from members of the Supreme Court. Given these dynamics, do some administrations' regulatory actions fare better in court than others? Are there any trends we can see over time?

These are some of the questions we sought to answer in the first empirical study of how major rules, as defined under the Congressional Review Act ("CRA"), fare in federal court. We chose major rules for several reasons, namely, the ability to conduct an apples-to-apples comparison across administrations while focusing attention on the most important agency actions. The study of the primary dataset summarized in this Article covers each of the 1,872 major rules issued from the CRA's enactment in 1996 through the end of the first Trump Administration. To our knowledge, the primary dataset's roughly 24-year period covering four administrations (two from each party) is the longest continuous time span of any empirical study of agency win rates.

The Article's title is perhaps ironic given that most major rules (78.7%) do not end up in court, which is itself notable because most previous studies of agency win rates focus only on the relatively small percentage of agency actions that end up in court. Our study finds that the challenge rate has steadily increased over time, rising from 16.8% for the Clinton Administration to 28.0% for the first Trump Administration. Courts are thus resolving more challenges to major rules than they once did.

Our study also finds lower agency win rates than other studies, which typically report win rates of 60–70%. In contrast, our study finds win rates of 49.4% or 56.9%, depending on the unit of analysis (major rules or controlling opinions resolving challenges to major rules). Our study further finds that win rates declined over time: The Clinton Administration saw 63.0% of its major rules

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upheld and 63.3% of controlling opinions rule in favor of its major rules; the first Trump Administration saw 32.1% of its major rules upheld and 45.4% of controlling opinions rule in favor of its major rules. The two intervening administrations were in between but closer to the range's upper end. Our results suggest that, while agency win rates declined over time, the first Trump Administration's win rates were unusually low. In addition to documenting these agency challenge and win rates, we also collected data on other topics including forum shopping, differences between independent and executive agencies, partisan trends, Chevron deference, and more.

We conclude with observations to date on the Biden Administration's major rules. Because the Biden Administration only recently concluded, and many challenges to its finalized rules remain ongoing, we analyze its major rules separately from our primary dataset. Based on data collected in January and February 2025, agency win rates have not returned to their earlier highs: The Biden Administration has seen 40.5% of its major rules upheld and 45.5% of controlling opinions rule in favor of its major rules.

All told, our study suggests that the conventional wisdom that agencies win two-thirds of the time no longer holds true, at least not for major rules. But the vast majority of major rules go unchallenged, revealing that most major rules survive, despite declining trends in agency win rates during the first Trump Administration and Biden Administration.

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I. INTRODUCTION

It is by now conventional wisdom that presidents cannot accomplish much, or at least not as much as they would like, by proposing legislation and working with a functioning Congress to enact it. Rather, the common perception is that presidents must use their control over the administrative state to accomplish many, if not most, of their policy objectives.¹ At the same time, the administrative state has come under increasing scrutiny, with a growing perception that the judiciary, and the Supreme Court in particular, is on a mission to exert more control over federal agencies.² Given these dynamics, do some administrations' important regulatory accomplishments fare better in court than others? Are there noticeable changes over time across all administrations?

These are some of the questions this Article aims to address while also providing additional data to inform other contemporary debates in administrative law. The study described in the following pages joins a long line of empirical studies on federal agency win rates in litigation.³ But it takes a different starting point from most (or perhaps all) others—agency actions themselves, rather than opinions resolving challenges to those actions. That is, instead of limiting ourselves to only judicial opinions or only those administrative actions addressed in judicial opinions, we began with a complete subset of agency actions and determined which of those actions were challenged and how those challenges concluded. And we did this for a span of roughly 24 years, a period significantly longer than most peer analyses.

Before we began, we needed to find some way to limit our unit of analysis. The universe of administrative actions is vast: Agencies issue upwards of 4,000 final rules each year and take countless other actions, covering everything from mundane decisions affecting a few people to consequential decisions affecting broad swaths of American society.⁴

1. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2344–45 (2001); Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 272–73 (2019).

2. See Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1011–12 (2023); see, e.g., *Buffington v. McDonough*, 143 S. Ct. 14, 18–19 (2022) (Gorsuch, J., dissenting from denial of certiorari) (mem.); *Michigan v. EPA*, 576 U.S. 743, 760–62 (2015) (Thomas, J., concurring).

3. See, e.g., Bethany A. Davis Noll, “*Tired of Winning*: Judicial Review of Regulatory Policy in the Trump Era”, 73 ADMIN. L. REV. 353, 357–58 (2021); Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 6–9 (2017) [hereinafter Barnett & Walker (2017)]; David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 140–42 (2010); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1097 (2008); Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 83 (2011).

4. MAEVE P. CAREY, CONG. RSCH. SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER 1, 7 (2019) [hereinafter CONG. RSCH. SERV., R43056].

We, like all scholars, have limited resources and could not hope to analyze every action a single agency takes, let alone every action from every agency. But how could we ensure that like would be treated alike across administrations?

We landed on major rules, as defined under the Congressional Review Act (“CRA”), as our unit of analysis.⁵ Many readers of this Article have heard of the CRA. Most probably view it as a procedural device that operates in practice only when new presidents come to power with an aligned Congress ready and willing to undo their predecessors’ late-term initiatives. But the CRA also neatly divides the world of agency rules into two buckets: major and non-major rules.⁶ The major-rules designation narrows the thousands of agency actions each year to around 70 rules that have the greatest economic impact.⁷ It thus provides an easy way to limit the unit of analysis for long-term study using an objective criterion that has existed for more than two decades. Better yet, the Government Accountability Office (“GAO”) maintains an easy-to-use database of all such rules.

Of course, using major rules as our unit of analysis has methodological drawbacks, which we address in greater detail in later pages. Among other things, it constrains the number of observations in our study. It also excludes certain categories of important administrative actions that do not go through the formal rulemaking process. But we believe the benefits of a manageable, stable, and identifiable unit of analysis available over a long time span offset the drawbacks.

Our primary dataset starts with the 1,872 major rules issued between the CRA’s enactment in 1996 and the end of the first Trump Administration in 2021. (We separately analyze the Biden Administration’s major rules at the end of this Article; because many challenges to its finalized rules remain ongoing, we do not include them in our primary dataset.) We identified which of these major rules were challenged in court (398) and which were addressed in opinions that could be used for coding agency win rates and other variables (322). Because some major rules faced multiple challenges in different venues, courts addressed some major rules in more than one controlling opinion (i.e., the ultimate opinion in a litigation). Hence why we have 445 controlling opinions in our dataset.

This process produced two ways to assess agency win rates: (1) major rules upheld; and (2) controlling opinions ruling in agencies’ favor. We analyze both. Although we primarily intended to assess agency challenge and win rates, we also collected variables on several other topics along the way, ranging from the party and president appointing the judge(s) who decided the controlling opinions to whether the

5. 5 U.S.C. §§ 801–08.

6. *See id.* § 804(2).

7. MAEVE P. CAREY & CURTIS W. COPELAND, CONG. RSCH. SERV., R41651, REINS ACT: NUMBER AND TYPES OF “MAJOR RULES” IN RECENT YEARS 5 (2011).

controlling opinions cited *Chevron*, deferred to an agency's interpretation of a statute, found a rule arbitrary and capricious, or ruled in favor of an agency on a ground unrelated to the rule (e.g., standing)—among others. Some of our results align with previous studies' findings; others do not. Those results that differ from the findings of past studies may demonstrate differences across time or across administrations that previous studies would not have captured, given their earlier and often more limited timeframes. We briefly highlight some of the more interesting findings here.

First, most major rules are not challenged. To be exact, only 21.3% of the major rules in our primary dataset ended up in court, meaning the vast majority of major rules go unchallenged. But the challenge rate has risen over time, going from 16.8% of the Clinton Administration's major rules to 28.0% of the first Trump Administration's. As a result, federal courts are resolving many more challenges to major rules than they once did, especially considering that challenges to individual rules are increasingly likely to be filed in multiple venues. Some agencies' major rules also landed in court more frequently than others. On that front, the 76.2% challenge rate for the Environmental Protection Agency ("EPA") was a notable outlier.

Second, we find lower overall agency win rates than most other studies. Previous studies typically found agency win rates of around 60–70%, with most studies closer to the top of that range.⁸ In contrast, we find an overall agency win rate of 49.4% (by major rules) and 56.9% (by controlling opinions). As explained in greater detail below,⁹ we grouped mixed results with losses to arrive at our overall win and loss rates while also clearly presenting such mixed results side-by-side with outright wins and outright losses. Readers should keep this nuance in mind. Most other studies based their win rates on opinions, so that figure may provide a better comparison. Here, too, our study finds changes over time. By major rules, the overall agency win rate declined from 63.0% (Clinton) to 55.4% (W. Bush), 51.6% (Obama), and 32.1% (Trump I).¹⁰ By controlling opinions, the overall agency win rate went from 63.3% (Clinton), to 58.1% (W. Bush), 62.8% (Obama), and 45.4% (Trump I). These figures show a general decline in agency win rates across administrations but a more significant drop for the first Trump Administration's major rules—a finding that aligns with Bethany Davis Noll's study of challenges to executive agency actions under the first Trump Administration.¹¹

8. See Barnett & Walker (2017), *supra* note 3, at 28 (71.4% win rate); Zaring, *supra* note 3, at 169–70 (69.0% win rate); *see id.* at 171 tbl. 1 (reporting range of ten prior studies from 54–77% but with half ranging from 60–70%); Pierce, *supra* note 3, at 85–86 (70.0% win rate).

9. *See infra* Section II.C.

10. All data referring to President Trump in this Article refers to his first administration.

11. Davis Noll, *supra* note 3, at 357.

Third, the two-term presidents in our primary dataset (Clinton, W. Bush, and Obama) had higher win rates for major rules issued in their second term. Our study does not reveal the cause of such fluctuations, but they should be kept in mind when comparing agency win rates across administrations and when analyzing data from studies that captured opinions addressing agency actions from a particular presidential term. Looking by presidential term, the first Trump Administration's win rate was closer to, but still much lower than, other administrations' win rates for major rules issued in their first term (e.g., 46.4% for the Obama Administration's first term versus 32.1% for the first Trump Administration).

Fourth, win rates varied widely across agencies. Among the top ten issuing agencies, the Federal Communications Commission ("FCC") had the highest win rate at 73.9%; the next highest were the Department of Agriculture ("USDA") at 63.6% and the Department of Transportation ("DOT") at 61.9%. The EPA and Securities and Exchange Commission ("SEC") had the lowest win rates at 36.4% and 35.7%, respectively. But the EPA also saw the highest percentage of mixed results (40.9%), which we group with losses when reporting overall win and loss rates. Reasonable minds could group those mixed results differently, especially ones that resulted in remand without vacatur. Doing so for the EPA would produce an arguable success rate of 77.3%, which demonstrates some of the nuance in our data that readers should bear in mind. We also find that independent agencies (as defined under 44 U.S.C. § 3502) had higher win rates than executive agencies (58.0% versus 47.5%). Agencies led by multimember commissions similarly had higher win rates than single-headed agencies (58.1% versus 47.6%).

Fifth, while around half of all challenges to major rules were filed in either the U.S. District Court for the District of Columbia or the U.S. Court of Appeals for the D.C. Circuit, these two courts' preeminence declined over time. The D.C. Circuit's decline was starker, dropping from 53.2% for challenges to the Clinton Administration's major rules to 38.1% (W. Bush), 27.7% (Obama), and 11.7% (Trump I). At the same time, courts that rarely saw challenges to major rules in earlier administrations saw a large share under the first Trump Administration; these included the U.S. District Courts for the Northern District of California (11.7%), Southern District of New York (7.3%), and District of Maryland (7.3%). The incidence of multiple challenges to a single major rule also increased, though not uniformly, with a low of 9.9% for the W. Bush Administration's major rules and a high of 32.3% for the first Trump Administration's. Together, these data points support the common perception that multi-venue challenges to agency actions have increased along with a rise in forum shopping.

Sixth, partisan trends in our study paint a mixed picture. Republican administrations generally fared better in front of judges appointed by Republican presidents, and vice versa, but Democratic administrations fared considerably better in front of mixed-panel majorities

than Republican administrations (73.8% versus 47.6%). Somewhat surprisingly, we did not observe strong differences in agency win rates before judges appointed by presidents in certain adjacent administrations, regardless of party: Carter and Reagan appointees (50.0% versus 48.0%); H.W. Bush and Clinton appointees (64.0% versus 63.1%); and W. Bush, Obama, and Trump I appointees (57.4%, 54.1%, and 54.2%).

Seventh, some of our most interesting findings concern the rise and fall of *Chevron* deference. *Chevron* citations in controlling opinions addressing challenges to major rules arguably followed *Chevron*'s own arc: They rose from Carter appointees (50.0%) through Reagan (60.0%) and H.W. Bush (64.0%) appointees, before declining through Clinton (54.4%), W. Bush (49.2%), Obama (45.9%), and Trump I (29.2%) appointees. Most notably, no controlling opinion authored by a Trump I appointee in our dataset deferred at the second step of the *Chevron* framework, even though every other administration's appointees deferred at step two in 40.0% or more of controlling opinions that cited *Chevron*.

Finally, as mentioned above, we analyzed the Biden Administration's major rules and present that data separately. We caution, however, that many challenges to the Biden Administration's major rules remain pending. Our analysis of the data points available to date finds that the challenge rate to the Biden Administration's major rules (29.0%) is in line with the first Trump Administration. The same goes for its win rate: 40.5% by major rules and 45.5% by controlling opinions. This data suggests that, although the first Trump Administration may have had an unusually low win rate, it may have been a dip in a longer downward trend.

All told, our study suggests that the conventional wisdom that agencies win roughly two-thirds of the time no longer holds true, at least not for major rules. This may come as little surprise to some administrative law scholars given recent doctrinal developments, including the Supreme Court's overturning of *Chevron*,¹² the rise of the major questions doctrine,¹³ and renewed interest in the nondellegation doctrine,¹⁴ among others. In addition, how one interprets our study's data may reflect one's preexisting views of the administrative state: Supporters of the administrative state may view the decline in agency win rates as reflective of judicial overreach, while critics of the administrative

12. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024).

13. See *West Virginia v. EPA*, 597 U.S. 697, 724 (2022); *Biden v. Nebraska*, 600 U.S. 477, 504–06 (2023).

14. See *Gundy v. United States*, 588 U.S. 128, 148 (2019) (Alito, J., concurring) (indicating that Justice Alito would support reviving the nondellegation doctrine); Cass R. Sunstein & Adrian Vermeule, *The Very Structure of Modern Government Is Under Legal Assault*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/09/15/opinion/us-government-constitution.html> [https://perma.cc/UHX7-5C55] (describing how at least four members of the Supreme Court have indicated that they would like to revive the nondellegation doctrine).

state may view it as reflective of agency overreach. Although our study cannot pinpoint causal relationships between doctrinal developments and agency win rates, it provides additional data supporting the widespread perception that the ground has shifted in administrative law. At the same time, our study also reveals that, while agency win rates have declined over time, the vast majority of major rules survive because most go unchallenged.

This Article proceeds as follows. Part II provides background on our study and its methodology, as well as its relationship to previous empirical studies of agency win rates. Part III summarizes our primary dataset's results, broken down by the following topics: general trends; challenge rates; win rates in general, by administration, by agency, and by agency type; remands without vacatur; forum shopping and litigation trends; partisan trends; and trends in administrative law, including the rise and fall of *Chevron* deference, arbitrary and capricious review, cost-benefit analysis, and agency wins unrelated to the rule (e.g., standing). Part IV summarizes data on the Biden Administration (up to date as of February 2025). The Article concludes in Part V with a reflection on the study results and plans for future research.

II. BACKGROUND AND METHODOLOGY

Our study analyzes legal challenges to federal agency actions categorized as “major rules” under the 1996 CRA. So, what is a major rule under the CRA, why analyze legal challenges to them, and how did we analyze such challenges?

A. What Is a Major Rule?

Under the CRA, before any federal agency’s rule can take effect, the agency must submit the rule to Congress.¹⁵ The CRA’s definition of “rule” borrows largely from Section 551 of the Administrative Procedure Act (“APA”), which defines a rule as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”¹⁶ This broad definition includes regulations adopted after notice-and-comment rulemaking, as well as less formal agency actions, like guidance documents.¹⁷ The CRA excludes from this definition

15. MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 1 (2021) [hereinafter CONG. RSCH. SERV., R43992].

16. *Id.* at 6 (quoting 5 U.S.C. § 551(4)).

17. VALERIE C. BRANNON & MAEVE P. CAREY, CONG. RSCH. SERV., R45248, THE CONGRESSIONAL REVIEW ACT: DETERMINING WHICH “RULES” MUST BE SUBMITTED TO CONGRESS 13 (2019) [hereinafter CONG. RSCH. SERV., R45248].

three categories of agency actions: rules “of particular applicability”; rules “relating to agency management or personnel”; and “any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.”¹⁸ In addition, the CRA does not apply to “rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee” (“the Fed” or “Federal Reserve”).¹⁹ But the CRA captures other Federal Reserve rules.²⁰

When an agency submits a rule to Congress, it must state whether the rule is “major.”²¹ Designating a rule as major serves a primarily procedural purpose: The CRA provides Congress with fast-track procedures to adopt a joint resolution disapproving any rule and gives Congress more time to review a “major” rule than a “non-major” rule.²²

But the designation also neatly divides all agency rules into the two distinct categories of “major” and “non-major.” The statute provides that a rule is major if it:

- has resulted in or is likely to result in—
- (A) an annual effect on the economy of \$100,000,000 or more;
 - (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
 - (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.²³

Rules can satisfy the \$100 million threshold for myriad reasons, “including because they involve compliance costs, result in transfers of funds, prompt consumer spending, establish user fees, or result in cost savings for consumers and taxpayers.”²⁴

18. 5 U.S.C. § 804(3).

19. *Id.* § 807.

20. Even if rules concerning monetary policy could have been included in our study, there would be few or no challenges to them. See Steffi Ostrowski, Note, *Judging the Fed*, 131 YALE L.J. 726, 729–30, 730 n.13 (2021); Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 L. & CONTEMP. PROBS. 129, 140 (2015).

21. CONG. RSCH. SERV., R43992, *supra* note 15, at 2.

22. *Id.* at 10, 15. Among other things, the CRA eliminates a possible filibuster for joint resolutions of disapproval. *Id.* at 1; Bridget C.E. Dooling, *Into the Void: The GAO’s Role in the Regulatory State*, 70 AM. U. L. REV. 387, 395 (2020). If the President signs the joint resolution or Congress overrides the President’s veto, the disapproved rule does not take effect. CONG. RSCH. SERV., R43992, *supra* note 15, at 2. Congress has rarely disapproved agency rules using the CRA’s fast-track procedures, however, because it is hard to do so without a unified government during the CRA’s timeframes. Dooling, *supra*, at 396–98. Presidents are unlikely to disapprove their own administration’s rules, so CRA disapprovals typically occur, if at all, in the narrow window after a presidential transition. CONG. RSCH. SERV., R43992, *supra* note 15, at 5–6.

23. 5 U.S.C. § 804(2). This definition also excludes “any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.” *Id.*

24. CONG. RSCH. SERV., R43992, *supra* note 15, at 10.

To give some context, agencies issue roughly 3,000 to 4,500 rules each year,²⁵ only 50 to 120 of which are major.²⁶ These major rules often include an administration’s most important regulatory initiatives. At a minimum, they include an administration’s most economically impactful rules.

Major rules are sometimes confused with “significant” or “economically significant” rules under Executive Order 12,866 (“E.O. 12,866”).²⁷ E.O. 12,866 requires the Office of Information and Regulatory Affairs (“OIRA”) to coordinate interagency review of certain rules and, like the CRA, uses rule designations for procedural purposes.²⁸ The CRA and original E.O. 12,866 designations are similar, but they differ in key respects. Under E.O. 12,866, a “significant regulatory action” was one that was likely to:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.²⁹

This definition may have captured more rules than the CRA’s definition of major rules, as it included more potential qualifying categories³⁰—but E.O. 12,866’s coverage has not historically included rules from independent agencies.

Rules that satisfied E.O. 12,866’s first requirement of a “significant” regulatory action[],” namely, an annual economic effect of \$100 million

25. CONG. RSCH. SERV., R43056, *supra* note 4, at 1.

26. *Id.* at 9 fig. 2.

27. Exec. Order No. 12,866, 58 Fed. Reg. 51735, 51738 (Sept. 30, 1993). The Biden Administration’s Executive Order 14,094 amended E.O. 12,866, including the criteria for designation as a significant rule, but those amendments are not relevant to this discussion and do not affect our study. See Exec. Order No. 14,094, 88 Fed. Reg. 21879, 21879 (Apr. 6, 2023).

28. Exec. Order No. 12,866, 58 Fed. Reg. 51735, 51738–39 (Sept. 30, 1993).

29. *Id.* at 51738.

30. See CONG. RSCH. SERV., R43056, *supra* note 4, at 10 & n.51. President Biden amended this definition in E.O. 14,094 by, among other things, raising the dollar threshold from \$100 million to \$200 million and requiring that the figure be periodically updated. Exec. Order No. 14,094, 88 Fed. Reg. 21879, 21879 (Apr. 6, 2023). Because our study uses the CRA’s definition of major rules, which has not changed, the amendment does not affect our analysis.

or more, were commonly called “economically significant” rules.”³¹ There is thus presumably a very close overlap between rules that were designated economically significant rules under E.O. 12,866 and major rules under the CRA.³² One key difference between these categories is that the CRA applies to all federal agencies, while most of E.O. 12,866 has historically not applied to independent agencies (as defined in 44 U.S.C. § 3502).³³ Major rules thus include rules with impacts similar to economically significant rules under E.O. 12,866, but they have historically come from more agencies.

B. Why Study Challenges to Major Rules?

So why focus on major rules? To begin with, there are too many federal agency actions to analyze all of them over a long timeframe given most scholars’ resource constraints. This is why long-term studies of federal rules choose a subset of actions to analyze. Focusing on major rules limits the unit of analysis to about 70 agency actions each year. This smaller universe also focuses attention on an administration’s most economically impactful regulations. And unlike economically significant rules under E.O. 12,866, major rules under the CRA capture the most economically impactful rules from *all* federal agencies (excluding monetary policy), not just agencies traditionally subject to OIRA review.

Focusing on major rules also restricts the scope of the analysis based on an objective statutory definition, eliminating the need to make judgment calls about what is important.³⁴ Better yet, the GAO maintains a public database of all rules submitted to Congress for review under the CRA and categorizes these rules as major or non-major,³⁵ eliminating

31. CONG. RSCH. SERV., R43056, *supra* note 4, at 4 n.21, 12.

32. *Id.* at 12–13.

33. *Id.* at 4. Scholars have long debated a president’s ability to subject so-called independent agencies to E.O. 12,866. See Clark Nardinelli & Susan Dudley, *On Balance: Extending Executive Order 12866 to Independent Regulatory Agencies*, SOC’Y FOR BENEFIT-COST ANALYSIS (Feb. 23, 2021), https://www.benefitcostanalysis.org/index.php?option=com_dailyplanetblog&view=entry&year=2021&month=02&day=22&id=63:on-balance-extending-executive-order-12866-to-independent-regulatory-agencies [<https://perma.cc/AS3T-HUUL>]; Cary Coglianese, *Improving Regulatory Analysis at Independent Agencies*, 67 AM. U. L. REV. 733, 746–49 (2018). In 2019, the Department of Justice’s Office of Legal Counsel issued an opinion concluding that the president can direct independent agencies to comply with E.O. 12,866. Extending Regul. Rev. Under Exec. Order 12866 to Indep. Regul. Agencies, 43 Op. O.L.C. 232, 233 (2019) [hereinafter OLC, Extending Regulatory Review]. By executive order issued in early 2025, President Trump directed all independent agencies to submit all proposed and final significant regulatory actions to OIRA for review. Exec. Order No. 14,215, 90 Fed. Reg. 10447, 10447 (Feb. 18, 2025).

34. CONG. RSCH. SERV., R43056, *supra* note 4, at 10 (“One advantage of measuring the number of major rules each year, rather than measuring the total number of rules, is that this counting approach does not include rules that are relatively minor in effect . . .”).

35. See *Congressional Review Act*, U.S. Gov’t ACCOUNTABILITY OFF., <https://www.gao.gov/legal/other-legal-work/congressional-review-act> [<https://perma.cc/HTP9-XN2L>] (last visited Feb. 22, 2025).

the need to scour the Federal Register to determine which of the thousands of rules issued each year are major.

Still, some major rules slip through the cracks. Agencies occasionally fail to submit rules to Congress.³⁶ Omissions were more common in the years immediately following the CRA's enactment as agencies adjusted to its requirements.³⁷ These omissions prompted the GAO to monitor the Federal Register for rules that agencies neglected to submit, a practice it says it now performs only for major rules.³⁸ Agencies have improved over time, and the GAO has suggested that agencies were always better at submitting major rules than non-major ones.³⁹ In addition, if an agency fails to submit a rule to Congress, members of Congress can request the GAO's opinion on whether the agency action qualifies as a rule under the CRA; if the answer is yes, the GAO's opinion restarts the CRA's clock for fast-track disapproval.⁴⁰ Agencies thus have an incentive to submit rules to Congress to avoid later CRA disapproval. Still, the GAO's database—and thus our study—may have missed some major rules since 1996. We assume any missed rules are unlikely to significantly alter the study's results.

For studies covering extended timeframes, it is also hard to know where to begin and end. Using major rules as the unit of analysis provides a clear starting point for our study—the CRA's enactment in 1996. Picking an end point was more challenging. For most of our analyses, we stopped with the end of the first Trump Administration, as that marked a clear end point sufficiently long ago that most challenges to major rules issued up to then have concluded. This period conveniently covers two Democratic administrations and two Republican administrations. As noted, we omitted the Biden Administration's major rules from our primary analysis because it takes time for challenges to work their way through the courts. Comparisons with the four prior administrations

36. Agencies often fail to submit guidance documents to Congress, but the CRA's disapproval procedures have limited application to such "rules" as they are not legally binding. CONG. RSCH. SERV., R43992, *supra* note 15, at 7. As we discuss below, the Internal Revenue Service failed to designate its rules as major until relatively recently. *See infra* text accompanying notes 68–70.

37. CONG. RSCH. SERV., R45248, *supra* note 17, at 18–19.

38. *Id.* at 19–20.

39. After the GAO conducted annual reviews to determine whether all final rules had been submitted pursuant to the requirements of the CRA, it noted multiple trends:

Although we reported that agencies' compliance with CRA requirements was inconsistent during the first years after CRA's enactment, compliance improved over time. In general, we have found the degree of compliance to have remained fairly constant, with roughly 200 nonmajor rules per year not filed with our office. In the 10 years since CRA was enacted, all major rules have been filed in a timely fashion.

J. CHRISTOPHER MIHM, U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-601T, PERSPECTIVES ON 10 YEARS OF CONGRESSIONAL REVIEW ACT IMPLEMENTATION 4 (2006).

40. CONG. RSCH. SERV., R43992, *supra* note 15, at 13.

could thus be misleading. At the end of this Article, however, we provide a few data points from the Biden Administration to date.⁴¹

In addition, using major rules as the unit of analysis permits an apples-to-apples comparison across time and administrations. Among other things, our study shows (a) the portion of an administration's major rules that were challenged (and thus the portion that went unchallenged), and (b) how many of those challenges were successful. Such comparisons may provide an informative indicator of the relative durability of each administration's important regulatory initiatives while ensuring (to the extent possible) that like is treated alike across administrations.

That said, using major rules as the unit of analysis may cause us to miss a given administration's strengths or weaknesses or other potentially interesting trends in administrative law. For example, our study does not capture non-major rules, agency inaction (e.g., the failure to promulgate a rule when required by statute), or agency actions that should have been but were not properly issued as rules or submitted to Congress. Such procedural shortcomings could vary significantly across administrations. Focusing on major rules also limits the number of observations in our study, a point we return to below.⁴² Nevertheless, we felt the advantages of using a relatively narrow—but consistent—unit of analysis outweighed these drawbacks, especially given that this unit captures an administration's most economically consequential rules.

C. How Did We Analyze Challenges to Major Rules?

Having settled on major rules, how did we analyze challenges to them? It was harder than we expected.

For each major rule in GAO's database, we searched Bloomberg Law for all references to the rule's Federal Register citation.⁴³ This included references in both judicial opinions and court filings (e.g., complaints and briefs). We used the rule's Federal Register citation because a natural language search of the rule's precise name would have missed many relevant results, while a similar search of key terms from the rule's name would have returned too many irrelevant results. We also assumed that, in most challenges to major rules, someone at some point

41. The Institute for Policy Integrity at NYU School of Law maintains the Major Rules in the Courts database and will be updating it with data from the Biden Administration. See *Tracking Major Rules in the Courts*, INST. FOR POL'Y INTEGRITY (July 15, 2025), <https://policyintegrity.org/tracking-major-rules> [<https://perma.cc/6LYR-BZYV>].

42. See *infra* Section III.C.1.

43. We chose Bloomberg Law because it often identified more court filings than other databases, and it did so in a more user-friendly way, identifying court dockets and highlighting the relevant filings within those dockets. As discussed below, we also used Westlaw for a quality control check.

(a party in a court filing or a judge in an opinion) would cite the rule's Federal Register citation.⁴⁴

We then examined each identified docket to determine whether it involved a challenge to the relevant major rule. This process was usually straightforward, such as when a complaint, petition for review, or judicial opinion clearly identified the rule at issue. But it was often difficult to determine whether a case constituted a challenge to a given rule. In some cases, parties and courts did not clearly state the agency action at issue. In other cases, the challenge came several years after the agency issued the relevant rule or grouped multiple rules in the same litigation.⁴⁵ Many searches of Federal Register citations turned up no dockets;⁴⁶ some turned up over one hundred.⁴⁷ We sifted through these dockets and their related filings to identify as many challenges as possible.

Once we identified a challenge, we traced the case's progression through the courts. Most challenges produced an opinion, but many concluded before that point.⁴⁸ For those challenges that resulted in an opinion, we coded selected variables based only on the litigation's ultimate (and thus controlling) opinion. For example, if a challenge initially filed in district court was appealed, we recorded the appellate decision as the controlling opinion. But because some major rules were challenged in multiple venues, certain rules in our database have more than

44. This is an imperfect search method, as there could be instances in which no filed documents in a docket cite the relevant rule's Federal Register citation or where Bloomberg Law and Westlaw do not have text-searchable copies of the relevant documents. This second point is especially relevant to our study's earlier years, when electronic filing was nascent. But we believe our approach provided the most thorough (and efficient) way to identify challenges to major rules and captured the vast majority of such challenges.

45. *E.g.*, Complaint at 5, Banner Health v. Sebelius, 945 F. Supp. 2d 1, 9–10 (D.D.C. 2013) (No. 10-cv-01638) (2010 challenge to rules promulgated in 1998 through 2006); Complaint at 5, Univ. of Colo. Health at Mem'l Hosp. v. Becerra, No. 14-cv-1220, 2022 WL 2191690 (D.D.C. June 17, 2022) (2014 challenge to rules promulgated in 2007 and 2008); Original Complaint at 1–2, Jindal v. U.S. Dep't of Educ., No. 14-cv-534, 2015 WL 5474290 (M.D. La. Sept. 16, 2015) (2014 challenge to a rule promulgated in 2009).

46. *E.g.*, Migratory Bird Hunting; Final Frameworks for Early-Season Migratory Bird Hunting Regulations, 74 Fed. Reg. 43008 (Aug. 25, 2009) (to be codified at 50 C.F.R. pt. 20); Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 78 Fed. Reg. 70416 (Nov. 25, 2013) (to be codified at 49 C.F.R. pt. 571); Tricare; Reimbursement of Long Term Care Hospitals and Inpatient Rehabilitation Facilities, 82 Fed. Reg. 61678 (Dec. 29, 2017) (to be codified at 32 C.F.R. pt. 199).

47. *E.g.*, Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328) (181 docket results on Bloomberg Law); Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120) (174 docket results on Bloomberg Law); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (120 docket results on Bloomberg Law).

48. To confirm that Bloomberg Law accurately captured a case's outcome, we also searched Westlaw for opinions we found and looked for additional case history that Bloomberg Law may have missed.

one controlling opinion. For example, one 2019 rule produced three different opinions in three different district courts located within two different circuits.⁴⁹

For each challenge that produced at least one opinion,⁵⁰ we used the controlling opinion to determine whether that challenge was successful, unsuccessful, or “mixed.”⁵¹ The mixed category for controlling opinions captured results that were hard to classify as entirely successful or unsuccessful. Most often, it involved a court finding some, but not all, challenged provisions of a rule invalid, typically resulting in only a partial vacatur or, in many instances, a remand without vacatur. As explained in further detail below, when reporting data by major rules (as opposed to by controlling opinions), mixed could mean either that a court found some, but not all, challenged provisions of the rule invalid or that different courts reached divergent results over the same major rule in different controlling opinions.⁵² Reasonable minds could differ over how to treat such mixed results (i.e., as wins or losses for the agency). To address this problem, we present results as successful, unsuccessful, or mixed.⁵³ But to arrive at the most conservative estimate of agency win rates, we also group mixed and successful challenges for reporting overall win-loss rates. We grouped mixed and successful challenges on the theory that even a partial loss is a loss for the agency.⁵⁴ As noted, however, because others could easily disagree with this grouping, we also report mixed results throughout this Article and flag at times

49. Patient Protection and Affordable Care Act; Exchange Program Integrity, 84 Fed. Reg. 71674 (Dec. 27, 2019) (to be codified at 45 C.F.R. pts. 155–56) (rule); California v. U.S. Dep’t of Health & Hum. Servs., 473 F. Supp. 3d 992, 994 (N.D. Cal. 2020) (opinion); Washington v. Azar, 461 F. Supp. 3d 1016, 1018 (E.D. Wash. 2020) (opinion); Planned Parenthood of Md., Inc. v. Azar, No. CCB-20-00361, 2020 WL 3893241, at *1 (D. Md. July 10, 2020) (opinion).

50. Multiple parties often filed complaints or petitions for review challenging the same rule in the same court. Courts generally consolidated such complaints or petitions and then resolved them in a single opinion. We treated such consolidated complaints or petitions as a single challenge.

51. Several challenges took a trip to the Supreme Court. But because the Supreme Court usually granted certiorari on only narrow issues, we often had to look at circuit court opinions, typically on remand, to determine whether a challenge was successful, unsuccessful, or mixed.

52. See *infra* Section III.C.1.

53. As explained in further detail below, when reporting data by major rules (as opposed to by controlling opinions), mixed could mean a court found some but not all challenged provisions of the rule invalid or different courts reached divergent results over the same major rule. See *infra* Section III.C.1.

54. It is not always clear how other studies treat mixed results. Some exclude them, either because the focus is on outcomes under a particular standard of review rather than agency win rates generally, *see, e.g.*, Zaring, *supra* note 3, at 177 n.136 (noting “cases in which the agency’s action was deemed supported by substantial evidence but illegal for some other reason” were excluded from the dataset), or because such exclusions are necessary for coding, *see, e.g.*, Martha Anne Humphries & Donald R. Songer, *Law and Politics in Judicial Oversight of Federal Administrative Agencies*, 61 J. Pol. 207, 214 (1999) (excluding mixed decisions for a regression analysis that coded agency wins as 1 and losses as 0).

when a different grouping might cause someone to view the data very differently.

As of January 2025, 5.2% of challenges to the major rules in our dataset remain ongoing, most of which involve more recent administrations: Clinton (0.0%); W. Bush (0.0%); Obama (4.4%); and Trump I (10.5%). We coded controlling opinions even for cases that remain ongoing, meaning a later appeal could affect some of these results. But we also checked these dockets periodically to determine whether they have concluded. Once these challenges conclude, their results could alter the overall results in our study, though we assume the changes would be relatively minor.

Coding nearly 2,000 major rules (or over 2,000 when the Biden Administration is included) and relevant challenges was an extensive undertaking with room for judgment calls and error. We did our best to reduce the number of judgment calls (e.g., using binary coding). To ensure our dataset was as accurate as possible, we also used several quality control mechanisms, including using another database (Westlaw) to re-check all major rules initially coded as not challenged, setting aside for group deliberation more complex coding decisions requiring judgment calls, and re-checking every twentieth major rule in the database (by someone who had not coded that rule initially). We address additional methodological and coding issues in relevant sections below and in the appendix.

D. Relationship to Previous Studies

Our study follows a long line of scholarship that empirically analyzes the outcomes of legal challenges to federal agency actions (often called agency win rates or validation rates). Some articles focus on specific courts,⁵⁵

55. E.g., Barnett & Walker (2017), *supra* note 3, at 1 (circuit courts); Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1441 (2018) [hereinafter Barnett & Walker (2018)] (circuit courts); Kiki Caruson & J. Michael Bitzer, *At the Crossroads of Policymaking: Executive Politics, Administrative Action, and Judicial Deference by the DC Circuit Court of Appeals (1985–1996)*, 26 L. & POL'Y 347, 347 (2004) (D.C. Circuit); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2168 (1998) (D.C. Circuit); Eskridge & Baer, *supra* note 3, at 1094 (Supreme Court); Humphries & Songer, *supra* note 54, at 217 (circuit courts); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REGUL. 1, 4 (1998) (circuit courts); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006) (Supreme Court and circuit courts) [hereinafter Miles & Sunstein (*Chevron*)]; Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1733 (2010) (Supreme Court); David H. Willison, *Judicial Review of Administrative Decisions: Agency Cases Before the Court of Appeals for the District of Columbia, 1981–1984*, 14 AM. POL. Q. 317, 324–25 (1986) (D.C. Circuit).

practice areas,⁵⁶ or agencies.⁵⁷ Some focus on challenges to a wide range of agency actions during a specific timeframe.⁵⁸ Much of this scholarship focuses on how courts applied *Chevron* deference⁵⁹ or other legal doctrines or standards of review.⁶⁰ At least two aggregate multiple studies.⁶¹ We cross-reference several of these studies as relevant when discussing specific results below.

Our study differs from past studies of agency win rates in two primary respects. First, rather than use opinions resolving legal challenges to agency actions as the unit of analysis, we used the relevant agency actions as the unit of analysis (while also reporting data on controlling opinions addressing challenges to those actions). This design allows us to capture not only the rate of agency success in the courts, but also the rate at which administrative rules are challenged in the first place. This statistic, which we do not believe has been captured in any other study, provides insight into the overall durability of agency action. Second, to our knowledge, the roughly 24-year period of our study covers the longest continuous timeframe of any study of agency win rates.⁶² Consequently, our study captures four presidential administrations (two from each party), with preliminary data from a fifth.

Together, these differences allow for a more complete understanding of the administrative state's relationship to the federal courts than

56. E.g., Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 767 (2008) (examining circuit courts' application of *Chevron* deference in environmental decisions from 2003 to 2005).

57. E.g., Miles & Sunstein (*Chevron*), *supra* note 55, at 825 (EPA and National Labor Relations Board ("NLRB")); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 766 (2008) (same) [hereinafter Miles & Sunstein (Arbitrariness Review)]; Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1717 (2012) (EPA); Elizabeth Guo, *Ruling by Repute: Agency Reputation on Judicial Affirmance of Agency Action*, 74 FOOD & DRUG L.J. 379, 379 (2019) (EPA and Food and Drug Administration).

58. E.g., Davis Noll, *supra* note 3, at 353 (executive agency action under the Trump Administration); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 988 (direct review of agency actions in circuit courts during select time periods from 1965 to 1988).

59. E.g., Barnett & Walker (2017), *supra* note 3, at 1; Barnett & Walker (2018), *supra* note 55, at 1441; Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1463 (2018); Czarnezki, *supra* note 56, at 767; Kerr, *supra* note 55, at 1; Miles & Sunstein (*Chevron*), *supra* note 55, at 823; Richard M. Re, *Should Chevron Have Two Steps?*, 89 IND. L.J. 605, 637–39 (2014).

60. Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 516 (2011) (Auer deference); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1235 (2007) (Skidmore deference); Zaring, *supra* note 3, at 177 (substantial evidence standard of review).

61. Zaring, *supra* note 3, at 170 (aggregating 11 studies); Pierce, *supra* note 3, at 78, 84 (summarizing ten studies).

62. Schuck and Elliott's dataset covers agency actions on direct review in the circuit courts over a non-continuous 23-year period (1965, 1974–75, 1984–85, and 1988). Schuck & Elliott, *supra* note 58, at 989–90.

many of its predecessors. Our study offers meaningful information about the outcomes of challenged rules while also contextualizing those outcomes. For example, a study focused only on agency win and loss rates based on judicial opinions would miss the fact that most agencies' important rulemaking goes unchallenged. Of course, our study is not comprehensive. And as we explain in our concluding part, our results raise several questions that require further scholarly attention. But we hope that our study's unique design will help spur more empirical research on changes in administrative law over time.

III. RESULTS

This Part presents our study's results, organized by topic (e.g., general trends, trends by administration, by agency, by type of agency, and so on). As a reminder, the results in this Part include only part of the Clinton Administration and all of the W. Bush, Obama, and first Trump Administrations. We address the results for the Biden Administration at the end of this Article.

A. General Trends

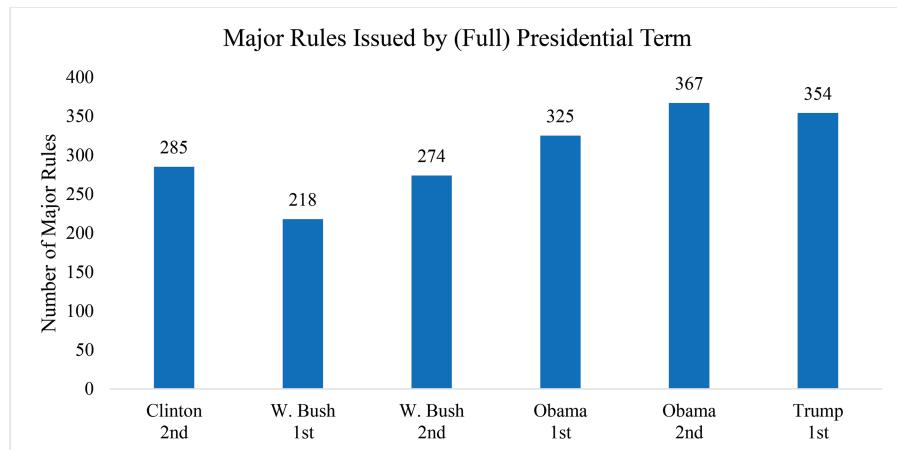
The number of major rules issued varied from year to year and agency to agency. In 2017, the full year with the fewest major rules, only 49 major rules were published; in 2020, the full year with the most major rules, the first Trump Administration issued 162.⁶³ (As explained below, the Biden Administration slightly beat out the Trump Administration in 2024 with 164.) Excluding 1996 and 2021 (as these years have only partial data), agencies issued an average of 80 major rules per year, with a small upward trend over time. Monetary inflation could explain some of that trend: The CRA's key economic threshold for a major rule has remained \$100 million since 1996, but \$100 million today was worth only a little more than \$50 million in 1996.⁶⁴ One would thus expect more rules to fall into the "major rule" bucket over time, all else being equal.

63. Our numbers do not perfectly align with the GAO's database if searched by year because the GAO organizes major rules by (1) the date that a rule becomes effective, and (2) the date that the GAO received a rule. We organized major rules by Federal Register publication date because that date better indicates which administration issued the rule. (For a few major rules issued at the end of an administration, we used the rule's actual date issued, as opposed to the date of Federal Register publication, to address Federal Register publication delays that would lead to a rule being ascribed to the wrong administration.) We also found a few duplicates in the GAO's database that we excluded from our study.

64. See *Inflation Calculator*, FED. RSRV. BANK OF MINNEAPOLIS, <https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator> [<https://perma.cc/H4MW-33MX>] (last visited Feb. 24, 2025).



The average number of major rules issued per presidential term also varied: Clinton (285),⁶⁵ W. Bush (246), Obama (346), and Trump I (354). But there was a more noticeable upward trend across presidential terms than across individual years.

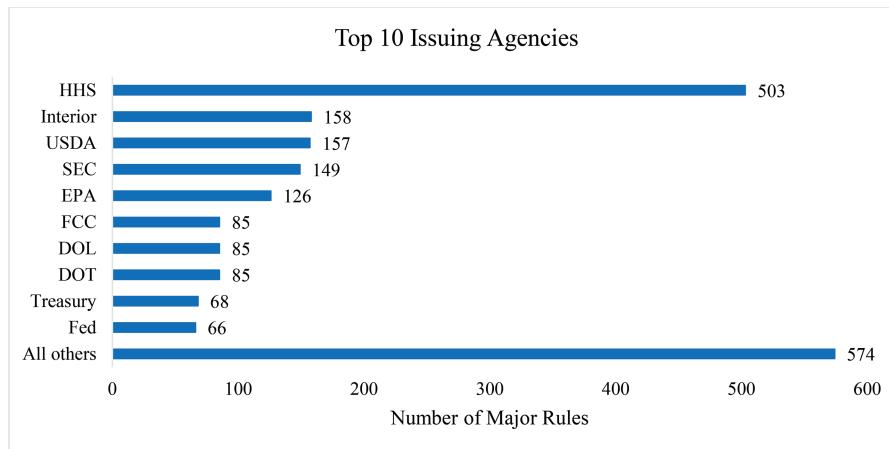


Some agencies issued significantly more major rules than their peers.⁶⁶ Of the 42 agencies that appear in our primary dataset, the top ten issuing

65. This number omits the 49 major rules in our dataset issued during the Clinton Administration's first term, as we have complete data only for the second.

66. With two exceptions, we group subagencies with their parent agencies when presenting agency-specific data throughout this Article. For example, we group all IRS rules with the Department of the Treasury. But two subagencies are also independent agencies: The Federal Energy Regulatory Commission ("FERC") is a subagency of the Department of Energy ("Energy"), and the Office of the Comptroller of the Currency ("OCC") is a subagency of Treasury. Because we report data later in this Article by type of agency (e.g., independent versus executive agencies), we treat FERC and the OCC as equivalent to a parent agency for purposes of reporting agency-specific data here and

agencies accounted for approximately 72% of all major rules.⁶⁷ The Department of Health and Human Services (“HHS”) alone accounted for nearly 24.5%. Four others—the Department of the Interior (“Interior”), USDA, SEC, and EPA—issued at least 100 major rules, each accounting for between 6.1% and 7.7%. The remaining top ten issuing agencies were the FCC, DOT, Department of Labor (“DOL”), Department of the Treasury (“Treasury”), and Federal Reserve.



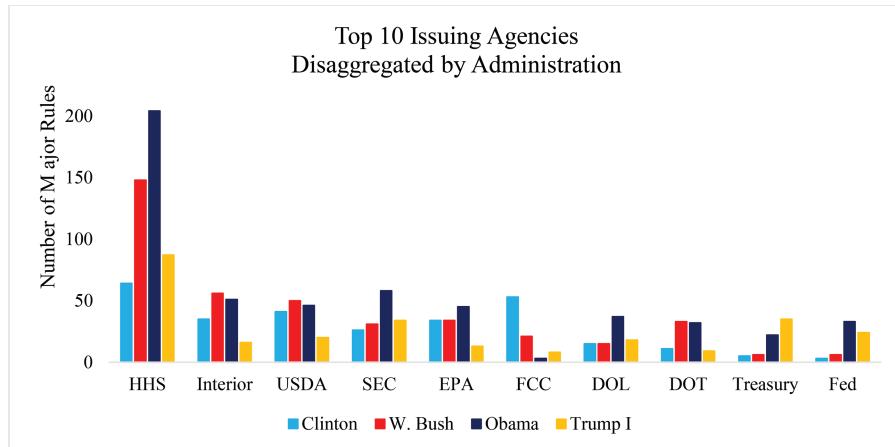
Just as the number of major rules issued per year or presidential term varies, the number of major rules issued per agency also changes over time. For example, there were many more HHS major rules under the Obama Administration than under other administrations, presumably because the Affordable Care Act required a significant increase in new HHS rules. Although there was a noticeable upward trend in the total number of major rules issued during each presidential term, there was a less clear trend in the total number of major rules issued when disaggregated by agency. Legislation requiring new rulemaking (e.g., the Affordable Care Act or the Dodd-Frank Act) or differing presidential priorities could explain much of the fluctuation.

In addition, the Treasury’s increase in major rules in the GAO’s database during the first Trump Administration may be the result of a change in reporting practices for the Internal Revenue Service (“IRS”),

elsewhere. Thus, we do not attribute FERC’s major rules to Energy or the OCC’s major rules to Treasury.

67. Agencies sometimes issue rules jointly, meaning that the same major rule may have more than one issuing agency. For reporting purposes, we assigned each major rule to each issuing agency. Thus, if you sum the number of major rules when broken down by issuing agency, the total number (2,056) exceeds the total number of major rules in our dataset (1,872).

a Treasury subagency, rather than a spike in rulemaking. The IRS had long taken the position that “any impacts associated with tax regulations or other guidance result from the underlying statute rather than the regulations or guidance implementing it.”⁶⁸ Accordingly, the IRS previously did not designate its rules as “major.”⁶⁹ This practice changed during the first Trump Administration, which could explain the spike in the Treasury’s major rules.⁷⁰

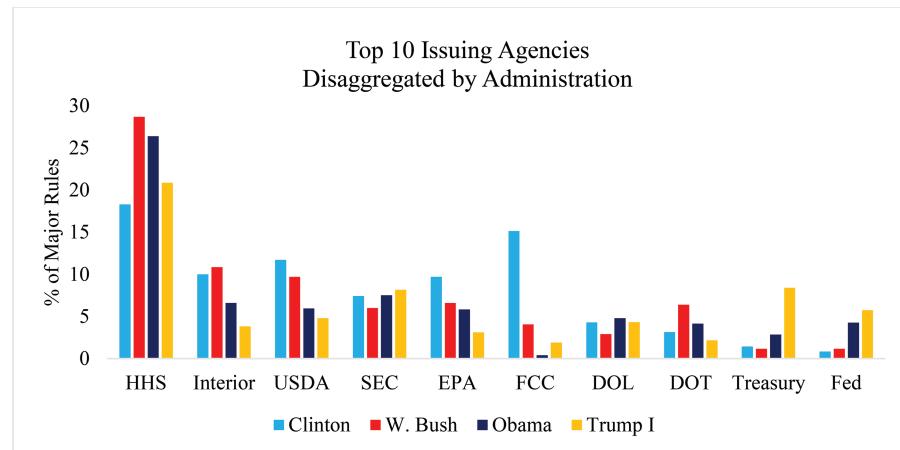


Because President Trump initially served only one term, and the CRA was passed near the end of President Clinton’s first term, comparing aggregate numbers of major rules issued by agencies may not provide the best comparison across administrations. Looking at the top ten issuing agencies’ relative percentages of major rules may provide a more relevant indicator of how agencies’ rulemaking activity varied across administrations. For example, the EPA’s share of major rules issued steadily declined across administrations, even though its absolute number of major rules did not. And though the HHS had a large spike in major rules under the Obama Administration, it had a larger share of major rules under W. Bush.

68. U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-720, REGULATORY GUIDANCE PROCESSES: TREASURY AND OMB NEED TO REEVALUATE LONG-STANDING EXEMPTIONS OF TAX REGULATIONS AND GUIDANCE 34 (2016).

69. *Id.*

70. See *id.* at 35–36. Our dataset includes 18 IRS rules issued before the first Trump Administration. The IRS jointly issued 17 of these rules with other agencies, which may have designated the rules as major. Our dataset includes 27 IRS rules issued during the first Trump Administration; the IRS jointly issued only two of them. Our dataset thus includes only one rule that the IRS solely issued before the first Trump Administration (even that one came at the end of the Obama Administration); but it includes 25 rules that the IRS solely issued during the first Trump Administration.



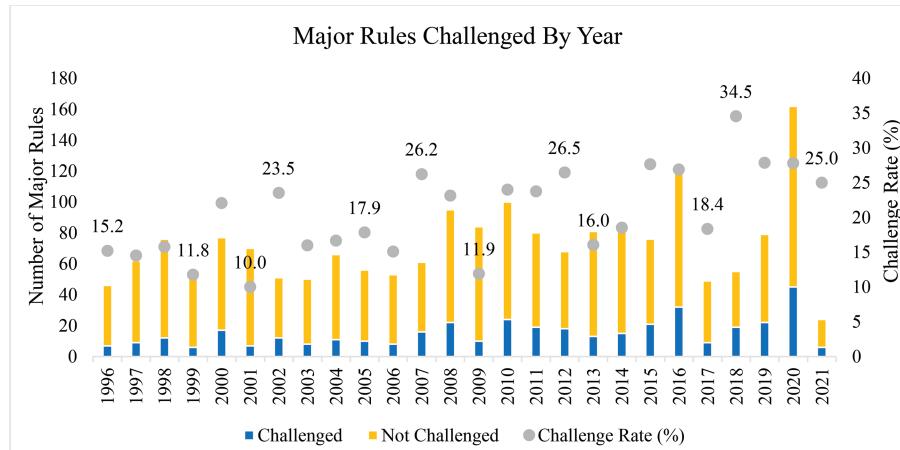
B. Challenge Rates for Major Rules

Most major rules are not challenged in court: Of the 1,872 major rules in our primary dataset, only 398 (21.3%) were challenged. This alone is an important finding, and it is one that readers should keep in mind throughout this Article, particularly when considering agency win rates, given that most major rules do not end up in court at all.

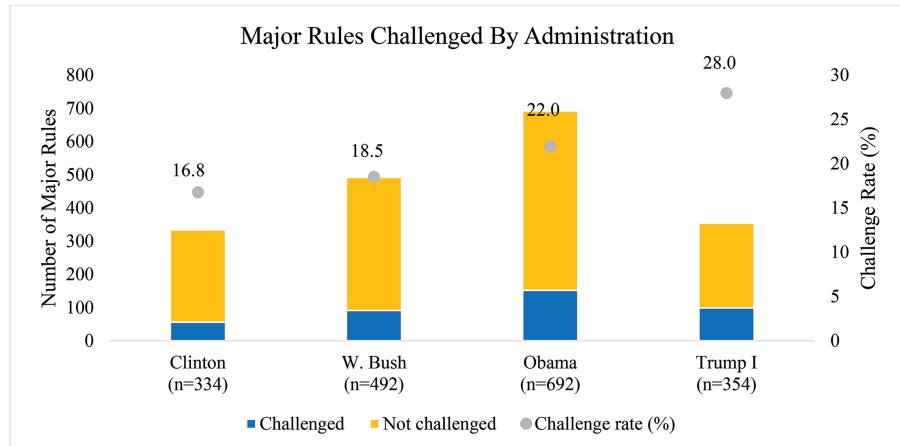
Still, the challenge rate increased over time. In addition, starting in 2001, the challenge rate reliably dipped in the first year of a presidential administration, popping back up in an administration's second year. This may be due to the cyclical nature of presidential administrations.⁷¹ Because of delays in staffing agencies with presidential appointees and the extensive research and analysis it takes to issue complex rules, it takes time to get a new administration "up and running."⁷² An administration might therefore issue a higher portion of "boring" rules in its first year, waiting for later years to undertake its more complex or contentious initiatives.

71. See generally Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008) (discussing the cyclical nature of agency rulemaking).

72. See *id.* at 943 ("There is a significant start-up period for each [p]resident, likely because of the lag associated with learning about the administrative state, finding and appointing agency leaders, having those leaders confirmed by the Senate, having confirmed leaders learn about their agencies and the rulemaking process, and other similar tasks.").



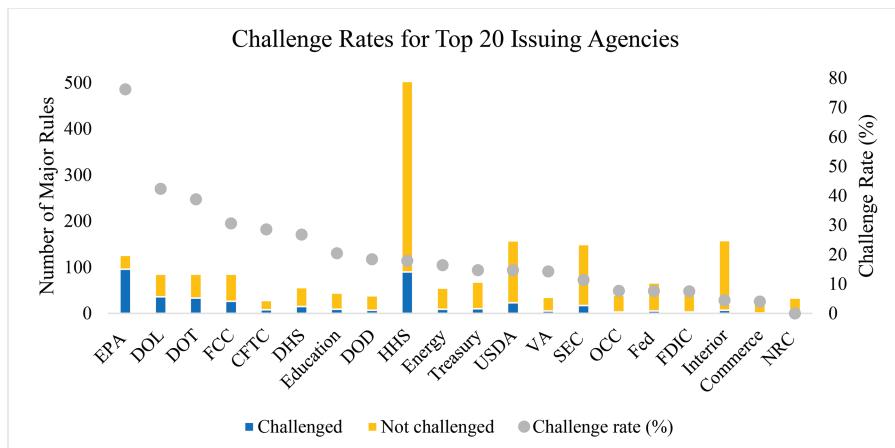
The challenge rate's upward trend is even more pronounced by administration, steadily rising from 16.8% of the Clinton Administration's major rules to 28.0% of the first Trump Administration's. This difference is statistically significant (at a 95% confidence level), as is the difference between the challenge rates for the W. Bush and Trump I and Obama and Trump I Administrations.



Some agencies faced more frequent challenges to their major rules than others. To provide context, the average challenge rate for all agencies combined was 21.1%, and all agencies outside the top 20 issuing agencies collectively had a challenge rate of 17.1%.⁷³ Six agencies among

73. When reporting challenge rates, we confined our analysis to the top 20 issuing agencies because some agencies issue very few major rules and can skew the results. For example, two agencies had a higher challenge rate than the EPA, but both issued very few rules: The Council on Environmental Quality issued one major rule, which was

the top 20 issuing agencies had higher-than-average challenge rates: the EPA (76.2%), DOL (42.4%), DOT (38.8%), FCC (30.6%), Commodity Futures Trading Commission (“CFTC”) (28.6%), and Department of Homeland Security (“DHS”) (26.8%). Three others had higher rates than their peers outside the top 20: the Department of Education (“Education”) (20.5%), Department of Defense (“DOD”) (18.4%), and HHS (17.9%). Among the top 20 issuing agencies, the EPA was an outlier but with a challenge rate close to rough estimates cited in earlier scholarship (80%).⁷⁴



In contrast, some agencies saw very few of their major rules challenged. Of the 42 agencies that issued major rules, 11 saw no challenges. Some of these agencies issued few major rules (three issued only one), and collectively they accounted for only 74 (3.5%) of the major rules in our dataset. Still, two issued more than ten major rules, none of which were challenged: the Nuclear Regulatory Commission (“NRC”), which issued 33 major rules, and the Social Security Administration (“SSA”), which issued 13.

challenged; the NLRB issued three major rules, which were challenged. Both thus faced challenges to 100.0% of their major rules.

74. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1296 (1997) (“[T]he belief that 80 percent of EPA rules get challenged in court has woven its way into an exhaustive body of work by journalists, governmental officials, and scholars.”). Coglianese estimated an EPA challenge rate of 26.0%, but he analyzed a different time period than we used and did not confine his analysis to major rules. *Id.* at 1298 & n.196. Still, when he limited his analysis to more significant EPA rules, he found EPA challenge rates that averaged only 35.0%. *Id.* at 1300.

C. Agency Win Rates

1. Win Rates in General

One or more opinions addressed 322 of the 398 major rules that were challenged in our dataset.⁷⁵ The challenges to the other 76 major rules concluded before an opinion issued or remain ongoing with no opinion having issued yet; we discuss these challenges in a later section. We based agency win rates only on challenges addressed in one or more opinions.

Of the 322 major rules addressed in one or more opinions, 159 (49.4%) withstood challenge in full and 106 (32.9%) did not. Another 57 (17.7%) major rules saw mixed results, meaning a court found some, but not all, challenged provisions of the rule invalid or different courts reached divergent results over the same major rule (i.e., one court upheld the rule and another found it invalid). To obtain the most conservative estimate of agency win rates, we grouped mixed results with agency losses to arrive at an overall loss rate. Combining the successful challenges with the mixed results, one or more courts found one or more challenged provisions invalid in slightly more than half of all major rules (50.6%). Stated differently, when it comes to defending major rules in court, agencies had an overall win rate of roughly 49.4% and an overall loss rate (including mixed results) of roughly 50.6%. (As noted, reasonable minds could group mixed results differently, including by preparing a range to reflect an agency's win rate or parsing the mixed results to categorize them as closer to wins or losses. We have tried to present our data in a way that reveals this nuance while also allowing readers to interpret the data for themselves.)

Looking instead at the 445 controlling opinions resolving the (sometimes multiple) challenges to major rules in our dataset, the overall agency win rate improves.⁷⁶ Because other studies typically report win rates based on opinions (rather than agency actions), the controlling opinions in our dataset may provide a better comparison point. Of the controlling opinions addressing legal challenges to major rules in our dataset, roughly 56.9% resulted in an agency win; 28.1% resulted in an agency loss; and 15.1% were mixed, meaning the court found some but not all challenged provisions of the rule invalid. Stated differently, agencies had an overall win rate of 56.9% and an overall loss rate (including mixed results) of 43.2% when looking at controlling opinions.

75. Most of these opinions concluded the litigation. Some, however, came at a non-final stage of the litigation (e.g., motions for a preliminary injunction). If these opinions addressed the challenge's merits, we coded them in the same way we coded opinions concluding the litigation.

76. Davis Noll similarly reported results "by reference to the latest ruling in the case." Davis Noll, *supra* note 3, at 382. Most studies of agency win rates report results based solely on opinions, but they often focus on specific courts (e.g., the D.C. Circuit, circuit courts, or Supreme Court), so distinguishing litigation stages would be irrelevant in these studies.

Our study's win rates may surprise some scholars because previous studies have typically found a 60–70% agency win rate, with most studies closer to the upper end of that range. For example, Zaring's 2010 aggregation of 11 studies found that agencies prevailed in approximately 69% of cases, regardless of the standard of review applied.⁷⁷ Looking at many of the same studies, Pierce concluded that "the norm for the results of judicial review of agency decisions is about a 70% affirmance rate."⁷⁸ More recent studies have found similar results. Re's 2014 study found "that the government won about three-quarters of all *Chevron* cases."⁷⁹ And Barnett and Walker's influential 2017 study found an overall agency win rate of 71.4%, regardless of the standard of review applied.⁸⁰

A few dynamics may explain the differences between the agency win rates in our study and others.⁸¹ Our study reveals that agencies may have lower win rates when looking at how their actions ultimately fared as opposed to when looking at how individual courts resolved challenges to those actions. The former may reveal more about the legal durability of agency actions; the latter may reveal more about trends in the law. Both are informative. But our study suggests that other studies may have found higher agency win rates than if they had examined how the underlying agency actions fared. We attempted to address this issue by reporting both ways of measuring agency win rates—by the ultimate fate of major rules and by controlling opinions addressing challenges to major rules. Still, we find a lower overall agency win rate than most other studies, even when looking only at controlling opinions. At least two other dynamics may explain those differences.

First, our study shows that agency win rates declined across administrations. Earlier studies' higher win rates may thus align more closely with the earlier periods in our study, a point we return to below.⁸²

77. Zaring, *supra* note 3, at 169–71. The studies he aggregated found agency win rates ranging from 54% to 77%. *Id.* at 171. Because of the consistency across standards of review, Zaring concluded that "what courts are really doing is the same sort of analysis regardless of the standard of review." *Id.* at 169; see also, e.g., Humphries & Songer, *supra* note 54, at 208–09 (discussing studies of agency success rates before the Supreme Court from 1948 to 1992 showing "average success rates of at least 70 percent").

78. Pierce, *supra* note 3, at 86.

79. Re, *supra* note 59, at 639.

80. Barnett & Walker (2017), *supra* note 3, at 28. Barnett and Walker coded individual issues of statutory interpretation in opinions, determining whether the agency prevailed on the issue and whether the court applied *Chevron* or some other standard of review. See, e.g., *id.* at 23 & n.146. They do not appear to have determined whether the agency prevailed in the case as a whole, as they were focused on how courts applied standards of review and whether the different standards produced meaningfully different outcomes for interpretive questions. *Id.* at 23.

81. As Pierce notes, "[a]ny study that finds an affirmance rate that varies significantly from that norm in some context suggests the need for detailed study of the decisionmaking context to identify and to address the causes of the variation from the norm." Pierce, *supra* note 3, at 86. Hence the extensive discussion here.

82. Even Zaring's studies may reveal temporal changes: Many of the studies he aggregated that covered earlier time periods (e.g., 1959 to 1994) found lower agency

For example, the studies in Zaring's aggregation covered 1981 to 2006,⁸³ and Barnett and Walker's study covered 2003 to 2013,⁸⁴ while our primary dataset covers rules issued from 1996 to 2021. Identifying possible changes over time is a key reason why we picked a relatively stable unit of analysis (major rules) that could better identify such changes.⁸⁵ A key drawback of that approach is that it limits the number of observations in our study: Only 322 major rules addressed in the 445 controlling opinions could be used to determine agency win rates. Still, the number of observations is comparable to other studies. For example, the studies in Zaring's aggregation had between 70 and 1,228 observations with an average of 462.⁸⁶

Second, and relatedly, our study shows stark differences between administrations. Most notably, the first Trump Administration's win rate is much lower than other administrations' win rates. This finding aligns with Davis Noll's study of virtually all challenges to executive agency actions during the first Trump Administration. If you exclude the first Trump Administration, the overall agency win rate increases to 54.9% (for major rules) and 61.6% (for controlling opinions). Those figures align more closely with earlier studies, none of which include the first Trump Administration. As explained below, however, our study also finds a decline in agency win rates across administrations, even excluding the first Trump Administration.⁸⁷

In addition, unlike some other studies of agency win rates, we did not exclude opinions if the agency prevailed based on a reason unrelated to the rule.⁸⁸ For example, we coded a challenge as unsuccessful (and thus a win for the agency) if a court dismissed the complaint or denied the petition for lack of standing. But that would not explain the lower overall win rates we found compared to other studies; if anything, including these opinions should increase the overall win rate compared to studies that excluded them. (In a later section, we break out challenges that failed for a reason unrelated to the rule.⁸⁹) As noted, we excluded challenges that concluded before any opinion was issued addressing the

win rates than studies covering later time periods (e.g., those including the mid-to-late 1990s). See Zaring, *supra* note 3, at 171.

83. *Id.*

84. Barnett & Walker (2017), *supra* note 3, at 1.

85. Zaring rightly notes that aggregated studies reporting weighted averages are often "more reliable than a single study." Zaring, *supra* note 3, at 141–42.

86. *Id.* at 171. Later studies have had similar numbers of observations. See, e.g., Davis Noll, *supra* note 3, at 382 (examining 278 total cases). Barnett and Walker's study had significantly more. Barnett & Walker (2017), *supra* note 3, at 5 (2,272 judicial decisions referencing *Chevron*; 1,327 opinions involving review of an agency statutory interpretation; and 1,558 instances of judicial review of an agency statutory interpretation).

87. See *infra* Section III.C.2.

88. See, e.g., Davis Noll, *supra* note 3, at 381 & n.186 (excluding from the dataset "lawsuits that were dismissed for reasons other than a finding that the agency had complied with the law" and giving as examples dismissals for lack of jurisdiction, mootness, and improper venue).

89. See *infra* Section III.F.3.

challenge because it was often difficult to know the exact reasons why the challenge concluded.⁹⁰ (We also report those resolutions separately.⁹¹) Most other studies have similarly excluded such resolutions (typically by necessity as they looked only at opinions), so this difference in methodology would not explain our lower overall win rate either.

We also considered the possibility that major rules fare worse in court than non-major rules as a potential explanation for the difference between our results and others. Challengers may devote more resources to litigating major rules than non-major ones, and courts may be more willing to give agencies the benefit of the doubt when non-major rules are challenged. But Davis Noll's study suggests that agencies' major rules may actually fare better than non-major ones: Her study of opinions resolving virtually all challenges to executive agencies' regulatory actions during the first Trump Administration found a lower win rate (23.0%) than we found for the first Trump Administration's major rules, whether by major rules (32.1%) or by controlling opinions (45.4%).⁹²

Of course, major rules may not be a representative sample of all agency actions. But it is doubtful that limiting our study to major rules could fully explain our findings. Rather, given our study's consistent unit of analysis and time span, it is more likely that declining agency win rates over time (and, relatedly, the sharp decline during the first Trump Administration) better explain why we found lower overall agency win rates than earlier studies.

2. Win Rates by Administration

As noted, agency win rates declined across the administrations included in our study. The Clinton Administration had the highest win rate: 63.0% of its major rules withstood challenge in full.⁹³ That rate falls within the 60–70% win rate found in many other studies, many of which included opinions resolving challenges to the Clinton Administration's regulatory actions.⁹⁴ But the agency win rate declined to 55.4% for the W. Bush Administration, 51.6% for the Obama Administration, and 32.1% for the first Trump Administration. The differences between the first Trump Administration's win rate and those of the other administrations are statistically significant (at a 95% confidence level), but the differences between the win rates of the Clinton, W. Bush, and Obama Administrations are not.

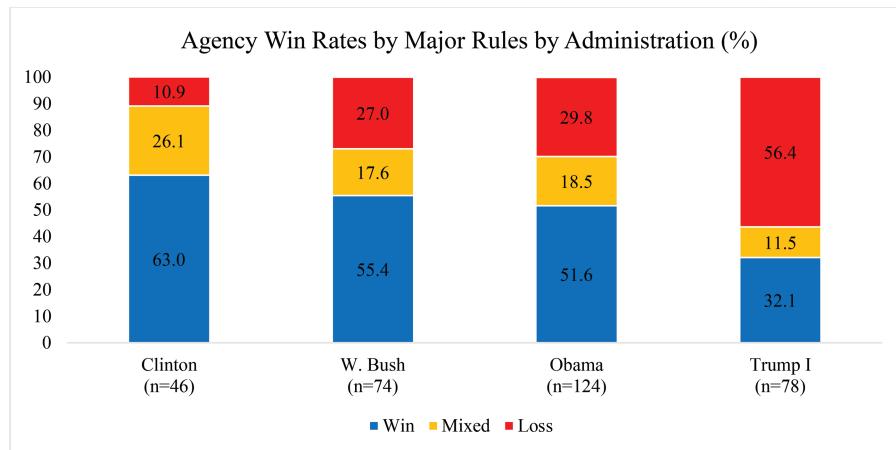
90. For example, Davis Noll included instances in which "the agency withdrew the action after being challenged in court." Davis Noll, *supra* note 3, at 385.

91. See *infra* Section III.D.

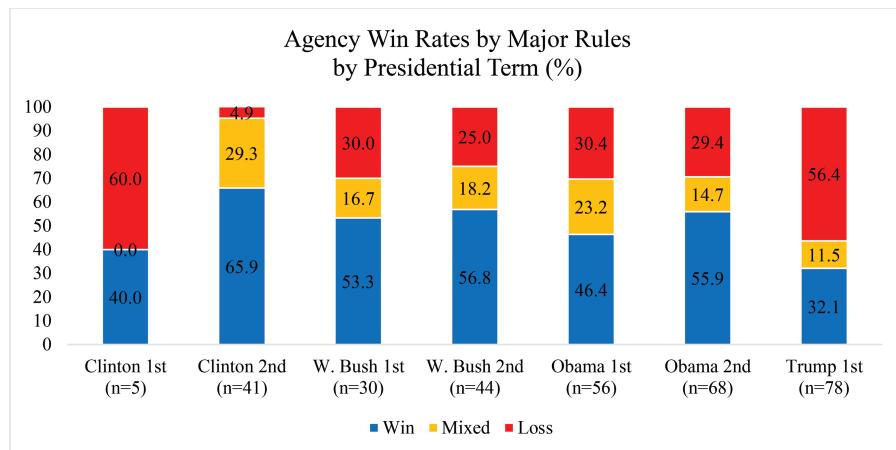
92. Davis Noll, *supra* note 3, at 353. As discussed below, our results also included independent agencies, which Davis Noll excluded. *Id.* at 379. We found that independent agencies have a higher win rate than executive agencies, but the difference in win rates was relatively small, and independent agencies accounted for a small number of the observations in our study (roughly 24.3%). It is thus unlikely that their inclusion in our study fully explains the difference.

93. Of course, as noted, the CRA took effect in 1996, so our study provides only a partial picture of the Clinton Administration.

94. See *supra* notes 77–80 and accompanying text.



Even by presidential term, there was a downward trend in agency win rates, which is more pronounced if you exclude the few observations from the Clinton Administration's first term.

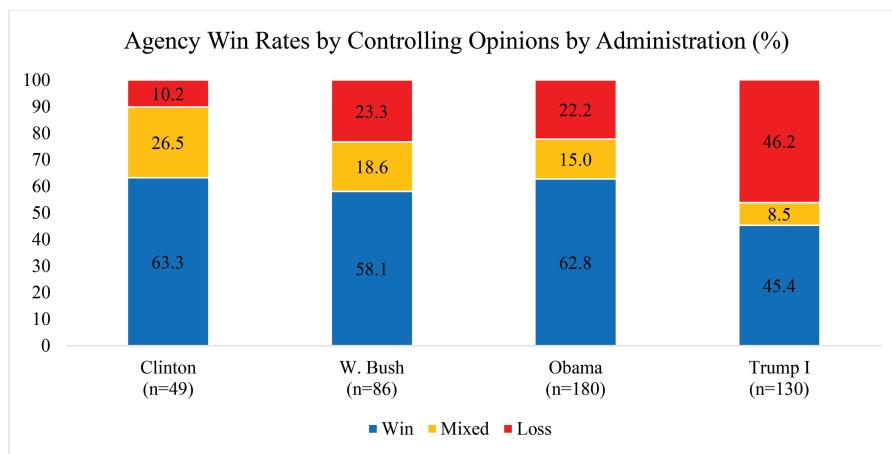


Interestingly, all two-term presidents saw higher win rates for major rules issued in their second terms. (Note, however, that we cannot conclude that the difference between the first and second terms of each two-term president in our dataset is statistically significant; note also that the data for the Clinton Administration's first term is truncated.) One possible explanation is that incoming presidents with ambitious priorities pursue bolder regulatory actions that push the envelope in their first term, with agencies returning to blander initiatives during a second term.⁹⁵ Another possibility is that some major rules vacated in a president's first term get reissued in a second term and withstand

⁹⁵. If that were the case, one would also assume that the challenge rate would be higher in a president's first term, but our study reveals the opposite: Clinton 1st (14.3%);

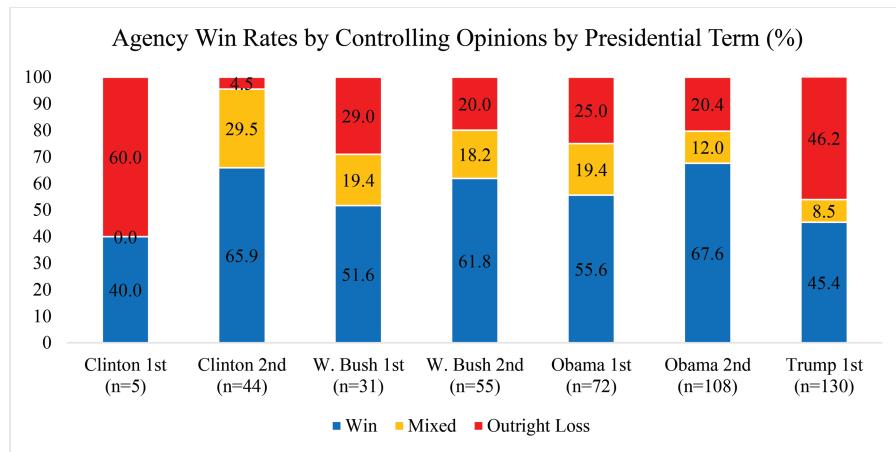
legal challenge the second time because the agency remedied the flaws a court already found. A more cynical explanation is that an administration may face a more receptive judiciary after a full term of appointments. Regardless of the reason, our data suggests that studies of agency win rates may produce skewed results if they look at challenges to agency actions issued during only one of two presidential terms. (A possibility that further counsels caution with our own data for the Clinton Administration, given that we have only partial data for its first term.) Our study also indicates that it may be more apt to compare one-term administrations with the first term of other administrations. Doing so makes the first Trump Administration's low overall agency win rate appear less stark, though it is still considerably lower than other first terms for which we have full data.

When looking instead at the 445 controlling opinions in our dataset, the numbers improve slightly for all administrations except the Clinton Administration, which remains essentially unchanged. But there is still a downward trend in agency win rates. The Clinton Administration had the highest win rate (63.3%), followed by the Obama Administration (62.8%), W. Bush Administration (58.1%), and first Trump Administration (45.4%). The difference between the Clinton Administration's win rate and the first Trump Administration's win rate is statistically significant (at a 95% confidence level), as is the difference between the Obama Administration's win rate and the first Trump Administration's win rate (at a 95% confidence level). But we cannot conclude that the differences between the Clinton, W. Bush, and Obama win rates are statistically significant, nor can we conclude that the difference between the win rates of the first Trump Administration and the W. Bush Administration is statistically significant.



Clinton 2nd (17.2%); W. Bush 1st (15.6%); W. Bush 2nd (20.8%); Obama 1st (21.5%); Obama 2nd (22.3%).

Win rates by controlling opinions also fluctuated by presidential term, with all two-term presidents in our primary dataset seeing higher win rates for major rules issued in their second term. There is no obvious trend across administrations.



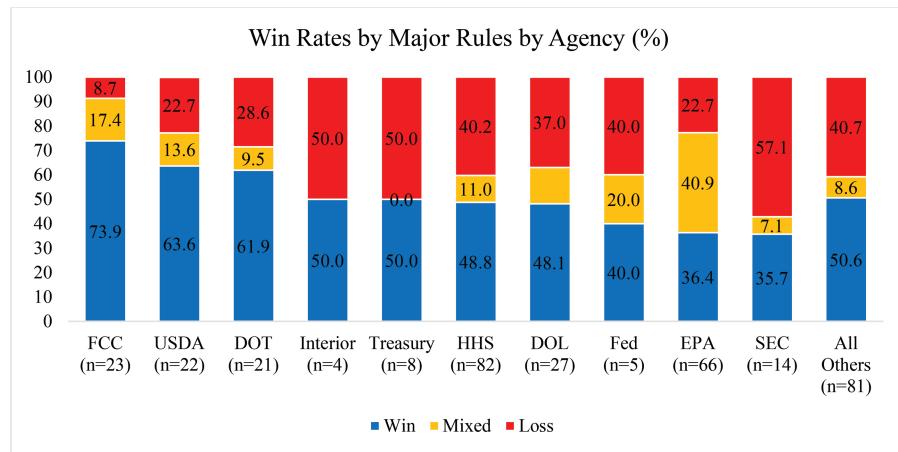
It is hard to know what to make of these results. Viewed in one light, the results demonstrate relatively stable agency win rates for all but the first Trump Administration. This is particularly true of the chart showing agency win rates by controlling opinion by presidential term. Viewed in another light, however, the charts demonstrate declining agency win rates, with a steeper decline during the first Trump Administration. Agency win rates by major rule may also be a better indicator of the legal durability of an administration's regulatory actions. That metric saw more consistent declines across administrations and presidential terms, regardless of whether the first term of the Clinton Administration or first Trump Administration was included.

3. Win Rates by Agency

Different agencies have considerably different win rates. The top ten issuing agencies accounted for 72.1% of the major rules in our study.⁹⁶ Looking at agency win rates by major rules, all other agencies grouped together had a win rate of 50.6%, which aligns with our study's roughly 50.0% overall win rate. Of the top ten issuing agencies, three agencies' major rules fared better than this overall average: the FCC, with a 73.9% win rate, followed by the USDA and the DOT, with a 63.6% and 61.9% win rate, respectively. The agencies with the lowest win rates were the SEC at 35.7%, followed by the EPA at 36.4% and the Federal Reserve at 40.0%. (But see the point below on the EPA's very high percentage

96. As noted, for purposes of reporting win rates by agency, we assigned each major rule to each of its issuing agencies.

of mixed results.) The remaining agencies among the top ten issuing agencies—the Treasury (50.0%), Interior (50.0%), HHS (48.8%), and DOL (48.1%)—hovered around the overall average. (But note that some of these agencies have very small numbers of observations.)



Others have speculated that certain agencies prevail in court more often than others.⁹⁷ And some studies have indeed found such differences.⁹⁸ For example, Zaring “found that the [D.C. Circuit] does appear to reverse agencies haled before it frequently more than agencies who are rarely sued.”⁹⁹ Although Zaring found that the effect was not statistically significant,¹⁰⁰ his descriptive statistics “suggested that familiarity breeds contempt,”¹⁰¹ at least in the D.C. Circuit. That adage may well apply to the EPA—it had the highest challenge rate and second-lowest outright win rate of the top issuing agencies in our study. But challenge rates did not otherwise appear to correlate with agency win rates.¹⁰² For example, the SEC and Fed had some of the lowest win rates among the top issuing agencies, but they also had among the lowest challenge rates. Conversely, the EPA, DOL, DOT, FCC, and DHS had the highest challenge rates (again, among the top issuing agencies). But two of those—the FCC and DOT—had among the highest win rates. These data points suggest there is no meaningful correlation between challenge rates and

97. See, e.g., Patricia M. Wald, *The “New Administrative Law”—With the Same Old Judges in It?*, 1991 DUKE L.J. 647, 662 (hinting from experience that certain agencies are “on top or at the bottom of the regulatory honor roll”).

98. See, e.g., Barnett & Walker (2017), *supra* note 3, at 52–56.

99. Zaring, *supra* note 3, at 178–79.

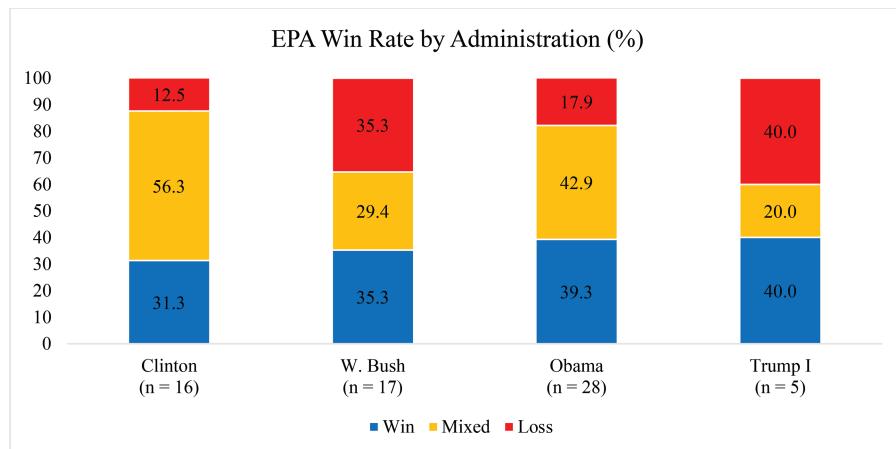
100. *Id.* at 179.

101. *Id.* at 183.

102. Zaring, who examined only D.C. Circuit opinions during a relatively narrow timeframe, found a 68.0% win rate for the “four agencies that appeared before the court more than ten times (. . . the NLRB, FERC, the FCC, and OSHRC),” versus an 80.0% win rate for “the agencies that appeared before the D.C. Circuit fewer than [ten] times.” *Id.* at 184.

win rates, which would align with Zaring's conclusion that his result was not statistically significant.¹⁰³

We cannot present detailed information on all agencies here, but we have pulled out more detailed statistics for the EPA, given its high challenge rate and low win rate. The EPA's challenge rate increased over time: Clinton (58.8%); W. Bush (64.7%); Obama (91.1%); and Trump I (100.0%). Somewhat surprisingly, however, given the general trends for all agencies, its win rate increased slightly across administrations, while its outright loss rate fluctuated. (Note that the sample size for the first Trump Administration is small.)



Readers should also note the very high mixed results for the EPA—far more than its peers among the top ten issuing agencies. As we explained earlier in the Article, reasonable minds could treat these mixed results differently, grouping them instead with agency outright wins to derive an overall win rate. Doing so would give the EPA a 77.3% win rate, second only to the FCC. In addition, 17 of the EPA's 27 challenged major rules that saw mixed results produced remands without vacatur. One could, for example, combine the major rules that saw mixed results resulting in remands without vacatur (17) with major rules that withstood challenge (24). Doing so produces a 62.1% win rate for the EPA—comfortably in the top five of the top ten issuing agencies.

The point of this exercise is to drive home the nuance in our data and to encourage readers to interpret the data for themselves. For example, some may instead wish to view agency win rates as a range, with outright wins at the bottom and outright wins plus mixed results at the top of the range. (The way we present the data here allows readers to see such ranges visually: They need only sum the wins and mixed figures for the upper end of that range.)

103. *Id.* at 179.

4. Win Rates by Agency Type

We next examined whether independent and executive agencies fared differently in litigation.¹⁰⁴ As others have noted, however, such a crisp “dividing line does not exist.”¹⁰⁵ Indeed, there is no definitive definition of an independent agency.¹⁰⁶ We thus used two different methods of categorizing agencies as independent: (1) whether the agency fell under the “independent regulatory agency” definition in 44 U.S.C. § 3502, a commonly referenced statutory definition; and (2) whether a multimember commission led the agency. We could have used many other attributes associated with independence. But we thought these two would be the most interesting for a study focused on how major rules fare in litigation.

a. *Independent Agencies Under § 3502*

Section 3502 provides a widely referenced definition of independent agencies. Most notably, E.O. 12,866, which requires centralized regulatory review for most agencies, exempts “independent regulatory agencies” as defined in § 3502 from that process.¹⁰⁷

Section 3502’s definition expressly references 19 independent agencies.¹⁰⁸ But the definition vaguely concludes with a catchall for “any other similar agency.”¹⁰⁹ It is unclear which agencies fall into the catchall, but a

104. That some readers may question whether it is fair to attribute the data for independent agencies to a given administration because the president does not always have the ability to change the head of an independent agency (or composition of a multimember commission) on taking office provides another reason to break out the data for independent agencies and multimember commissions.

105. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORN. L. REV. 769, 776 (2013).

106. See, e.g., JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 42–43 (2d ed. 2018) (“There is no general, widely accepted definition of an independent agency across all government officials, practitioners, and scholarly disciplines, but this label or definition is consequential for both law and politics.”).

107. Exec. Order No. 12,866, 58 Fed. Reg. 51375, 51737 (Sept. 30, 1993). Whether to subject independent agencies to OIRA review has long been a topic of debate, with each administration since Ronald Reagan debating whether to preserve E.O. 12,866’s exemption for independent agencies. See, e.g., OLC, Extending Regulatory Review, *supra* note 33, at 232; Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 109 (2011).

108. The Fed, CFTC, Consumer Product Safety Commission (“CPSC”), FCC, Federal Deposit Insurance Corporation (“FDIC”), FERC, Federal Housing Finance Agency (“FHFA”), Federal Maritime Commission, Federal Trade Commission (“FTC”), Interstate Commerce Commission (“ICC”), Mine Safety and Health Review Commission (“MSHRC”), NLRB, NRC, Occupational Safety and Health Review Commission (“OSHRC”), Postal Regulatory Commission (“PRC”), SEC, Consumer Financial Protection Bureau (“CFPB”), Office of Financial Research (“OFR”), and OCC. 44 U.S.C. § 3502(5). Congress abolished the ICC in 1995 but provided that all references to the ICC shall be “deemed to refer” to its successor, the Surface Transportation Board (“STB”). ICC Termination Act of 1995, Pub. L. No. 104-88, § 205, 109 Stat. 803, 943.

109. 44 U.S.C. § 3502(5).

memorandum from the Department of Justice's Office of Legal Counsel ("OLC") identified three more.¹¹⁰ We categorized these 22 agencies as independent in our dataset; when we refer to "independent agencies" in this Article, we are referring to those captured by § 3502.

As noted, E.O. 12,866 exempted these 22 agencies from OIRA centralized review.¹¹¹ One might predict that executive agencies subject to OIRA centralized review have a higher win rate than other agencies because a third party scrutinizes their major rules, including their cost-benefit analyses.¹¹² Alternatively, independent agencies have other attributes—e.g., multimember structures—that might produce more legally durable rules.

Keep in mind that independent agencies issued only 24.3% of the major rules in our dataset.¹¹³ Of those major rules, only 15.6% were challenged, compared to 22.9% for executive agencies. Independent agencies had a higher win rate (58.0%) for their major rules than executive agencies (47.5%), but with far fewer observations (69 versus 284).¹¹⁴

110. OLC, Extending Regulatory Review, *supra* note 33, at 238. The three additional agencies are the U.S. International Trade Commission ("ITC"), 19 U.S.C. § 1330(f); National Credit Union Administration ("NCUA"), 12 U.S.C. § 1752a(a); and Farm Credit Administration ("FCA"), 12 U.S.C. § 2241.

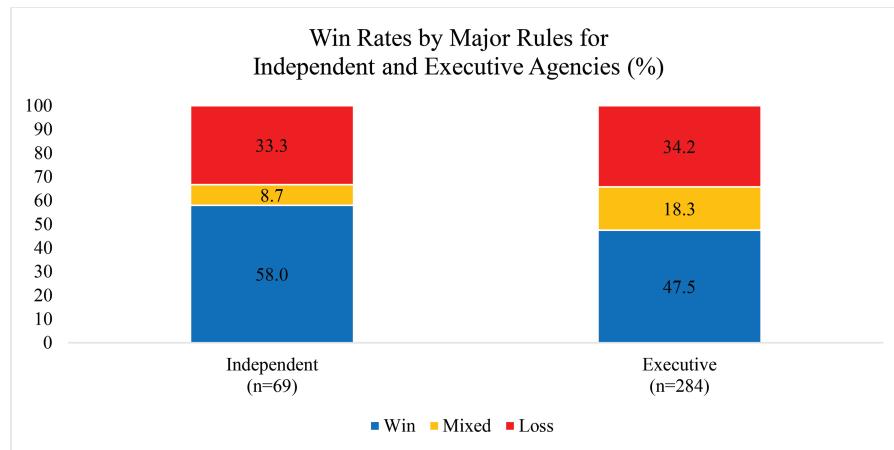
111. The *Sourcebook of the United States Executive Agencies* published by the Administrative Conference of the United States ("ACUS") identifies the following agencies as exempt from OIRA regulatory review: the CFPB, CFTC, CPSC, FCC, FDIC, FEC, Fed, FERC, FHFA, FMC, FTC, NLRB, NRC, OCC, OSHRC, PRC, and SEC. See SELIN & LEWIS, *supra* note 106, at 104. Our list of independent agencies includes all of these except the FEC, which § 3502 expressly excludes. 44 U.S.C. § 3502(1)(B). The exclusion is immaterial because the FEC issued only one major rule during our analysis period, Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47386 (Aug. 8, 2003) (codified in scattered parts of 11 C.F.R.), and no one challenged that rule. Our list of independent agencies also includes the following agencies omitted from the ACUS list: the MSHRC, OFR, STB, ITC, NCUA, and FCA. The first three (or a successor) are listed in § 3502(5). And an OLC memo states that the last three fall into § 3502's catchall. See OLC, Extending Regulatory Review, *supra* note 33, at 238 (first citing 19 U.S.C. § 1330(f); then 12 U.S.C. § 1752a(a); and then 12 U.S.C. § 2241). In any event, these additional agencies issued few or no major rules during our analysis period: the MSHRC (0); OFR (0); STB (0); ITC (0); NCUA (8); and FCA (6). Only one—the NCUA—saw its major rules challenged, but only three of its major rules were challenged. So, the difference between our list and ACUS's is also immaterial.

112. See, e.g., Catherine M. Sharkey, State Farm "With Teeth": Heightened Judicial Review in the Absence of Executive Oversight, 89 N.Y.U. L. REV. 1589, 1592 (2014) ("Executive branch agencies, in anticipation of OIRA review, have an incentive to develop a robust body of information on the likely potential costs and benefits of proposed regulations").

113. Independent agencies sometimes jointly issue rules with executive agencies. As noted elsewhere, for purposes of reporting win rates by agency, we assigned each major rule to each issuing agency. This means that a single major rule may be assigned to both an independent agency and an executive agency. So, the denominator for the results reported here (2,056) is higher than the total number of major rules in our study (1,872).

114. Incidentally, our dataset's breakdown in observations—24.3% for independent agencies and 75.7% for executive agencies—is not far off from the breakdown in observations for the Barnett and Walker dataset (17.6% and 82.4%), even though their list of 22 independent agencies differs slightly from ours. Barnett & Walker (2017),

The 10.5% difference is relatively small, and we cannot conclude that the difference is statistically significant. Both types of agencies also had similar rates of outright losses; and if you instead grouped mixed results with wins, both types of agencies may appear to be similarly successful (66.7% versus 65.8%).



Our results align with other studies' findings that independent agencies fare better in court than executive agencies.¹¹⁵ For example, Barnett and Walker's study also found that independent agencies were more successful than executive agencies (by 6.8%).¹¹⁶ This commonality between our studies is interesting given that their study found a much higher overall

¹¹⁵ *supra* note 3, at 56 & n.248. Barnett and Walker's list of independent agencies included seven that we omit: the FEC, Federal Labor Relations Authority ("FLRA"), Merit Systems Protection Board ("MSPB"), National Indian Gaming Commission, National Mediation Board ("NMB"), National Transportation Safety Board ("NTSB"), and SSA. *Id.* Only two of these agencies issued major rules during the period of our study—the FEC (1) and SSA (13)—but none of these agencies' major rules were challenged in court. So, omitting these agencies from our list of independent agencies does not greatly affect the results of our study. On the flip side, our list of independent agencies included eight agencies that Barnett and Walker omitted: the CPSC, FHFA, NLRB, OSHRC, OFR, NCUA, and FCA. Only six of these agencies issued major rules during the time span of our study—the CPSC (3), FHFA (9), NLRB (3), OCC (39), NCUA (8), and FCA (6)—but only four of these agencies' major rules were challenged in court—the FHFA (1), NLRB (3), NCUA (3), and OCC (3). Thus, our inclusion of these additional agencies also does not greatly affect the results of our study, which could explain the similarities between our two studies' results with respect to independent agencies.

¹¹⁶ See, e.g., Caruson & Bitzer, *supra* note 55, at 351–52 (discussing empirical work finding that independent agencies fared better than executive agencies before the Federal Circuit and Supreme Court). *But see id.* at 363 (finding that whether the agency was independent or executive was not statistically significant when applying deference); *id.* at 364 ("Independent agencies did not fare better than their executive branch counterparts.").

¹¹⁷ Barnett & Walker (2017), *supra* note 3, at 57 ("Indeed, independent agencies were more successful, to varying degrees, as to all three indicators of deference: the overall agency-win rate (77.0% to 70.2%); the rate of circuit courts applying *Chevron*

win rate (77.0% for independent and 70.2% for executive agencies) than ours (58.0% for independent and 47.5% for executive agencies). Barnett and Walker's study also covered an earlier timeframe (2003–2013) and a different unit of analysis (issue outcomes in circuit court opinions citing *Chevron*), which could explain some of the difference between overall agency win rates.¹¹⁷ Still, despite the different methodologies and overall win rates, independent agencies performed similarly better than executive agencies in both studies.¹¹⁸

b. *Multimember Structures*

As noted, “there is no binary distinction between agency types. Indeed, there is no single feature that every agency commonly thought of as independent shares, not even a for-cause removal provision.”¹¹⁹ Rather, “[a]gencies fall along a spectrum ranging from more insulated to less insulated from the President.”¹²⁰ Kirti Datla and Richard Revesz identify at least seven structural attributes commonly associated with independence that help explain where an agency might fall along that spectrum: “removal protection[;] specified tenure[;] multimember structure[;] partisan balance requirements[;] litigation authority”; congressional comments, legislative proposals, and budget authority; and adjudication authority.¹²¹ Instead of using § 3502’s definition, one could use (and some have used) these attributes of independence to identify relevant agencies.¹²² We used one that we thought could be most relevant to the legal durability of an agency’s rules: multimember structure.

Multimember agencies possess three qualities that distinguish them from single-headed agencies, all of which might lead such agencies to produce rules more likely to withstand legal challenge. “First, a multimember structure can foster more deliberative decision making,

deference (82.5% to 73.2%); and the agency-win rate with *Chevron* deference (79.6% to 76.8%).”).

117. *Id.*

118. Eric Fraser et al. note that “Congress is more likely to give the D.C. Circuit exclusive jurisdiction over the review of independent agency actions than over the review of executive agency actions.” Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORN. J.L. & PUB. POL’Y 131, 131 (2013). One possible explanation for independent agencies’ higher win rate could thus be that the D.C. Circuit is more inclined to rule in agencies’ favor. But Fraser et al. also noted that “[t]he D.C. Circuit has a higher reversal rate of agency decisions than do the other circuits, and is regarded by some as a ‘relatively strict overseer of agencies.’” *Id.* at 147 (internal citations omitted). That the D.C. Circuit may resolve more challenges to independent agencies’ major rules thus may not explain their higher win rates.

119. Datla & Revesz, *supra* note 105, at 842.

120. *Id.*

121. *Id.* at 772.

122. For example, Barnett and Walker categorized an agency as independent if the agency’s head could be removed only for cause or if the agency was usually categorized as independent. Barnett & Walker (2017), *supra* note 3, at 56 n.248.

a higher level of expertise, and continuity of policy.”¹²³ Such “[g]roup deliberation,” in turn, may “lead[] to better-informed and reasoned policy outcomes from the agency.”¹²⁴ Second, a multimember structure can “allow for the development of institutional memory” because most multimember agencies’ members serve staggered terms.¹²⁵ “Third, the stability of membership leads to the continuity of policies” that “will not be immediately influenced by changes in [p]residential administrations.”¹²⁶

Our study cannot test whether such qualities cause multimember agencies to promulgate more legally durable major rules, but it does suggest that multimember agencies are generally more successful in court than their single-headed peers.¹²⁷ Again, to provide some context, multimember agencies issued 21.2% of the major rules in our dataset.¹²⁸ Of those, only 16.1% were challenged, compared to 22.5% for non-multimember agencies. Our study finds that multimember agencies had a higher win rate (58.1%) than non-multimember agencies (47.8%), but again with far fewer observations (62 versus 291).¹²⁹ The 10.3% difference is arguably small, and we cannot conclude that this difference is statistically significant.

123. Datla & Revesz, *supra* note 105, at 794 (citing MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 70 (1955)).

124. *Id.* But see Brief of Amici Curiae Rachel E. Barkow et. al. in Support of the Court-Appointed Amicus at 14–18, Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197 (2020) (No. 19-7) (explaining that, depending on the circumstances, group decisionmakers may produce more radical outcomes than individual decisionmakers).

125. Datla & Revesz, *supra* note 105, at 794–95.

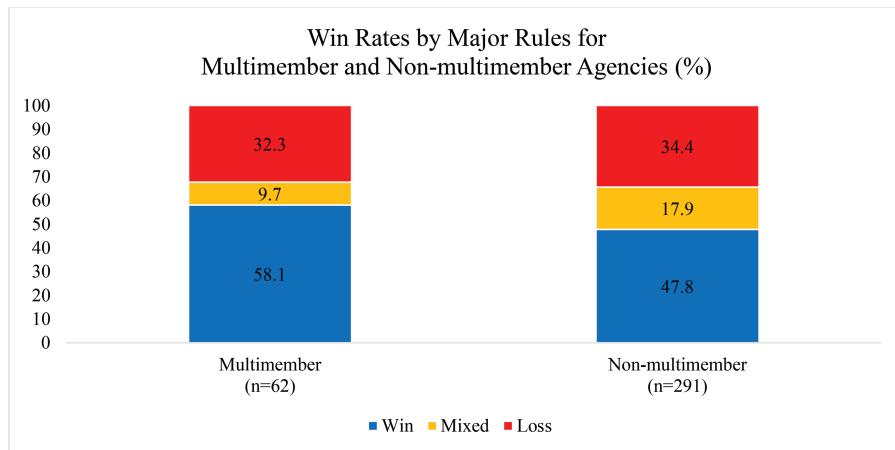
126. *Id.* at 795.

127. We used Datla and Revesz’s list of 43 agencies with multimember structures: Chemical Safety and Hazard Investigation Board; Commission on Civil Rights; CPSC; FERC; FMC; Federal Reserve; FLRA; FTC; [Independent Payment Advisory Board]; [MSHRC]; MSPB; NLRB; NMB; NRC; NTSB; OSHRC; PRC; STB; [United States Postal Service]; . . . ACUS; Advisory Council on Historic Preservation; African Development Foundation; CFTC; Corporation for National and Community Service; Defense Nuclear Facilities Safety Board; Election Assistance Commission; Equal Employment Opportunity Commission; Export-Import Bank; [FCA]; FCC; FDIC; FEC; Federal Retirement Thrift Investment Board; ITC; [Millennium Challenge Corporation]; National Capital Planning Commission; National Council on Disability; [NCUA]; Overseas Private Investment Corporation; Panama Canal Commission; Railroad Retirement Board; SEC; and [Tennessee Valley Authority].

Id. at 793 tbl. 3.

128. Multimember agencies sometimes jointly issue rules with non-multimember agencies. As noted elsewhere, for purposes of reporting win rates by agency, we assigned each major rule to each issuing agency. This means that a single major rule may be assigned to both a multimember agency and a non-multimember agency.

129. The denominator includes only major rules addressed in an opinion.



The win rate for multimember agencies (58.1%) is close to the win rate for independent agencies (58.0%), likely because there is much overlap between these two categories, particularly when narrowed to agencies with major rules in our study. Roughly 42% of multimember agencies are independent agencies, and roughly 82% of independent agencies are multimember agencies. But of the 14 multimember agencies in our study, 12 (85.7%) are independent agencies; of the 15 independent agencies in our study, 12 (80.0%) are multimember agencies. Given the overlap, one would expect multimember agencies and independent agencies to have similar win rates.

5. Remand Without Vacatur

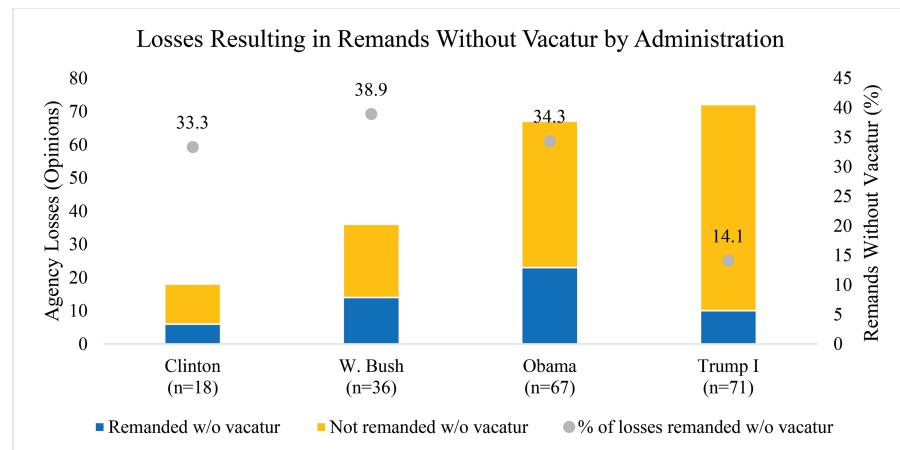
When a court remands a rule without vacatur, it leaves the rule in place while providing the issuing agency an opportunity to address a flaw in the rule or rulemaking process.¹³⁰ Reasonable minds could differ over how to treat this remedy in terms of agency wins and losses. (Remands without vacatur were themselves often hard to identify, as courts did not always clearly state the remedy ordered.¹³¹) We coded all controlling opinions based on a court's conclusions about the challenged provision(s) rather than the remedy ordered, which meant that remands without vacatur could be coded as either agency losses or

130. To determine whether remand without vacatur is appropriate, courts evaluate: (1) the seriousness of the deficiencies; and (2) the disruptive consequences of vacating the agency's action(s). *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (quoting *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety and Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)).

131. To ensure we captured as many of these as possible, we cross-referenced our coding with an ACUS study on remands without vacatur. See STEPHANIE J. TATHAM, ADMIN. CONF. OF THE U.S., THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR 7 (2014).

mixed results.¹³² But we also thought it would be helpful to separately provide data on this remedy, which we report by controlling opinions.¹³³

Across all administrations, 27.5% of overall agency losses (i.e., losses and mixed results combined) by controlling opinions resulted in remands without vacatur. Here, too, however, results differed by administrations. The Clinton, W. Bush, and Obama Administrations saw relatively similar applications of this remedy, ranging from 33.3% to 38.9% of agency losses by controlling opinions. That figure dropped to 14.1% during the first Trump Administration. This drop could suggest that courts became less willing to use the remedy or that the flaws found in the first Trump Administration's major rules were more likely to cause courts to vacate these rules rather than remand for the agency to fix them. (As earlier charts also show, the first Trump Administration also saw a smaller percentage of mixed results, which often correlated with remands without vacatur.)



¹³². Many mixed results involved remands without vacatur. Of the 67 opinions coded as mixed, 36 (53.7%) involved remands without vacatur. Conversely, of the 53 opinions coded as involving remands without vacatur, 36 (67.9%) were coded as mixed.

¹³³. Opponents of the remedy argue that it runs afoul of the APA. See TATHAM, *supra* note 131, at 7. The Supreme Court has yet to rule on the issue, and lower courts continue to employ the remedy. *Id.* at 8. Courts acknowledge, however, that remand without vacatur is an unusual remedy granted in limited circumstances. *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (quoting *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012)). Recent debates over whether the APA's use of the term "set aside" requires vacatur may inform how the Supreme Court and other courts approach this issue in the future. See, e.g., John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REGUL. BULL. 37, 42 (2020); *United States v. Texas*, 599 U.S. 670, 695–704 (2023) (Gorsuch, J., concurring); *Griffin v. HM Florida-ORL, LLC*, 144 S. Ct. 1, 2 n.1 (2023) (Kavanaugh, J., statement respecting denial of stay application) (mem.).

D. Forum Shopping and Other Litigation Trends

In recent years, academics and other court watchers have lamented increased “forum shopping” and “judge shopping” in litigation over federal government policies and programs.¹³⁴ Relatedly, some have complained of an increase in lawsuits by state attorneys general challenging federal government actions.¹³⁵ Recent data suggests state attorneys general often file lawsuits in forums that litigators perceive will be friendlier than others.¹³⁶

We also explored whether challenges to major rules revealed any trends related to forum shopping. Of course, litigants often cannot choose where to file a challenge to a major rule.¹³⁷ Many federal statutes require that certain challenges to agency actions be filed in a specific court—often the U.S. Court of Appeals for the D.C. Circuit.¹³⁸ Some federal statutes give challengers a choice between the D.C. Circuit or

134. See, e.g., Brief of Professor Stephen I. Vladeck as Amicus Curiae in Support of Petitioners at 2, 7, *United States v. Texas*, 599 U.S. 670 (2023) (No. 22-58) [hereinafter Vladeck Brief] (criticizing forum shopping and judge shopping in challenges to the Biden Administration); Ronald A. Cass, *Nationwide Injunctions’ Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 42 (2019) (describing how the recent uptick in the granting of nationwide injunctions encourages plaintiffs to engage in forum shopping). See generally Paul Nolette, *State Lawsuits Database*, STATE LITIG. & AG ACTIVITY DATABASE (May 25, 2025), <https://attorneysgeneral.org/list-of-lawsuits-1980-present/> [<https://perma.cc/T7EV-PVKE>] (database of lawsuits initiated by state attorneys general that contains information on the originating court). Judge shopping occurs when a litigant files in a specific division of a district court with a predictable judge assignment. Vladeck Brief, *supra*, at 3–4. The issue of nationwide injunctions has become so salient that the Supreme Court recently took it up. See *Trump v. CASA, Inc.*, No. 24A884, 2025 WL 1132004, at *1 (U.S. Apr. 17, 2025) (mem.) (deferring consideration of stay applications pending oral argument); *Trump v. Washington*, No. 24A885, 2025 WL 1132005, at *1 (U.S. Apr. 17, 2025) (mem.) (deferring consideration of stay applications pending oral argument); *Trump v. New Jersey*, No. 24A886, 2025 WL 1132002, at *1 (U.S. Apr. 17, 2025) (mem.) (deferring consideration of stay applications pending oral argument).

135. Brief for Samuel L. Bray & William Baude as Amici Curiae in Support of Petitioners at 10–11, *Biden v. Nebraska*, 600 U.S. 477 (2023) (Nos. 22-506 & 22-535) (“The pattern has become familiar and predictable. When a Republican administration is in power, attorneys general from Democratic states line up (most often as a group) to challenge any politically controversial act by the federal government; and when a Democratic administration is in power, the roles are reversed.”).

136. Vladeck Brief, *supra* note 134, at app. A.

137. Challengers also sometimes do not know exactly where they must file (including whether first in a district or appellate court), so they file “protective” complaints or petitions for review in multiple venues. See, e.g., *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 119 (2018) (“Uncertainty surrounding the scope of the Act's judicial-review provision had also prompted many parties . . . to file ‘protective’ petitions for review in various Courts of Appeals to preserve their challenges in the event that their District Court lawsuits were dismissed for lack of jurisdiction”).

138. See, e.g., 42 U.S.C. § 7607(b)(1) (providing that challenges to “nationally applicable regulations promulgated” under the Clean Air Act must be brought in the D.C. Circuit); see also Fraser et al., *supra* note 118, at 143 (noting 130 provisions of the U.S. Code address the D.C. Circuit's jurisdiction, with “over a third of those jurisdictional provisions grant[ing] exclusive jurisdiction to the D.C. Circuit”).

the circuit in which the regulated entity is located or has its principal place of business.¹³⁹ Absent such statute-specific venue provisions, however, litigants often have a wide range of options.¹⁴⁰

Of the venues where major rules are initially challenged, the D.C. Circuit accounted for 28.0% of challenges, and the U.S. District Court for the District of Columbia (“D.C. District Court”) accounted for 21.6%.¹⁴¹ Those courts held the top two spots (in that order) and accounted for more than 50% of all venues for initial challenges to major rules for all administrations except the first Trump Administration.¹⁴² Under the first Trump Administration, the D.C. District Court moved to first place (23.5%), followed by the D.C. Circuit (11.7%) and the U.S. District Court for the Northern District of California (11.7%).

Somewhat surprisingly, the share of challenges initially filed in the D.C. Circuit greatly declined over time—going from over 50% during the Clinton Administration to just over 10% during the first Trump Administration. The D.C. District Court’s share remained essentially flat over the three most recent administrations in our primary dataset.¹⁴³ (But see the discussion below on the Biden Administration.) Combined, both D.C. courts saw a consistent decline over time.

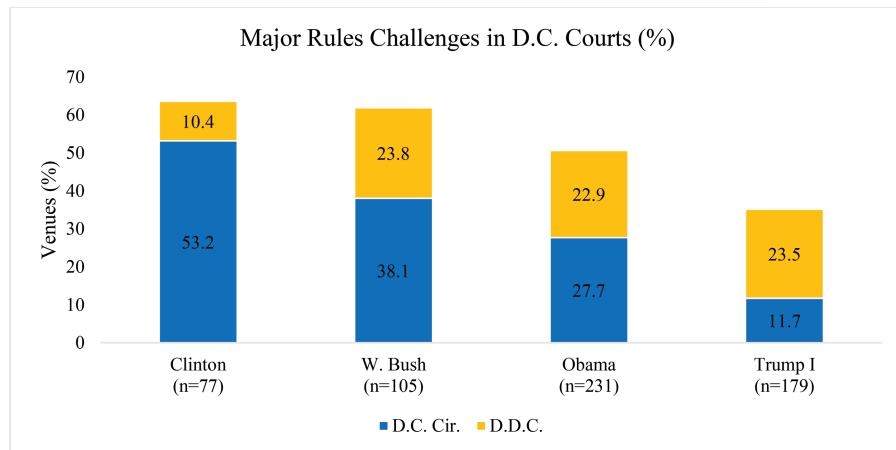
139. See, e.g., 15 U.S.C. § 717r(b) (challenges under the Natural Gas Act); 16 U.S.C. § 825l(b) (challenges under the Federal Power Act); 28 U.S.C. § 2343 (challenges under the Interstate Commerce Act).

140. See, e.g., 5 U.S.C. § 703 (providing that absent a statute-specific venue provision, challenges under the APA may be brought in any court of “competent jurisdiction”); 28 U.S.C. § 1391(e) (providing that challenges against agency officers in their official capacities may be brought in any district where the defendant resides, the claim arises, relevant real property is located, or where the plaintiff resides); *see also* Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 2 (2015) (“[T]he United States Code is replete with thousands of compromises dividing initial review of agency decisions between district and circuit courts.”).

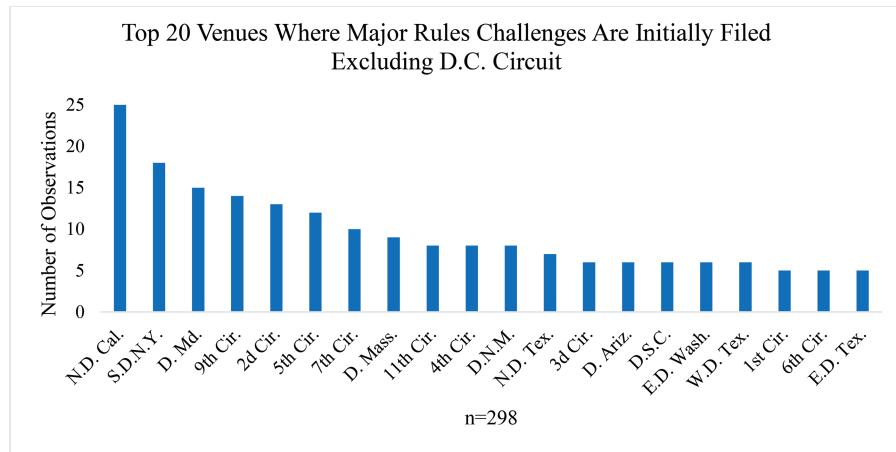
141. We coded each venue where a major rule was initially challenged as a single observation for purposes of analyzing this data, even if different parties filed multiple complaints or petitions for review challenging the same major rule in that venue. For example, if a major rule was challenged in one venue only, that would be one observation (regardless of how many complaints or petitions for review challenging that major rule were filed in that venue); if a major rule was challenged in two venues, that would be two observations, and so on. The total number of observations was 592, which greatly exceeded the total number of challenged rules (398) because many major rules were challenged in more than one venue.

142. The data in this section addresses only the venues where a challenge was initially filed, not the court that ultimately decided the case. Challenges filed in one venue are sometimes transferred to another, and challenges sometimes concluded before an opinion issued.

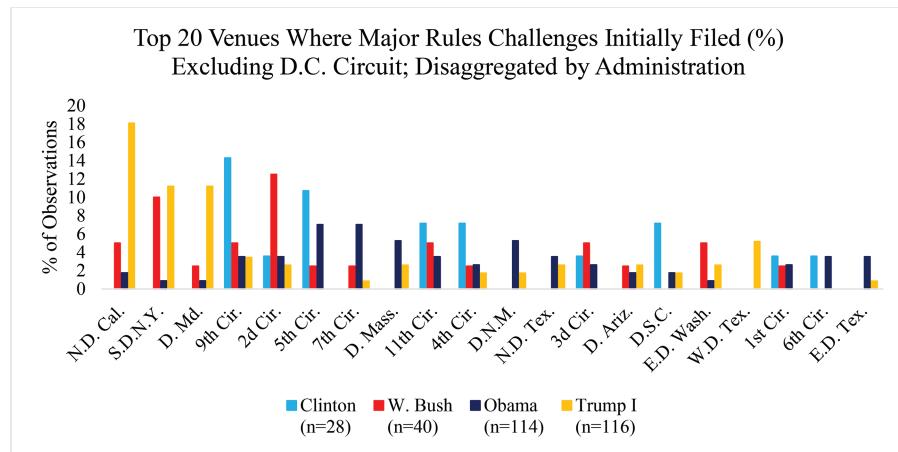
143. One possibility that could skew these results toward the D.C. Circuit is that it may have adopted electronic filing earlier than its peers, meaning we may have missed challenges filed in other courts in the late 1990s.



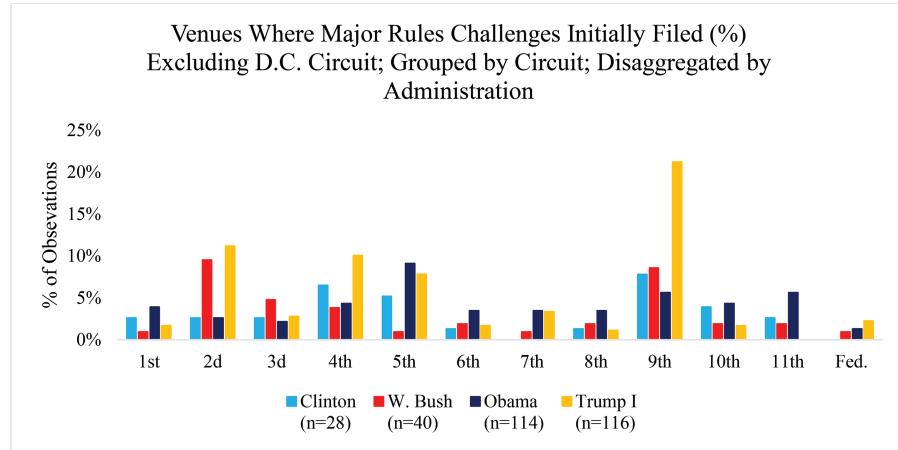
Excluding the two D.C. courts, the top three courts are all U.S. District Courts—for the Northern District of California, the Southern District of New York, and the District of Maryland.



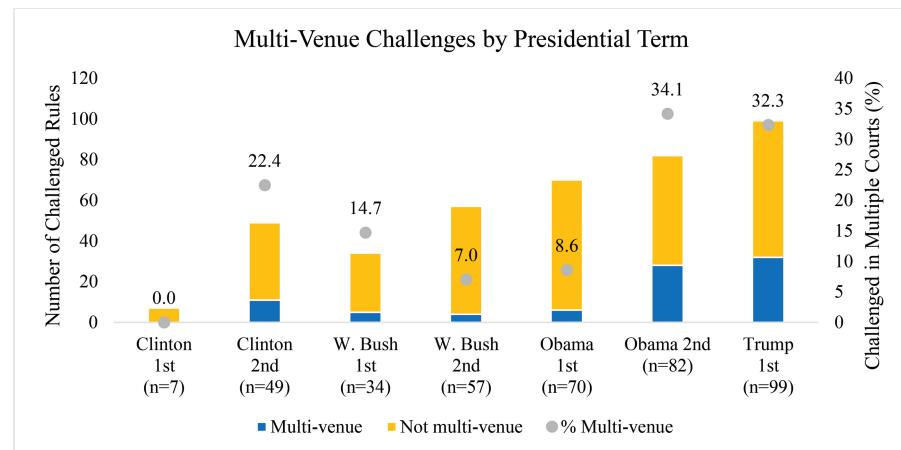
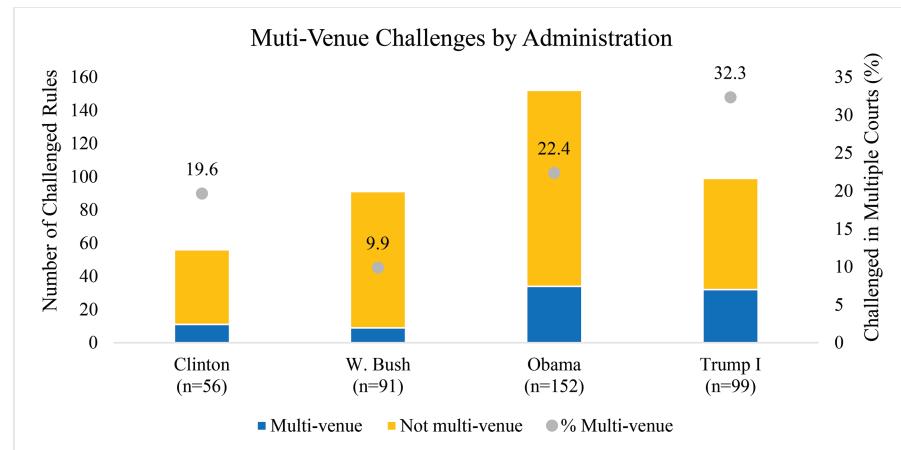
But these three district courts did not rise in prominence until the first Trump Administration. In fact, no major rules issued under the Clinton Administration were challenged in any of these three courts. Only seven major rules issued under the W. Bush Administration and only four issued under the Obama Administration were challenged in these courts. But 47 major rules issued under the first Trump Administration were challenged in these three courts.



Certain patterns emerge across administrations for challenges filed outside the D.C. Circuit. For Clinton Administration rules, the Ninth (5.2%) and Fifth (3.9%) Circuits were the most popular venues for initiating challenges. For the W. Bush Administration, it was the Second Circuit (4.8%) and Southern District of New York (3.8%). For the Obama Administration, the Fifth and Seventh Circuits tied for first place (3.5%). The first Trump Administration had perhaps the most dramatic differences, with the Northern District of California (11.7%), Southern District of New York (7.3%), and District of Maryland (7.3%) accounting for 26.3% of all venues where challenges were initially filed. Similar trends can be seen when grouping district courts and circuit courts by circuit (still excluding the D.C. Circuit from the graph, for readability).



Another related trend is the increase in the number of challenges to a single major rule. Our data suggests that more and more major rules face multiple challenges in multiple venues. This is true whether we group challenges by issuing administration or presidential term.

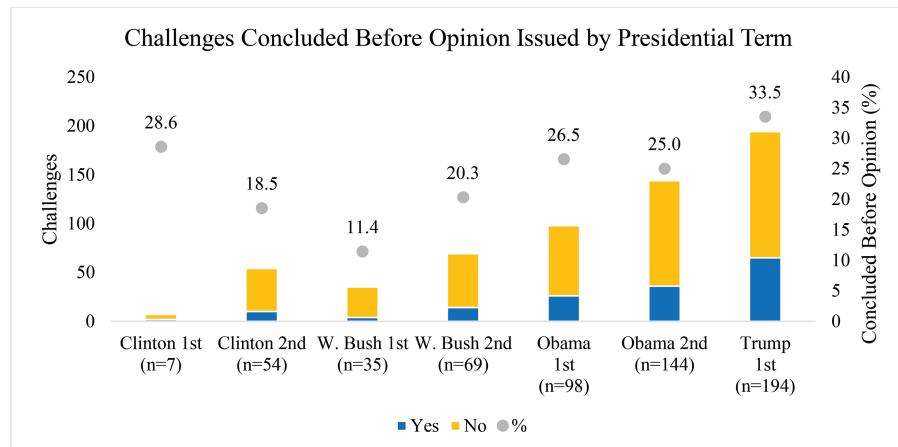


A related trend is an increase in opinions addressing the same major rule. For example, 46 Clinton Administration rules resulted in an opinion, with a total of 49 controlling opinions—a difference of only three. In other words, multi-venue challenges to Clinton Administration rules produced a “surplus” of only three controlling opinions (or 6.1% of controlling opinions for the Clinton Administration’s major rules). The surplus of controlling opinions increased to 12 (14.0%) for W. Bush, 56 (31.1%) for Obama, and 52 (40.0%) for Trump I.

It is thus surprising that the Clinton Administration saw a relatively large number of multi-venue challenges to its rules (11 or 19.6%). One reason for the discrepancy between the number of multi-venue challenges and surplus opinions is that many of the multi-venue challenges to the Clinton Administration’s rules were consolidated before a single court. Of the Clinton Administration’s 11 multi-venue challenges, at least two may have been protective filings in both the D.C. District Court and the D.C. Circuit; seven others saw multi-venue challenges consolidated before a single court. The growth in surplus opinions may thus

say less about the growth in multi-venue challenges and more about the decline in transfers to a single court for consolidation. In other words, courts may be holding onto cases and preventing their consolidation more than they did in the past.

As also noted, many challenges—26.1% overall—concluded before an opinion issued. Excluding the Clinton Administration, such resolutions saw an upward trend across presidential terms. Perhaps this rise was due to the increase in multi-venue challenges; when an agency loses in one court, it may be more likely to settle similar challenges filed in other courts.



We could not easily classify challenges that concluded before an opinion issued as agency wins or losses. Many challengers voluntarily dismiss their challenges after settling with the government, often because they obtain their goals through settlement. Others settle because they had weak cases to begin with. Some challengers voluntarily dismiss their cases when a new administration comes in and modifies or repeals the challenged rule. Although some studies have counted such resolutions as agency wins or losses, we excluded them as we felt such classifications required too many judgment calls, often with relatively little information about why a case settled.

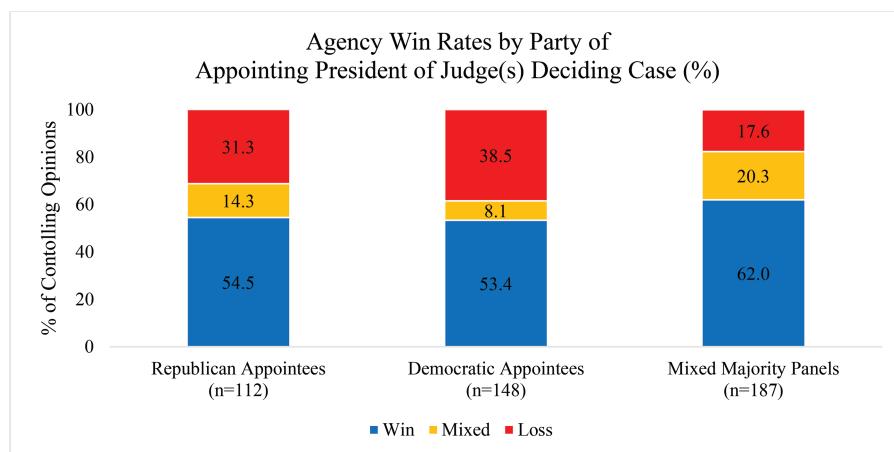
E. Partisan Trends

Many empirical studies have examined whether there is a correlation between agency win rates and the party of the reviewing judges' appointing president(s).¹⁴⁴ We also collected this data using two different methods. For all controlling opinions in our dataset, we identified (1) the party of the individual judge's or majority's appointing

¹⁴⁴. See, e.g., Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1640 (1998); Miles & Sunstein (*Chevron*), *supra* note 55, at 848; Davis Noll, *supra* note 3, at 392–95; Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1727 & n.31 (1997); Zaring, *supra* note 3, at 178–86.

president(s), and (2) the opinion author's appointing president. We collected information on opinion authors because they usually have considerable control over what goes into the majority opinion, even if they need other votes for the bottom-line result. Such information provides an additional data point about legal trends, e.g., willingness to cite and apply contested doctrines. (All data in this section is by controlling opinion.¹⁴⁵)

Looking at agency win rates by party of the appointing president of the judge(s) deciding the case (i.e., the district court judge or the appellate judges in the majority), agencies fared similarly before Republican and Democratic appointees, with win rates just slightly below the overall average for agency win rates by controlling opinion (56.9%). Agency win rates were better (and slightly above the overall average) when the appellate majority was mixed (i.e., at least one Republican and one Democratic appointee) (62.0%). We cannot conclude that any of these differences are statistically significant. We did not collect information on full panel composition (only the judges in the majority), but our results align with other studies that have found that agencies may perform better before mixed appellate panels.¹⁴⁶



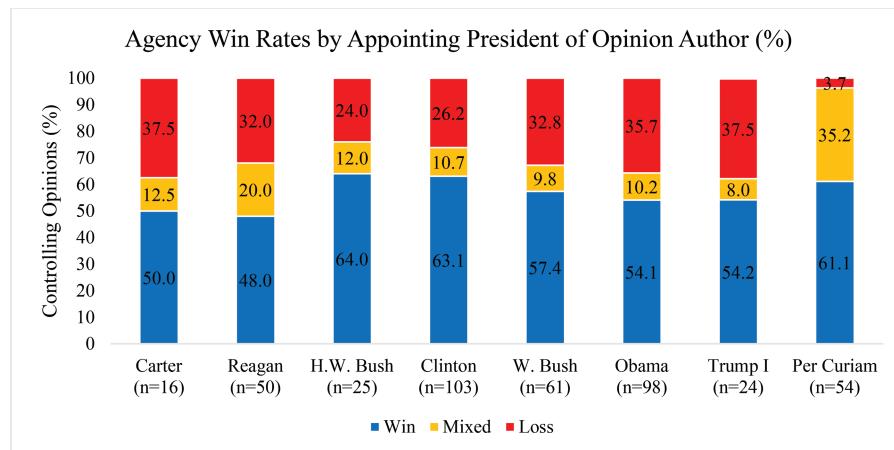
Looking at agency win rates by the opinion author's appointing president reveals a mixed picture.¹⁴⁷ Agencies had the highest win rates when

145. For all the results reported in this section, we excluded the three controlling opinions in our dataset decided by magistrate judges, as they are not presidential appointees. *Types of Federal Judges*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/about-federal-judges> [https://perma.cc/QQT8-CEUF] (last visited Mar. 14, 2025).

146. See, e.g., Pierce, *supra* note 3, at 89 (“Many studies also analyzed the patterns of decisions in an effort to detect a panel effect, i.e., a difference in patterns of decisions that varies depending on whether a panel consists of three judges of the same political party or instead consists of two judges of one party and one judge of the other party. Every study found large panel effects.”). But see Zaring, *supra* note 3, at 183 (finding panel effects in his study were not statistically significant).

147. Our dataset includes opinions authored by Kennedy, Johnson, Nixon, Ford, and Biden appointees, but we excluded this data from the results reported here because each

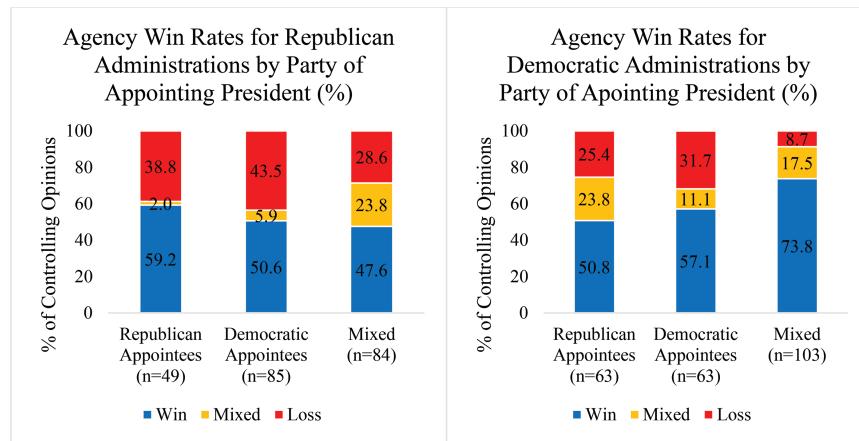
H.W. Bush and Clinton appointees authored the opinion, followed by per curiam opinions.¹⁴⁸ They had the lowest win rates when Carter and Reagan appointees authored the opinion. And they had roughly average or just below average win rates when the W. Bush, Obama, and Trump I appointees authored the opinion. These results could suggest that judges' generations may influence how they approach challenges to agency actions, but a more detailed analysis is needed to assess that possibility.



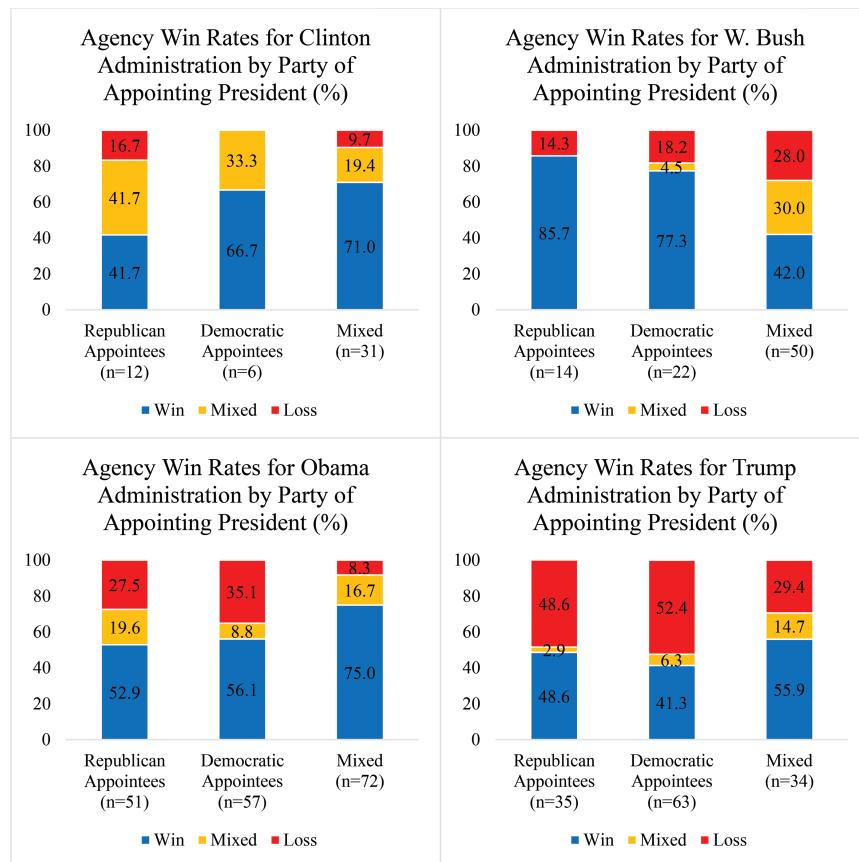
Win rates before different judges varied by the issuing administration. Looking first by administration party, Republican administrations fared better (and slightly above the average overall win rate of 56.9%) before Republican appointees, and Democratic administrations fared better (and slightly above the average overall win rate of 56.9%) before Democratic appointees. But Democratic administrations also performed much better before mixed panels than Republican administrations (73.8% versus 47.6%), and this difference is statistically significant (at a 95% confidence level). For Republican administrations, we cannot conclude that the differences among the win rates are statistically significant. For Democratic administrations, we can conclude that the difference between the win rate before mixed panels and the win rate before Republican appointees is statistically significant (at a 95% confidence level), as is the difference between the win rate before mixed panels and the win rate before Democratic appointees (at a 95% confidence level).

of these presidents' appointees had at most two opinions. We excluded two opinions that were jointly authored but not per curiam because the joint authors had different appointing presidents.

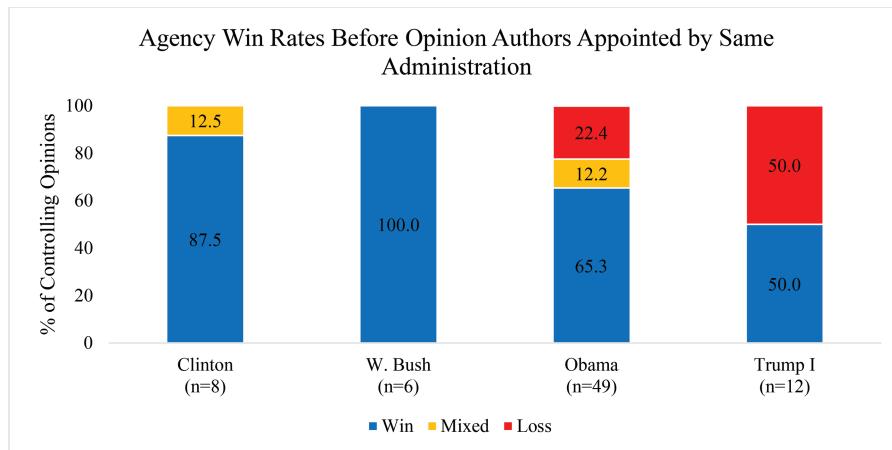
¹⁴⁸ Readers will also notice that per curiam opinions almost never resulted in complete agency losses. This makes sense; per curiam opinions are usually—although not always—less significant and/or controversial than signed opinions, so courts may not be inclined to use them to strike down a major rule. See *Per Curiam*, CORN. L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/per_curiam [<https://perma.cc/CTK3-6X4V>] (last visited Mar. 14, 2025).



Looking at each administration also revealed differences across administrations. Here, too, each administration fared better before judges appointed by presidents of the same party, but the differences varied across administrations. Both Democratic administrations also fared better before mixed panels than both Republican administrations.



Finally, we examined agency win rates for each administration before judges appointed by that administration. As noted, two-term presidents appear to have higher agency win rates for major rules issued in their second term. We identified at least three possible explanations, including that an administration may fare better before judges appointed by that same administration. Our data suggests that administrations do fare better (meaning above the overall average agency win rate for that administration¹⁴⁹) before judges appointed by that administration, but the number of observations is small. The first Trump Administration's 50.0% win rate before its own appointees appears low compared to other administrations. One possible reason is that President Trump may have appointed judges generally more skeptical of agency authority, regardless of the administration associated with the action at issue.



F. Trends in Administrative Law

This section reports trends in administrative law picked up in our study. We stress, however, that our study focuses primarily on agency challenge and win rates, not trends in administrative law. The following sections thus do not provide some of the nuanced analyses found in other studies that focused on specific doctrines or courts. Still, our analysis provides additional big-picture data that complements other studies' more detailed findings.

1. Chevron Deference

Until recently, federal courts reviewing an agency's interpretation of a statute it administered were bound—at least theoretically—by the *Chevron* doctrine, under which courts (1) determined whether Congress

¹⁴⁹. As a reminder, the overall agency win rates by controlling opinion by administration were 63.3% (Clinton), 58.1% (W. Bush), 62.8% (Obama), and 45.8% (Trump I).

has answered the interpretive question at issue, and (2) deferred to the agency's interpretation if it was reasonable.¹⁵⁰

Although *Chevron* became one of the most cited opinions in American law,¹⁵¹ it also turned into one of the most controversial.¹⁵² Critics of the doctrine included scholars,¹⁵³ legislators,¹⁵⁴ and Supreme Court Justices.¹⁵⁵ In 2024, the Supreme Court officially overruled the doctrine, holding that “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.”¹⁵⁶ Even before the Supreme Court decided to take up the issue, Court watchers had noted that the Court had not cited *Chevron* in at least six years, leading many to speculate that the precedent was losing support among the Justices.¹⁵⁷ Still, others, including some supporting *Chevron*'s elimination, noted that lower courts continued to apply the longstanding precedent.¹⁵⁸

150. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). The Supreme Court later held that, before undertaking a *Chevron* analysis, a court must first determine whether Congress intended an agency to issue “rulings with the force of law.” *United States v. Mead Corp.*, 533 U.S. 218, 231–32 (2001). If not, *Chevron* did not apply, although a court could still afford the agency “*Skidmore* deference”: persuasive value based on an agency’s “specialized experience” and the “value of uniformity” in administering a nationwide law. *Id.* at 234 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 124, 139–40 (1944)).

151. See Lauren Mattiuzzo, *Most-Cited U.S. Supreme Court Cases in HeinOnline: Part III*, HEINONLINE BLOG (Sept. 26, 2018), <https://home.heinonline.org/blog/2018/09/most-cited-u-s-supreme-court-cases-in-heinonline-part-iii/> [https://perma.cc/GUM7-6REK]; Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, YALE J. ON REGUL. NOTICE & COMMENT (Oct. 9, 2014), <https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/> [https://perma.cc/G83C-L7QM].

152. Barnett & Walker (2017), *supra* note 3, at 2 (“This *Chevron* deference doctrine is both untouchable and yet always under attack.”).

153. See Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 779 (2010); Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1189 (2016); Kristin E. Hickman & Aaron L. Nielson, Foreword, *The Future of Chevron Deference*, 70 DUKE L.J. 1015, 1015–1017 (2021).

154. H.R. 4768, 114th Cong. (2016) (outlining congressional bill called the “Separation of Powers Restoration Act of 2016” that would amend the APA to require courts to “decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies”); S. 2724, 114th Cong. (2016) (same).

155. See *Buffington v. McDonough*, 143 S. Ct. 14, 18–19 (2022) (Gorsuch, J., dissenting from denial of certiorari) (mem.); *Michigan v. EPA*, 576 U.S. 743, 760–62 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2143 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

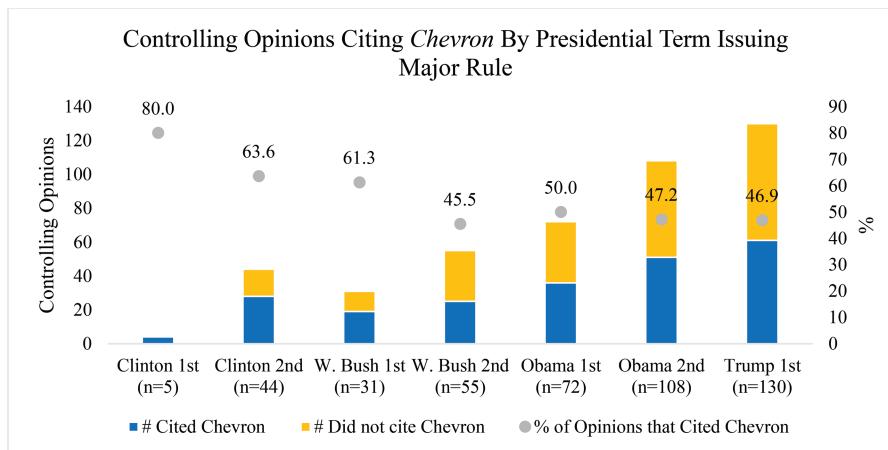
156. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024).

157. See, e.g., Isaiah McKinney, *The Chevron Ball Ended at Midnight, But the Circuits Are Still Two-Stepping by Themselves*, YALE J. ON REGUL. NOTICE & COMMENT (Dec. 18, 2022), <https://www.yalejreg.com/nc/chevron-ended> [https://perma.cc/FW3B-6XGE]; James Kunhardt & Anne Joseph O’Connell, *Judicial Deference and the Future of Regulation*, BROOKINGS (Aug. 18, 2022), <https://www.brookings.edu/articles/judicial-deference-and-the-future-of-regulation/> [https://perma.cc/WK8A-MF6L].

158. See, e.g., McKinney, *supra* note 157 (using data to illustrate that circuit courts still regularly apply *Chevron*); Richard J. Pierce, Jr., *Is Chevron Deference Still Alive?*, REGUL. REV. (July 14, 2022), <https://www.theregreview.org/2022/07/14/pierce-chevron-deference> [https://perma.cc/2TFY-2GRE] (contending that recent Supreme Court decisions declining to use *Chevron* are unlikely to influence circuit courts’ use of the doctrine).

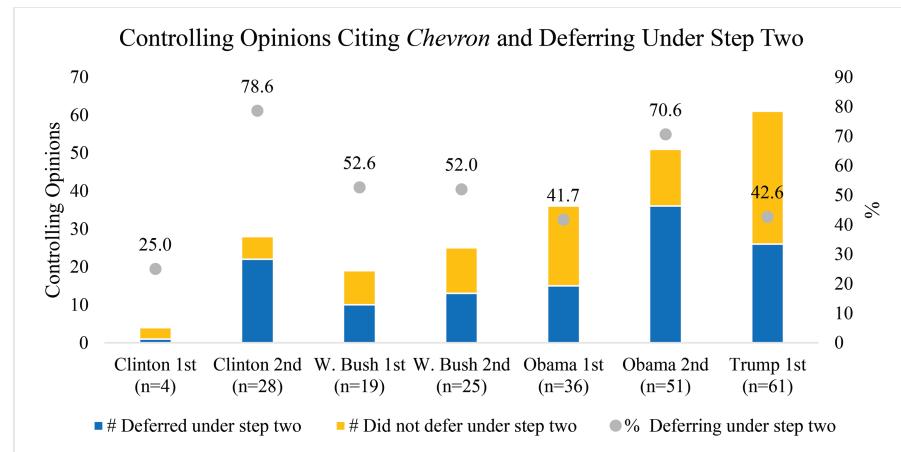
Our study suggests that, over time, criticism of *Chevron* may have affected its application not only at the Supreme Court, but also in the lower courts. Unlike other studies of *Chevron*, we did not code each instance of the *Chevron* framework's application in an opinion because we were less interested in *how* courts applied the *Chevron* framework than *whether* they cited or applied *Chevron* at all.¹⁵⁹ We recognize this is a rather crude way of assessing *Chevron*'s rise and ultimate demise, but, as noted, we were more interested in general trends that could be picked up in our study rather than a nuanced understanding of the doctrine's application.

Over time, *Chevron* citations decreased, as did instances in which courts actually deferred to the issuing agency (i.e., accepted the agency's reasonable interpretation of an ambiguous statute at *Chevron* step two).¹⁶⁰ In total, courts cited *Chevron* in just over half of all controlling opinions (50.3%) and deferred to at least one of an agency's statutory interpretations under step two in 54.9% of all controlling opinions citing *Chevron*. Both rates generally declined over time: Courts cited *Chevron* in 63.6% of controlling opinions addressing the Clinton Administration's second-term major rules and deferred under step two in 78.6% of these opinions; those numbers fell to 46.9% and 42.6%, respectively, for controlling opinions addressing the first Trump Administration's major rules.



¹⁵⁹ Other scholars have ably analyzed how courts apply the *Chevron* doctrine. See, e.g., Barnett & Walker (2017), *supra* note 3, at 1; Barnett & Walker (2018), *supra* note 55, at 1441; Kerr, *supra* note 55, at 1; Miles & Sunstein (*Chevron*), *supra* note 55, at 823; Re, *supra* note 59, at 605; Raso & Eskridge, *supra* note 55, at 1727.

¹⁶⁰ We coded an opinion as citing *Chevron* if the opinion anywhere cited *Chevron*, *U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or used the phrase "Chevron deference." As noted, our study includes 445 controlling opinions. Because we coded only the controlling opinions, the results here do not include any possible references to *Chevron* at earlier stages of litigation over the same rule. We coded an opinion as applying *Chevron* deference if the court applied *Chevron* deference anywhere in its opinion, even if it declined to apply *Chevron* deference in other parts of the same opinion (i.e., to a different question of statutory interpretation addressed in the same opinion).

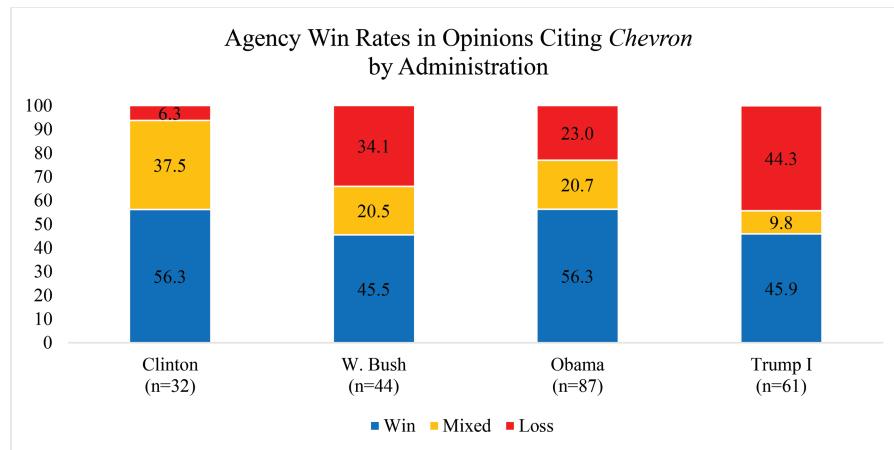


Chevron did not inherently favor one political party; rather, asking courts to defer to agencies' reasoned judgments favored the administration that issued any given rule. Nonetheless, debates over *Chevron*'s validity took on an ideological valence over time. The general perception pre-*Loper Bright* was that conservative scholars and judges appointed by Republican presidents tended to be more critical of *Chevron* deference than liberal scholars and judges appointed by Democratic presidents. This perception existed even though the *Chevron* Court upheld a Reagan Administration rule challenged by environmental groups, and Justice Antonin Scalia was one of the most ardent defenders of *Chevron* deference for much of his judicial career.¹⁶¹

It is difficult to say whether *Chevron*, in practice, advantaged one party over another. As the following chart demonstrates, Democratic administrations had a higher win rate in opinions citing *Chevron* (56.3%) than Republican administrations (45.7%), but we cannot conclude that the difference in win rates is statistically significant. These rather crude metrics may not reveal the full picture of *Chevron*'s effect in a given case. And if you pair these metrics with others, the picture is more mixed. For example, every administration but the first Trump Administration had higher overall win rates than in opinions citing *Chevron*: Clinton (63.3% versus 56.3%); W. Bush (58.1% versus 45.5%); Obama (62.8% versus 56.3%); and Trump I (45.4% versus 45.9%). This could suggest that *Chevron* was comparatively more helpful to the first Trump Administration than other administrations,¹⁶² but more detailed analysis is needed to test this possibility.

161. See Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1869 (2015).

162. The comparative boost may be due, at least partly, to the fact that cases citing *Chevron* would concern questions about the breadth of agency authority, which makes them less likely to be routine updates to a regulation or deregulation (as questions of

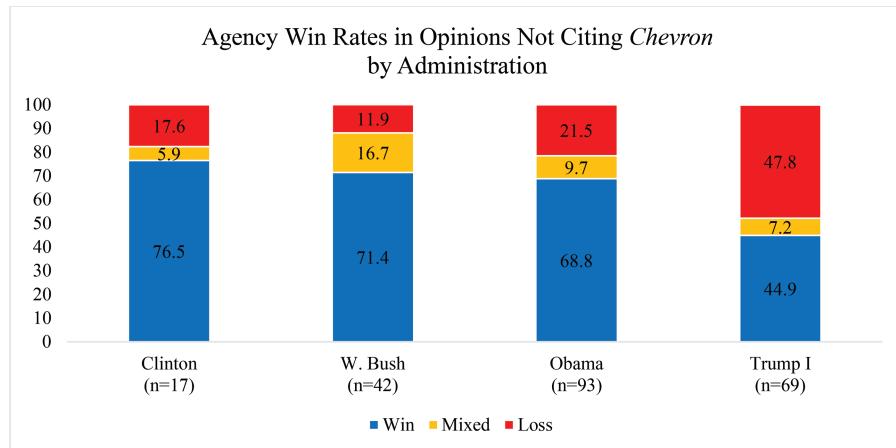


A similar picture emerges when looking at agency win rates in opinions that did not cite *Chevron*. First, the Clinton, W. Bush, and Obama Administrations were more likely to win when a controlling opinion did not cite *Chevron* (perhaps because the agency won on a reason unrelated to the rule, like standing, and so *Chevron* was less likely to be mentioned). But the opposite was true of the first Trump Administration. That finding also suggests that *Chevron* did comparatively more work to help the first Trump Administration defend its major rules in court than previous administrations; again, more analysis is needed to test this possibility.

Second, both Democratic administrations had similarly higher win rates when a controlling opinion cited *Chevron* (both 56.3%), and both Republican administrations had similarly lower win rates when a controlling opinion cited *Chevron* (45.5% and 45.9%), but we cannot conclude that the differences between each of the Democratic administrations and the Republican administrations are statistically significant. In other words, there was no temporal trend in agency win rates when a controlling opinion cited *Chevron*. In contrast, agency win rates steadily declined in controlling opinions that did not cite *Chevron*. At the same time, and as discussed in greater detail below, the percentage of controlling opinions that ruled in favor of an agency for reasons unrelated to the rule (and that would thus have less reason to cite *Chevron*) was relatively flat over the W. Bush, Obama, and first Trump Administrations (ranging from 31.0% to 39.0%)—so that does not appear to explain the steady decline in the agency win rate in cases that did not cite *Chevron*. Still, as noted, our study does not purport to conduct the type of detailed analyses of other studies focused

statutory interpretation are less likely to come up when you choose to pare down a former rule, as opposed to create something new).

on *Chevron* itself, and so we cannot offer any definite conclusions on *Chevron's* effect on agency win rates.¹⁶³

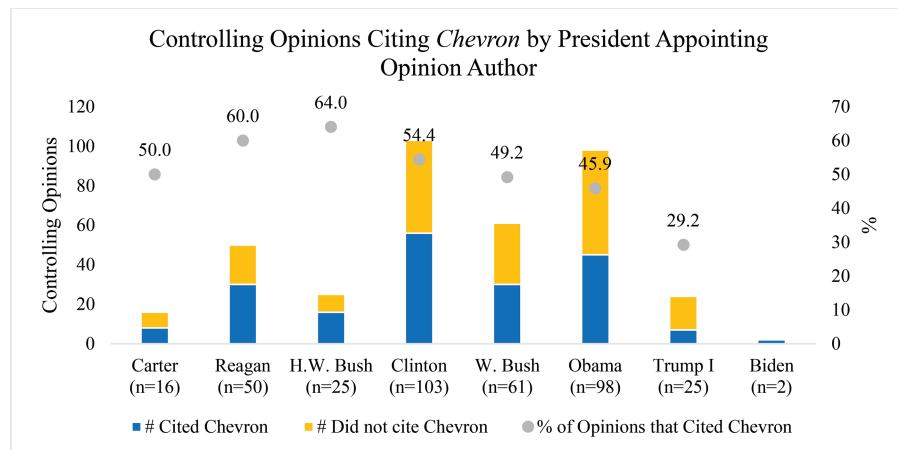


We also examined whether the appointing president's political party correlated with a judge's application of *Chevron*. When the judges deciding a case were appointed by a Republican—i.e., when the district court judge was appointed by a Republican or the judges in the majority on the appellate court were all appointed by a Republican—controlling opinions cited *Chevron* 49.1% of the time; of those opinions, 54.5% also deferred at step two. When the judges deciding a case were appointed by a Democrat, the controlling opinion cited *Chevron* at the similar rate of 48.0%; of those, however, only 47.9% deferred at step two—less than their Republican-appointed colleagues. Controlling opinions with “mixed” panels—i.e., when at least one Democrat- and one Republican-appointed judge were in the panel majority—cited *Chevron* slightly more at 52.4% of the time; of those, they deferred at step two slightly more at 59.2% of the time. But we cannot conclude that any of these

163. Other scholars have tried to determine *Chevron's* effect. Barnett and Walker evaluated whether agencies were more likely to win interpretive issues when the *Chevron* framework applied, as opposed to when *Skidmore* or no deference applied. Barnett & Walker (2017), *supra* note 3, at 30. They found that agencies were more likely to win when a court applied *Chevron*, suggesting that “agency-win rates are meaningfully different under different deference regimes.” *Id.* at 31. Eskridge and Baer conducted a similar analysis using Supreme Court cases involving an agency’s interpretation of a statute. Eskridge & Baer, *supra* note 3, at 1094. They found that agencies won in 76.2% of cases that applied the *Chevron* framework, a figure similar to Barnett and Walker’s, compared to a 68.2% win rate in non-*Chevron* cases. *See id.* at 1099 tbl. 1. This is a smaller difference between *Chevron* and non-*Chevron* cases than observed by Barnett and Walker, and ultimately, Eskridge and Baer hypothesize that *Chevron* itself did not substantially benefit agencies litigating before the Supreme Court, attributing the higher win rate under *Chevron* to case selection bias and the Court being more likely to apply *Chevron* when a majority intended to uphold agency action. *See id.* at 1122.

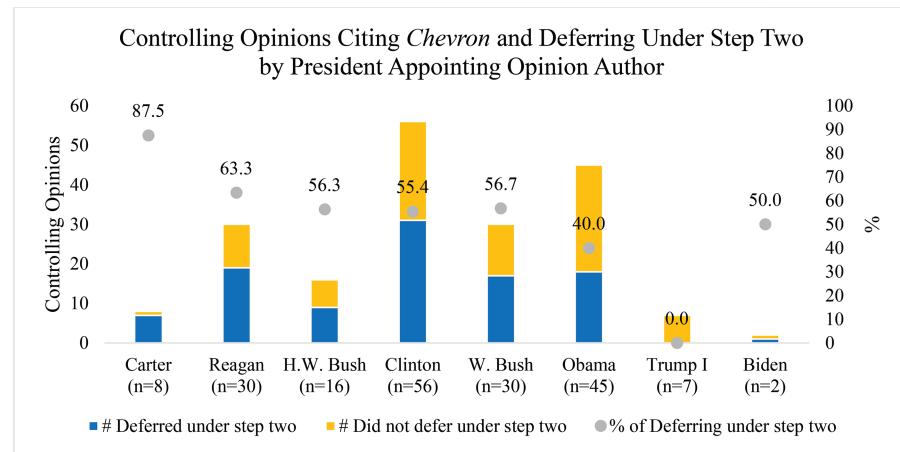
differences between Republican- and Democrat-appointed deciding judges are statistically significant. Thus, across all controlling opinions in our dataset, the appointing president's party did not appear to correlate with *Chevron* citations or instances of deference.

But when looking at the appointing president of an opinion's author, noticeable differences emerge.¹⁶⁴ In many respects, these differences reflect the arc of *Chevron* deference itself—citations rise through Carter and Reagan appointees, peak with H.W. Bush appointees, and then steadily decline through Clinton, W. Bush, Obama, and Trump I appointees. Perhaps the most noteworthy data point here is the stark difference between judges appointed by President Trump and those appointed by previous presidents. Controlling opinions authored by Trump I appointees cited *Chevron* only 29.2% of the time—a much lower rate than their peers, who ranged from 45.9% to 64.0%.¹⁶⁵ Of those opinions that did cite *Chevron*, none authored by a Trump I appointee deferred to an agency's interpretation under step two. Contrast that with Obama appointees, the next-lowest group, who deferred under step two in 40.0% of opinions citing *Chevron*, and the Carter appointees, who deferred under step two in 87.5% of such opinions. These differences in the percentages of controlling opinions citing *Chevron* that deferred under step two across judges appointed by different presidents are statistically significant (at a 95% confidence level).



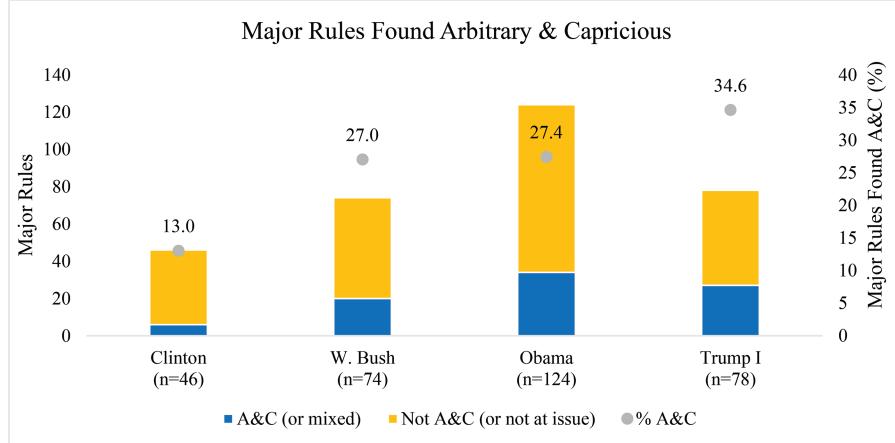
¹⁶⁴ For this analysis, we analyzed only opinion authors. We excluded opinions written by magistrate judges, who are not presidential appointees, and per curiam and jointly authored opinions if not all attributable authors were appointed by the same president. We also excluded the very few opinions in the dataset authored by judges appointed by Presidents Kennedy (1), Johnson (1), Nixon (2), Ford (2), and Biden (1).

¹⁶⁵ As a reminder, our primary dataset covers a time period when *Chevron* remained good law.

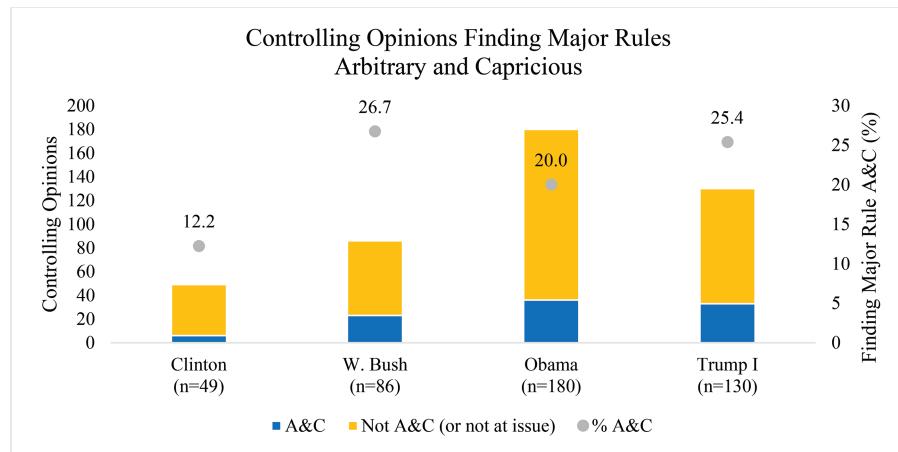


2. Arbitrary and Capricious Review

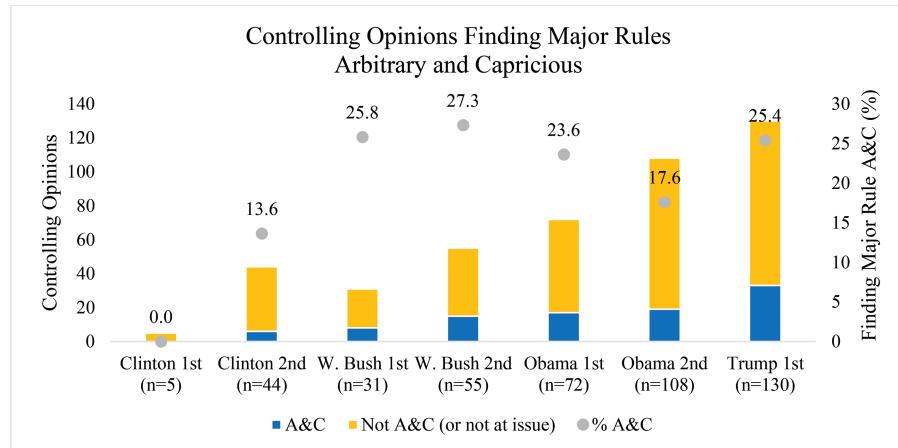
Of the 322 challenged rules that resulted in judicial opinions, 27.0% were found to be arbitrary and capricious in at least one opinion. The Clinton Administration had the smallest percentage (13.0%), and the first Trump Administration had the largest (34.6%) of major rules found arbitrary and capricious. Our data shows an upward trend over time.



Of the 445 controlling opinions in our dataset, 98 (22.0%) found a rule to be arbitrary and capricious. The percentage was slightly higher for Republican administrations than Democratic ones: 18.3% of controlling opinions addressing rules from Democratic administrations, versus 25.9% for Republican administrations.



The trends are similar by presidential term. But there is not the same consistent fluctuation between the first and second presidential terms for the two-term presidents in our primary dataset as we saw with overall win rates. In addition, if you exclude the Clinton Administration, the trend is essentially flat or even slightly declining.

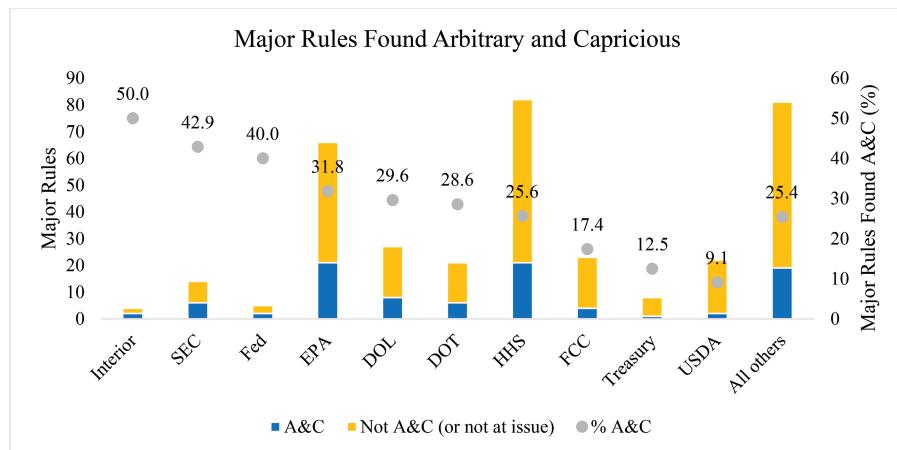


Again, unlike other studies of arbitrary and capricious review, ours was not designed to determine how often agencies prevailed when courts applied the arbitrary and capricious standard.¹⁶⁶ Rather, we looked for general trends in terms of how often major rules were found arbitrary and capricious. Using that metric, it is unclear whether judges

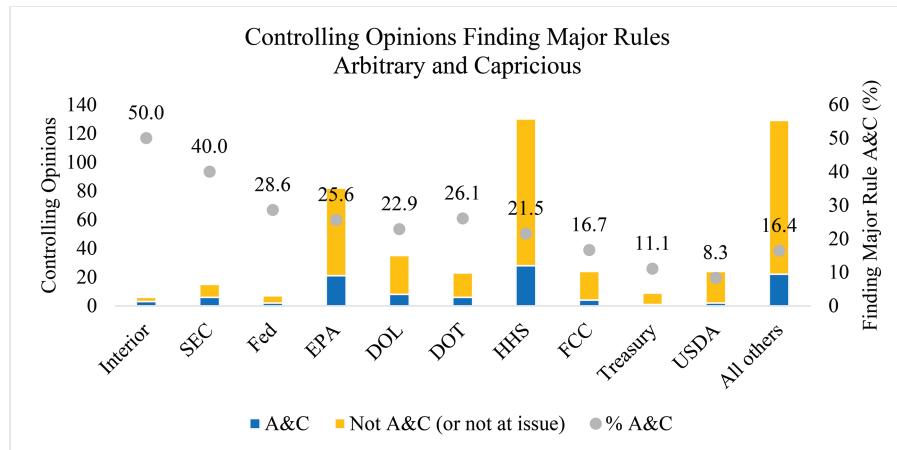
¹⁶⁶. See, e.g., Miles & Sunstein (Arbitrariness Review), *supra* note 57, at 776, 778–80 (examining how often the EPA and NLRB prevailed under “hard look” review); see also Zaring, *supra* note 3, at 175–76 (discussing the Miles and Sunstein study).

are taking a “harder look” over time.¹⁶⁷ Analyzing rules found to be arbitrary and capricious, there appears to be an upward trend over time. But looking at controlling opinions, the trend is less pronounced (and arguably nonexistent, at least for the last three administrations, particularly when looking by presidential term).

Among the top ten issuing agencies, there was a wide range in the percentage of rules found arbitrary and capricious. But some of these percentages were skewed by the relatively small number of major rules addressed in opinions.



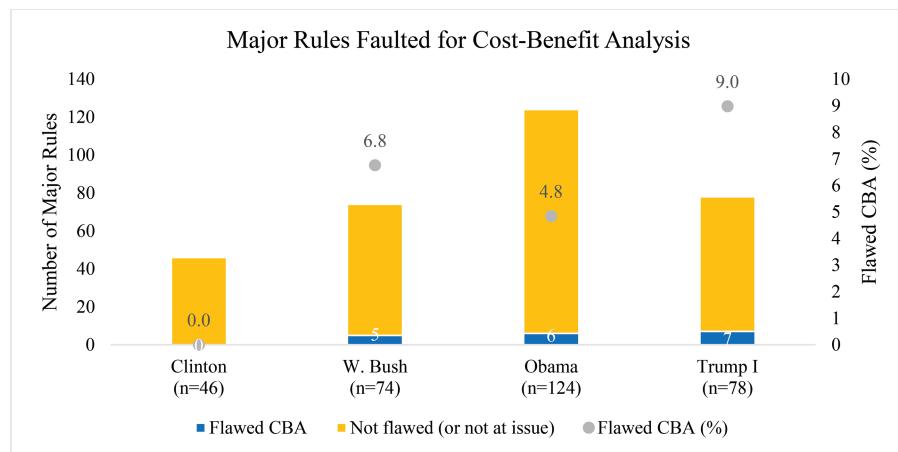
The figures are similar even if you look at controlling opinions.



¹⁶⁷ See, e.g., Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 759 (2006); Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 359 (2019); Sharkey, *supra* note 112, at 1607; Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1154 (2021).

Perhaps unsurprisingly, the rankings align relatively closely with agencies' win-rate rankings: the SEC, EPA, and Federal Reserve had among the lowest win rates, and they also had among the highest rates of rules found to be arbitrary and capricious. Interior jumps ahead of these three, but with a small number of observations (6).

Courts found relatively few major rules flawed based on a problem with the agency's cost-benefit analysis.¹⁶⁸ Of the 322 rules addressed in an opinion, only 18 (5.6%) were faulted for their cost-benefit analysis. Similarly, of the 445 controlling opinions in our dataset, only 20 (4.5%) found a rule's cost-benefit analysis flawed. That number represents 16.0% of overall agency losses in controlling opinions.



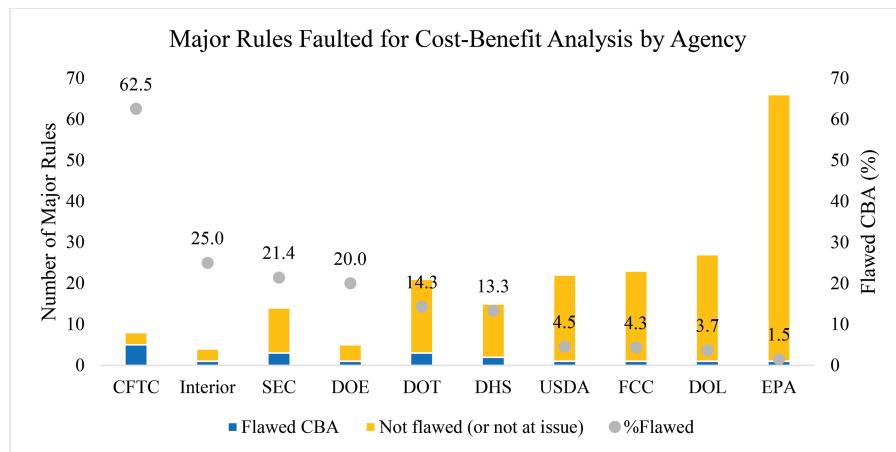
Of the 42 agencies with rules in our dataset, only ten issued rules later found to have a flaw with their cost-benefit analysis. Notably, three of these agencies (the CFTC, FCC, and SEC) are independent agencies that were long exempt from OIRA's centralized review. They accounted for 50.0% of the major rules faulted for their cost-benefit analysis.

This data presents a mixed picture for OIRA's centralized review of agencies' cost-benefit analysis. Some have argued that heightened judicial review is warranted for independent agencies' cost-benefit analyses given the absence of OIRA oversight.¹⁶⁹ While executive agencies subject to OIRA review produced more major rules faulted for their cost-benefit analysis, those flawed major rules constituted a much smaller percentage of the executive agencies' major rules, suggesting

¹⁶⁸. We included only opinions faulting an agency for how it performed its cost-benefit analysis, not whether it should have performed a cost-benefit analysis in the first place. See, e.g., Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 583 (2015) (explaining the difference between determining "whether an agency permissibly relied on [cost-benefit analysis]" and "the adequacy of the [cost-benefit analysis]" performed).

¹⁶⁹. Sharkey, *supra* note 112, at 1631.

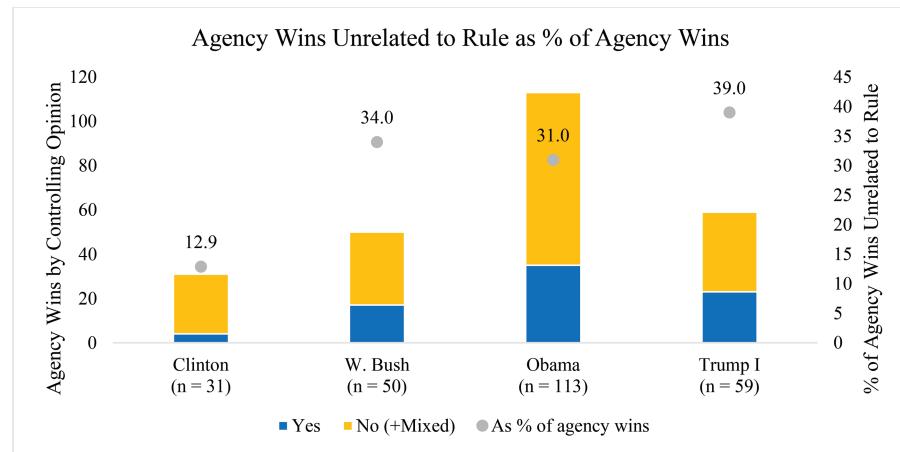
the flaws may have been aberrational.¹⁷⁰ For example, the EPA—which issues a large number of major rules, sees a high challenge rate, and has a low success rate—had only one rule faulted for its cost-benefit analysis out of 66 challenged rules addressed in an opinion. In contrast, the SEC saw three rules vacated based on a flaw with its cost-benefit analyses out of just 15 rules addressed in an opinion. Thus, although roughly half of the major rules with flawed cost-benefit analyses can be attributed to executive agencies, this may be a relatively smaller problem for such agencies (perhaps thanks to OIRA’s oversight). In any event, the small number of observations here prevents firm conclusions either way.



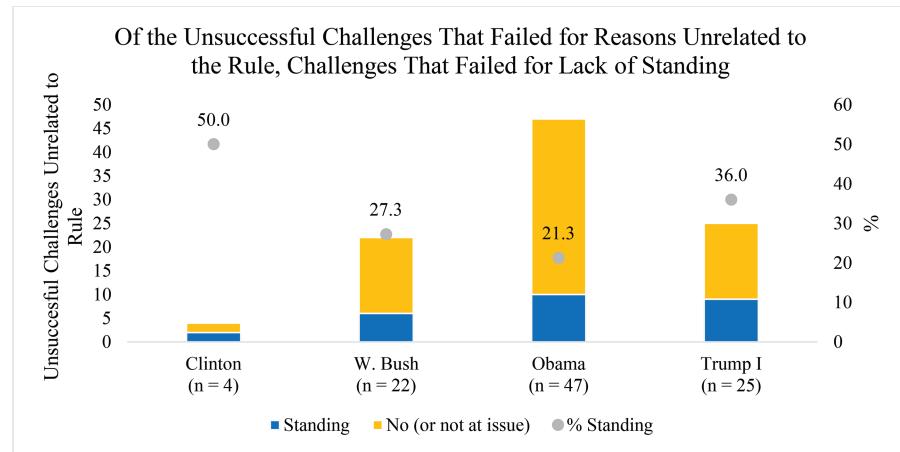
3. Standing, Exhaustion, Mootness, Etc.

Challenges to rules often fail for reasons unrelated to the rule, including for lack of standing, failure to exhaust administrative remedies, lack of ripeness, and mootness. Across all 445 controlling opinions in our dataset, roughly 17.8% ruled in favor of the agency for a reason unrelated to the rule. Narrowing further, roughly 31.2% of agency wins were for a reason unrelated to the rule. These figures vary by administration, with both Republican administrations seeing a higher percentage of wins come from reasons unrelated to the rule than Democratic administrations. But the figure has also increased over time.

¹⁷⁰. If you group the independent agencies (the CFTC, FCC, and SEC) together, opinions faulted 9 of 47 (19.1 %) of their challenged rules for their cost-benefit analysis; in contrast, opinions faulted only 12 of 201 (6.0%) of the rules promulgated by executive agencies where at least one rule had a flawed cost-benefit analysis (the DHS, DOL, DOT, EPA, Interior, Energy, and USDA).



Zeroing in on standing, 29.6% of agency wins unrelated to the rule can be attributed to standing. The percentages were higher under the Clinton and first Trump Administrations and lower but roughly equal under the W. Bush and Obama Administrations.¹⁷¹



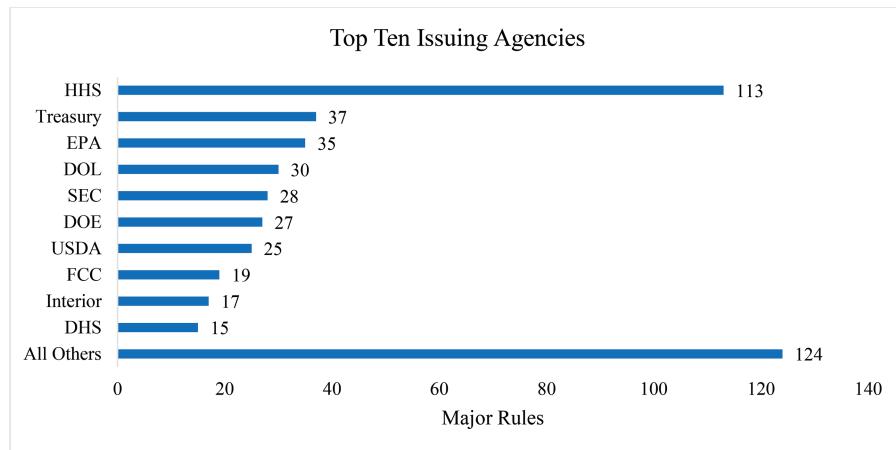
IV. THE BIDEN ADMINISTRATION

After the Biden Administration concluded in January 2025, we assessed which of its major rules have been challenged to date and the current status of those challenges. All the data reported in this part (in fact, all the data reported in this Article) is thus current as of February 2025. As stressed elsewhere, however, readers should approach these numbers with caution, particularly because many of

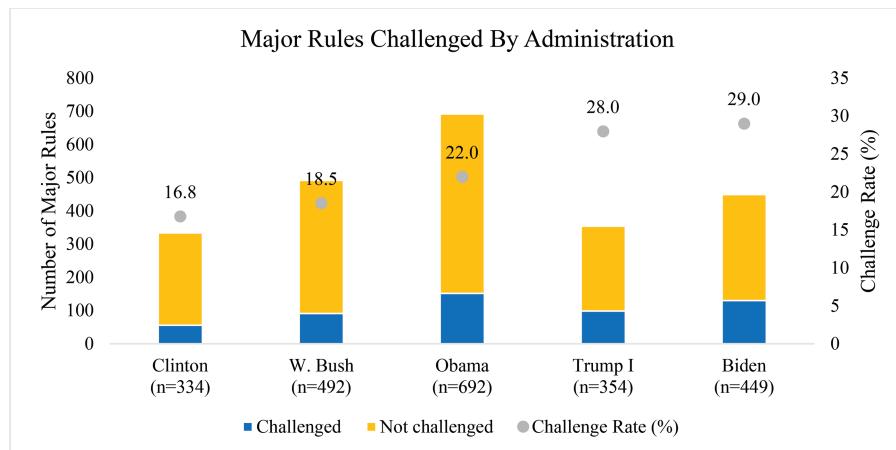
^{171.} Cf. Vladeck Brief, *supra* note 134, at 2, 7 (discussing how Texas uses standing to file suits almost exclusively under Republican-appointed judges).

these challenges (70.0%) remained ongoing in February 2025 and may see different results in later stages of litigation.

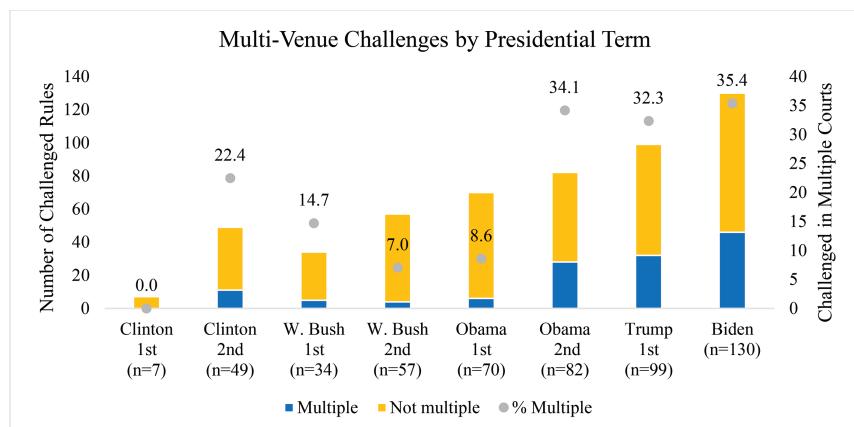
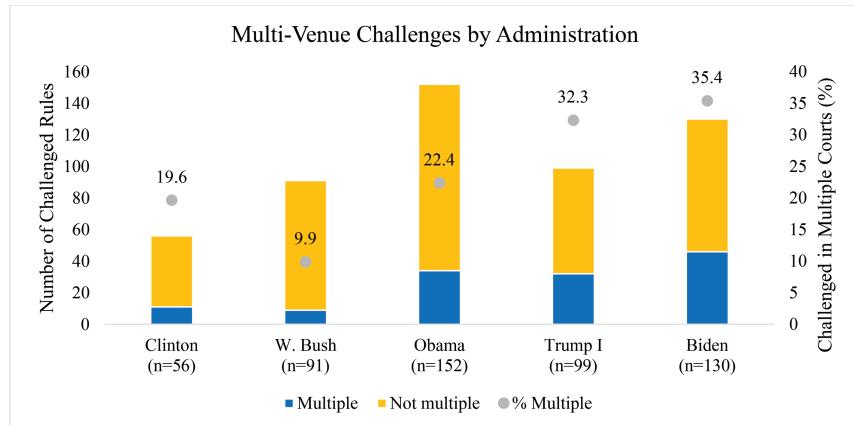
The Biden Administration has a similar list of top ten issuing agencies as all other administrations combined, though the Departments of Education and Energy replace the Federal Reserve and Treasury in the top ten.



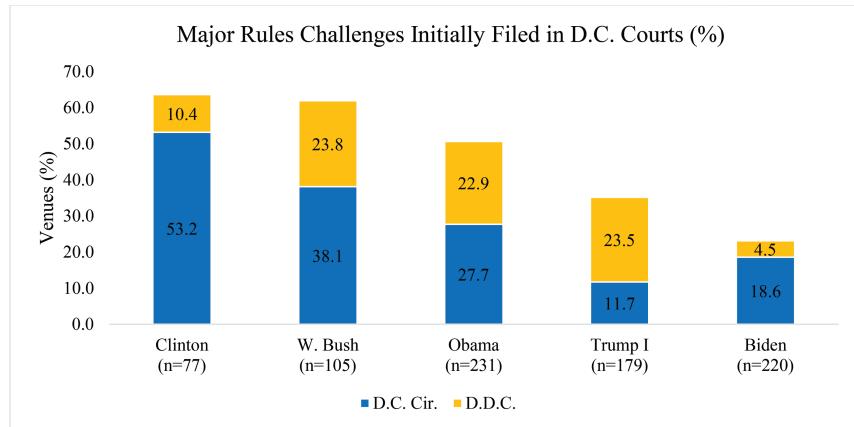
Of the Biden Administration's 449 major rules, 130 (29.0%) were challenged. That challenge rate is slightly higher than the first Trump Administration's high challenge rate (28.0%), indicating that the challenge rate has continued its upward trajectory.



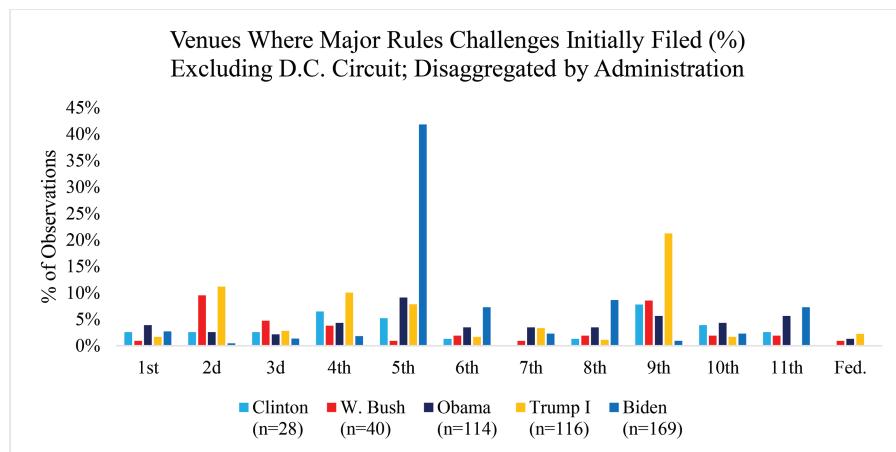
Of the Biden Administration's 130 challenged rules, 46 (35.4%) were challenged in more than one venue. That multi-venue challenge rate is higher than any other administration. But it is roughly in line with the preceding two presidential terms.



One of the more noteworthy trends so far is an apparent increase in forum shopping. For starters, the D.C. courts (meaning both the D.C. District Court and the D.C. Circuit) continued to decline as a top venue of choice for initial filings, though the percentage of initial filings in the D.C. Circuit increased compared to the first Trump Administration.

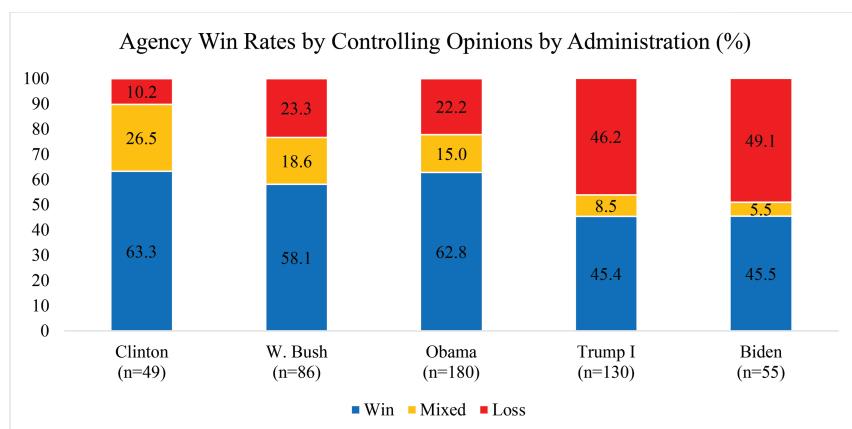
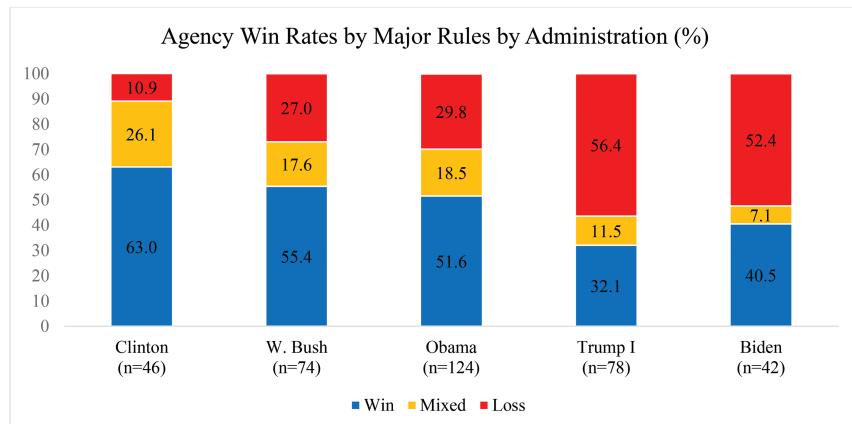


What is more striking, the four U.S. District Courts in Texas alone accounted for over 25% of all venues where challenges to the Biden Administration's major rules were initially filed. And if you group by circuit (meaning challenges initially filed in either a district court in a given circuit or the court of appeals for that circuit), the Fifth Circuit accounted for 41.8% of all venues where challenges to the Biden Administration's major rules were initially filed. Excluding the D.C. Circuit, the Fifth Circuit's share of initial filings is the highest for any circuit for any administration. These data points align with a common perception that forum shopping, while not new, has only increased under the Biden Administration.¹⁷²

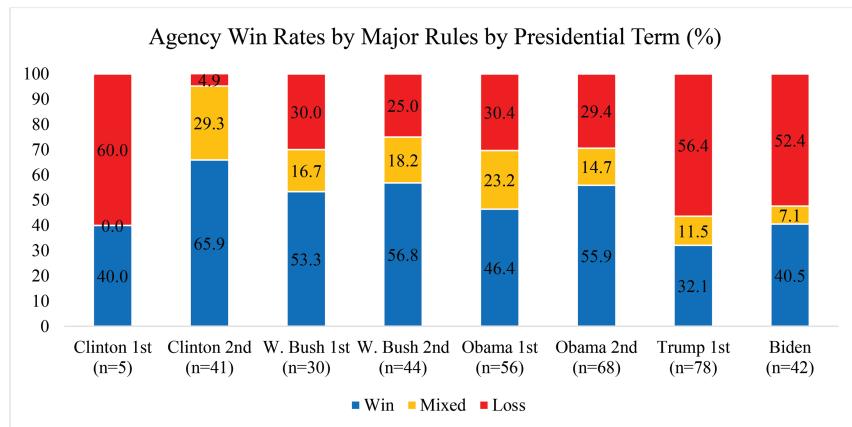


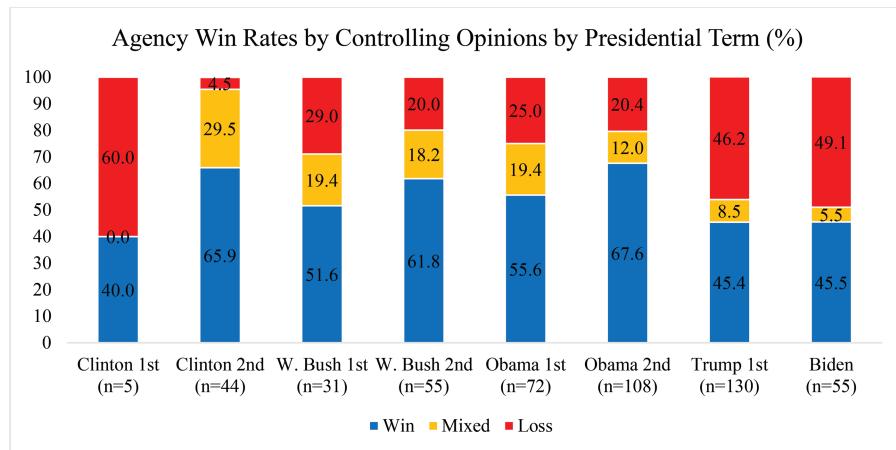
The Biden Administration's win rate by major rules is higher than the first Trump Administration's win rate, but its win rate by controlling opinions is roughly the same as the first Trump Administration's win rate. The Biden Administration's win rates are lower than previous administrations' win rates and considerably lower than previous studies' findings of win rates ranging from 60–70%. These win rates could suggest that a change in administrative law or the composition of the federal courts (or both) has a larger impact on agency success than the issuing administration, but further analysis is needed to test that possibility.

¹⁷². See *Conference Acts to Promote Random Case Assignment*, U.S. Crs. (Mar. 12, 2024), <https://www.uscourts.gov/data-news/judiciary-news/2024/03/12/conference-acts-promote-random-case-assignment> [<https://perma.cc/4SA3-L4MV>]; Nate Raymond, *US Federal Judiciary Moves to Curtail “Judge Shopping” Tactic*, U.S. NEWS & WORLD REP. (Mar. 12, 2024), <https://www.usnews.com/news/us/articles/2024-03-12/us-federal-judiciaryadopts-policy-to-curtail-judge-shopping> [<https://perma.cc/L8U8-VN4N>].



Even when viewed by presidential term, perhaps a better comparison with two-term administrations, the Biden Administration's win rates are lower than the first terms of both the W. Bush and Obama Administrations.





Because we were only able to collect complete data on the Biden Administration as this Article was going to publication, we did not conduct all of the analyses we conducted for other administrations.

V. CONCLUSION AND PLANS FOR FUTURE STUDY

When we embarked on this study, we had little idea how challenging it would be. Although we knew we would have to make certain judgment calls, we did not anticipate just how many legal challenges to major rules would end in a mixed result for the agency, or even how difficult it can be to determine whether a party is actually challenging a given rule. Myriad other decisions cropped up along the way.

By providing a frank discussion of these methodological challenges, and by reporting data in different ways, we hope that readers have a more complete and contextualized understanding of the strengths and weaknesses of our methodological choices. And by presenting the data as we have, we also hope that readers can interpret much of the data for themselves, perhaps arriving at different conclusions. As noted throughout, it is often possible to view the same data points very differently, and much of that variation may depend on whether one is generally supportive or critical of the administrative state. We know that reasonable minds may differ, and we look forward to any discussion or debate that our work may inspire. (We also encourage readers to contact us with any potential errors in our dataset, which has been made public at policyintegrity.org.)

We also look forward to addressing some of the numerous future research avenues that remain. First and foremost, we puzzled a bit over exactly why the overall agency win rate increases when looking at controlling opinions, which would require a more detailed analysis of the “surplus” opinions identified. We did not collect more precise data on the projected economic impact of the rules in our study, but it also

would be interesting to know if there is any correlation between the projected economic impact of a rule and its rate of challenge or success. Relatedly, we did not collect detailed information on transfer issues, but it would be interesting to know if courts are, in fact, less inclined to transfer cases than they once were. Many challenges to major rules also concluded before a court could even rule on a motion to dismiss; a more exhaustive study would show what portion of these challenges were dropped because a new administration entered and began to dismantle the challenged rule versus, for example, what portion were dropped because they were not strong challenges to begin with. And as some of the reviewers of our draft Article also suggested, another future avenue of research involves looking at how the decline of major rules' challenges filed in the D.C. courts may affect the development of administrative law more generally.

Given the tremendous flux in administrative law at the moment, future studies (whether from us or others) may want to explore better ways of assessing the impact of recent developments, including the rise of the major questions doctrine. How much do these developments explain changes in agency win rates? Or does the party or president appointing the judge better explain changes over time?

Our study provides at least a useful starting point for assessing these developments, as it provides a relatively stable unit of analysis that may be better able to assess trends over time. At a minimum, our study suggests that agencies no longer win roughly two-thirds of the time, at least not when it comes to major rules. Some may lament this development, while others may celebrate it. Regardless of one's views, it appears clear that the relationship between the administrative state and federal courts is not what it once was.

VI. APPENDIX: METHODOLOGY DISCUSSION

This appendix provides a more detailed discussion of our methodology. We populated an excel spreadsheet with information about every major rule in the GAO’s database,¹⁷³ including: name of rule; regulatory identification number (“RIN”); Federal Register citation; date rule was published (in the Federal Register); date the GAO received the rule; date the rule was to become effective; agency that issued the rule; and subagency that issued the rule (if relevant).¹⁷⁴

After collectively drafting a manual to guide our coding determinations, we divided the rules for analysis among each of us or a research assistant. We determined whether each major rule was challenged by searching the Federal Register citation in the “all content” field in Bloomberg Law.¹⁷⁵ We then examined each (1) docket and (2) judicial opinion returned from these search results to determine whether they involved a challenge to the major rule at issue. In most instances, this was a straightforward determination. In other instances, this was more challenging. For example, in some instances, court filings and judicial opinions referenced a major rule’s Federal Register citation for irrelevant reasons (e.g., as background). Or a complaint or petition for review would omit the Federal Register citation for the major rule at issue, but a later brief or other filing would identify the major rule as potentially at issue, requiring further review of the docket and surrounding context (e.g., date of the challenged agency action) to determine if the litigation involved an actual challenge to a major rule.

We coded a major rule as challenged only if the rule itself was challenged. Thus, for example, we did not code a major rule as challenged if the litigation involved an agency’s disputed interpretation of the rule at issue or agency action flowing from the rule at issue, unless the challenge could be reasonably interpreted as ultimately challenging the rule itself. This determination was also usually straightforward but sometimes required closer inspection of other filings in the litigation to determine which agency action was at issue.

Once we identified a challenge to a major rule, we coded where the challenge was initially filed (including, as relevant, multiple courts) and whether multiple challenges were filed in different courts. To help us keep track of the challenges, particularly when multiple challenges were

173. See *Congressional Review Act*, U.S. Gov. ACCOUNTABILITY OFF., <https://www.gao.gov/legal/congressional-review-act> [<https://perma.cc/66VL-YS3X>] (last visited Mar. 20, 2025).

174. Our research assistant also cross-referenced the Federal Register to check for discrepancies (e.g., with the publication date for a rule). We also discovered the GAO database occasionally contained duplicates, which we removed at a later stage of the process.

175. We searched using two formats: NN Fed. Reg. NNNN and NN FR NNNN. Through trial and error, we discovered that searching using just “FR” sometimes returned different results than searching using “Fed. Reg.”

filed in the same or different courts, we also kept track of the docket numbers (district court and appellate court, as relevant), which helped us trace the litigation through to completion.

We then identified all substantive district court and appellate court opinions in the litigation (as relevant) so that we could determine the controlling opinion (and thus ultimate resolution) for a given challenge. As part of this process, we also coded whether a challenge was resolved before an opinion issued and, if so, whether that occurred during the same or a different administration. And we also coded a challenge as ongoing so that we could follow up later to determine if the challenge had reached a final resolution.

Finally, we coded controlling opinions for additional variables focused on the court's legal analysis. For these additional variables, we opted to code only controlling opinions, as they best reflected the ultimate resolution of the challenge. But we also coded all controlling opinions if challenges were filed in multiple courts. So, for example, if a challenge to the same rule was filed in two different circuit courts, we coded each of these separately. But if that same challenge later resulted in a Supreme Court opinion, we often had to treat both the Supreme Court opinion and preceding or following circuit opinions as collectively the controlling opinion because the Supreme Court often reviewed just an isolated issue in the litigation.

For the controlling opinions, we determined whether the challenge was successful, unsuccessful, or mixed. It was relatively easy to code most challenges, e.g., when a court granted or denied a petition for review in full. Some, however, were more difficult to code, particularly for the more complex major rules with multiple components. We coded a challenge as mixed if a court found some but not all challenged provisions of a rule invalid. Similarly, if a court preliminarily enjoined some provisions but not others, we coded that as a mixed result. We also separately coded whether a court remanded without vacatur.

We identified who appointed the author of the opinion, indicating mixed if the opinion was jointly authored or issued as a per curiam opinion. And we coded the party of the majority's appointing president. For a district court opinion, this was a single president (and thus a single party). For many appellate opinions, however, the majority consisted of two or more judges appointed by different presidents of different parties, which we coded as mixed.

Finally, we coded all opinions for a few additional variables designed to track general trends in administrative law. We coded whether the controlling opinion cited *Chevron* or the phrase “*Chevron* deference” anywhere in the opinion. We then coded whether the controlling opinion deferred to the agency’s interpretation under step two. This was coded yes/no even if the controlling opinion applied *Chevron* deference to one aspect of the major rule but not another. The goal of both *Chevron* codings was to gauge the arguable rise and fall of *Chevron* deference over time, so we did not break the opinion down by issue.

We separately coded whether the controlling opinion found one or more parts of the major rule at issue invalid under arbitrary and capricious review and, relatedly, due to flaws in the agency's cost-benefit analysis. Finally, we coded whether a controlling opinion ruled in favor of the agency based on a reason unrelated to the rule at issue (e.g., standing).

Once we collected all this data, we had to run different analyses with the data presented by rule (to present our findings by major rule) and disaggregated by challenge or controlling opinion (to present our findings by controlling opinion). We then used Excel formulas to populate dozens of summary tables on each of the issues presented in the Article.

At each step of the process, we implemented quality control measures to ensure we (1) captured all major rules in the GAO database, (2) captured as many challenges to those major rules as possible, and (3) correctly coded those challenges and their resulting opinions. This involved at least two reviews of the GAO database by two different people and a research assistant, cross-referencing Westlaw for any rule initially marked as unchallenged, cross-referencing Westlaw for controlling opinions to determine other potentially relevant opinions or case history, double-checking every twentieth major rule by someone who had not coded that rule initially, and double-checking all challenges coded as mixed. We also flagged dozens of major rules or associated challenges for further discussion at regular meetings. And before publication, we also benefited greatly from one final quality control review (and a fresh pair of eyes) from Bridget Pals at the Institute for Policy Integrity.

