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Supreme Court Alters the Administrative State: Loper and Relentless Decision Shifts Authority from Administrative Agencies and Creates Uncertainty

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It goes without saying that the actions of federal regulatory agencies greatly affect many essential aspects of our daily lives, among them the delivery of medical services, medicines, and therapeutic devices and the availability of insurance to cover them; the safety of our workplaces; the quality of the environment; and relations between employers and employees.

Where these agencies, of what is known colloquially as the "Administrative State," have acted under clearly stated legislative authority, their conduct has been evaluated by the federal courts under a well-established set of strictures defined in the Administrative Procedure Act (APA). For the past 40 years, where agencies' statutory authority is ambiguous, these agencies, not the courts, have been given broad authority to act. This deference to agencies had been embodied in the doctrine of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). But no longer.

On June 28, 2024, the Supreme Court of the United States categorically overturned *Chevron* and its doctrine of agency deference in *Loper Bright Enterprises, et al. v. Raimondo*, No. 22-451, and *Relentless, Inc., et al. v. Department of Commerce*, No. 22-1219. Strongly asserting that the *Chevron* doctrine was inconsistent with the constitutional separation of powers and the APA, the Chief Justice, writing for himself and Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, opined that courts are to exercise their independent judgment in deciding if an agency has acted within the scope of its statutory authority, and are not bound to defer to any agency just because the relevant statute is ambiguous. This ruling will have a broad impact on federal departments and agencies, Congress, courts, and those individuals and entities challenging agency regulations, orders, and guidances.

The *Chevron* Doctrine: 1984–June 28, 2024

From 1984 until June 28 of this year, the bedrock formulation for resolving challenges to agency interpretations of their enabling statutes through rulemaking has been the two-part inquiry embodied

in the *Chevron* doctrine. The first part of the formulation looks to the underlying statute to determine if Congress has made its intent unambiguously clear; if so, the inquiry ends, and both the agency and the reviewing court must give effect to Congress's intent. This has become known by the shorthand phrase "Step One."

However, if Congress's intent is not clear, either because it did not address a specific point or used ambiguous language, then *Chevron* required the court to defer to the agency's construction if it is based on a permissible reading of the underlying statute, with an understanding that a court should not substitute its own construction for a reasonable agency construction.[1] This has become known as "Step Two."

Chevron ranks among the most cited Supreme Court decisions of all time and has been cited more often in administrative law cases than any other decision. Nevertheless, *Chevron*'s significance has waned over time as courts have focused more on a strict reading of the text of the relevant statute that authorized the agency's rulemaking authority. Indeed, the Supreme Court itself has not relied on a *Chevron* analysis to decide a case since 2016.[2]

The Court's *Loper* and *Relentless* Decision—and Why It Changes the Administrative State

The *Chevron* doctrine came to an abrupt end on June 28, 2024, when the Supreme Court overruled it. The Chief Justice described *Chevron* as a "fiction" and "fundamentally misguided."[3]

The underlying dispute in both the *Loper* and *Relentless* cases involved a regulation issued by the National Marine Fisheries Service in 2020 that requires certain commercial herring fishing vessels to bear the costs of observers to help ensure compliance with fishery management plans. In both cases, the lower courts had upheld the regulation but on slightly different grounds. The lower-court decision in *Loper* applied a *Chevron*-based deference analysis, while the *Relentless* decision rested on an analysis of the statutory text and a holding that Congress had authorized the regulation and that regulated parties are expected to bear the costs of compliance with a regulation.[4] The Supreme Court agreed to review both cases and heard oral arguments on the same day.

The Supreme Court concluded that deference to agency determinations cannot be automatic or authoritative. Lower courts must exercise their independent judgment to determine if an agency has acted within the scope of its delegated authority from Congress, and courts cannot "defer to an agency interpretation of the law simply because a statute is ambiguous."[5]

The Supreme Court relied on several concepts to reach this result. It determined that *Chevron* deference cannot be reconciled with the statutory provisions in the APA that govern judicial review of agency action.[6] In the Court's view, the APA does not provide for any deference to agency interpretations of law. By contrast, questions of policy or fact can be reviewed under the APA's arbitrary and capricious standard, which does allow for some deference. The Court rejected the argument that ambiguity requires deference to agency determinations. Thus, the Court emphasized that administrative agencies have no special competence in resolving statutory ambiguities but that courts do. Nevertheless, it conceded that there is a limited role for agency interpretations to be given respect by a reviewing court, but only as guidance that is neither binding nor presumptive in favor of the agency.[7]

Similarly, the Court rejected other grounds that had been advanced for retaining deference to agency interpretations. It found that there is no authority for the concept that when a technical matter is

involved, agencies should be given greater latitude. Next, it rejected the argument that deference helps promote consistency in the administration of a statutory scheme, as it concluded that Congress has never required this result. In addition, it was not persuaded that doing away with *Chevron* deference puts courts in the position of determining policy as well as law.[8]

Although the Court overruled *Chevron*, its ruling is not retroactive. It expressly left in place the decisions in thousands of cases that were decided based on the *Chevron* framework.[9]

Where Do We Go from Here?

The Supreme Court overruled *Chevron* but did not provide further instructions as to how lower courts are supposed to review future challenges. Nevertheless, its decision impliedly revitalized the deference standard described in its 1944 decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under the *Skidmore* approach, deference is no longer presumed, and a court may determine how much weight it wants to give to an agency's analysis and interpretation based upon the persuasiveness of the agency's views.

This case-by-case analysis of the weight to be assigned to agencies' rulings, interpretations, and opinions as to statutory coverage can be variable. Based on existing caselaw, courts may consider a range of factors, including:

- the thoroughness of the agency's consideration of the issue,
- the formality of the agency's procedures,
- the validity of the agency's reasoning,
- whether the agency's interpretation has been consistent,
- how the agency has demonstrated the exercise of its expertise,
- whether the agency's interpretation is a new or long-standing agency position, and
- whether the interpretation is contemporaneous with the enactment of the statute that the agency relies on as its authority.[10]

Although *Loper's* rejection of *Chevron* deference creates new opportunities to challenge arguably unlawful agency action, this likely will not be the last word on the subject from federal courts. An advantage of *Chevron* is that it provided for one-stop shopping for an opinion on statutory coverage with no real appellate review. With *Chevron* gone, not only will there be a likely surge in challenges to agency action, but agencies' statutory authority to act will be subject to potential determinations by 94 district courts and 13 courts of appeals. This, no doubt, is going to result in differing and conflicting outcomes as a case-by-case approach following *Skidmore* standards is likely to lead to inconsistent results depending on the weight given to agency interpretations. Where some courts might see an issue as a pure question of law, others might see the same fact pattern as a mix of law and policy and apply a higher level of deference. Where there are inconsistent decisions, agencies will have to adapt their conduct. Since there is no bright line in every case, these questions will likely be addressed through future litigation or legislation. Indeed, in continuing a recent trend towards the limitation of administrative agency power, the Supreme Court is telling Congress that it needs to act more definitively and clearly when it delegates authority to agencies of the Executive Branch.

Limits to *Loper* and *Relentless* and Additional Takeaways

Despite warnings by some that the Court's recent holding has completely upset the settled tenets of administrative law and likely will hamstring agencies, *Loper* has clear limits. It and its companion case are about textual literalness. If Congress has spoken unambiguously in a given statute, the

dispute over an agency's authority (though not the way it has exercised it) is over. That was true under *Chevron,* and it still is true under *Loper.* It does not affect issues involving an agency's rulemaking authority where Congress has expressly directed an agency to formulate rules. Similarly, it does not affect statutes where Congress has either expressly granted a right of judicial review of agency action or expressly excluded certain agency actions from administrative or judicial review. The ruling also does not affect existing precedents that have allowed deference to agencies' interpretations of their own regulations unless they are "plainly erroneous or inconsistent with the regulation."[11]

When bedrock shifts, the seismic waves can be felt far from the center. The decision in *Loper* and *Relentless* realigns the relationship among the branches of government and enhances the authority of the judiciary. As a result, stakeholders who want to challenge final agency rules might find an easier path to success in the shift from automatic deference to agency determinations of statutory authority to courts making those decisions, analyzing a variety of factors in adversarial proceedings that might give weight to agency decision-making.

With courts no longer able to afford automatic deference to agencies, and facing a probable wave of new challenges to agencies' statutory authority to act in certain fields and manners, administrative agencies might find it increasingly difficult to exercise their authority as to emergent areas of conduct and technology, for example, artificial intelligence, where purportedly enabling statutes are ambiguous in the nature and scope of their delegation. Agencies, therefore, might face unintended consequences to their ability to respond to critical contingencies, such as pandemics and other national emergencies.

If there is an underlying message in all of this, it is first to Congress, strongly suggesting that it has a responsibility to legislate clearly, unambiguously, and definitively. It also is instructive for agencies to act within the spheres that clearly are assigned to them in a similar way. They will be more likely persuasive to courts where their policies and actions are reasonable, supported by convincing evidence, and applied consistently over time.

ENDNOTES

[1] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984).

[2] *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117 (2016).

[3] *Loper Bright Enterprises, et al. v. Raimondo*, No. 22-451 and *Relentless, Inc. v. Dep't of Commerce*, No. 22-1219, slip op. at 26 and 29 (June 28, 2024).

[4] *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022); *Relentless, Inc. v. Dep't of Commerce*, 62 F.4th 621 (1st Cir. 2023).

[5] *Loper Bright*, slip op. at 35.

[6] 5 U.S.C. § 706.

[7] *Loper Bright*, slip op. at 10 and 16, *citing Skidmore v. Swift & Co.,* 323 U.S. 134,140 (1944).

[8] *Id.* at 30-35.

[9] *Id.* at 34.

[10] *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235 (2007).

[11] *See, e.g., Kisor v. Wilkie*, 588 U.S. 558 (2019).

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