

Publications

Open Season for Regulatory Challenges: Supreme Court Overturns Chevron Deference and Expands Opportunities to Attack Federal Rules

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On June 28, 2024, in a 6-3 decision, the Supreme Court overturned *Chevron v. Natural Resources Defense Council* (“*Chevron*”),^[1] the most-cited case in administrative law. *Chevron* established a framework for how the federal courts decide challenges to agency interpretations of statutes—and served as a bedrock support for upholding agency interpretations of statutes for the last 40 years. *Chevron* had been the target of frequent criticism, and the Court had not invoked it (at least, by name) in an opinion since 2016. Notably, district and appellate courts have faced significant difficulty in applying *Chevron* in challenges to various agency rulemaking. That difficulty has arisen in the context of federal regulation of both retirement and health and welfare plans over the past decade.

Likewise, on July 1, 2024, in another 6-3 decision, *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, the Supreme Court held that the six-year statute of limitations for challenges under the Administrative Procedure Act (“APA”) begins to run from the time of the plaintiff’s injury by final agency action (as opposed to when the agency takes final action). The ruling opens the door for challenges to long-standing regulations. And, such challenges may be particularly attractive given the extinction of *Chevron* deference. The combination of *Loper Bright* and *Corner Post* create additional opportunities to challenge federal regulation, but more globally, for plans that are well-established and meeting current regulatory requirements, these two cases could create material uncertainty regarding the ongoing viability of existing regulations.

Background on *Chevron*

The Supreme Court established *Chevron* deference in 1984, holding that when a statute is ambiguous with respect to a specific issue, courts must grant deference to the agency’s reasonable interpretation of the statute. This created a two-step process asking: (1) is the intent of Congress clear based on the text and structure of the statute, legislative history, and the canons of statutory interpretation or is the statute

ambiguous; and (2) if the intent of Congress is ambiguous, is the agency's interpretation of the ambiguous provision a permissible one? For the next four decades, *Chevron* became the standard for analyzing administrative authority on topics ranging from regulation of tobacco products to immigration to the implementation of the Affordable Care Act.^[2]

In 2020, two groups of fishing companies filed suits in federal courts challenging National Marine Fisheries Service regulations that imposed fees on vessels for some of the cost of federal compliance monitors that vessels must have aboard under the Magnuson-Stevens Act. In both *Loper Bright v. Raimondo* ("*Loper Bright*")^[3] and *Relentless v. Department of Commerce* ("*Relentless*")^[4] the Circuit Courts relied on *Chevron* to uphold the fees. Both sets of plaintiffs appealed to the Supreme Court, which agreed to hear the cases in tandem.

The Court's Analysis in *Loper Bright*

The Court's decision in *Loper Bright* overturns *Chevron*'s dictate that courts defer to the expertise of federal regulators when an organic statute is ambiguous.^[5] In this decision, the Court shifted power from the executive to the judiciary to interpret statutes and resolve technical controversies.

Chief Justice John Roberts, writing the majority opinion on behalf of the Court, concluded that the APA obligates the courts to exercise independent judgment when evaluating whether an agency's actions are within its statutory power. The Court explained that *Chevron* was "fundamentally misguided" and that its unworkable and evolving standards have resulted in a lack of meaningful reliance. In effect, under *Chevron*, courts were unable to arrive at a uniform or intelligible standard for determining whether a statute is "ambiguous" and, as a result, *Chevron* did not lead to the uniformity that its writers had anticipated.

In reaching this conclusion, the Court relied upon analysis of Article III of the Constitution and the APA and emphasized that federal agencies lack expertise when it comes to interpretation of statutory ambiguities when juxtaposed with the courts' expertise. Justice Kagan filed a dissenting opinion in which Justices Sotomayor and Ketanji Brown Jackson joined.

A. The Duties Imposed on the Federal Judiciary Under Article III

In reaching its conclusion, the Court explained that Article III mandates the federal courts to be the ultimate authority on interpretations of law, citing to the case that established judicial review, *Marbury v. Madison*. The Court detailed how the courts have long recognized that "respect" be given to federal agency interpretations due to their expertise and knowledge concerning the regulated subject matter. However, the Court emphasized that this respect was never intended to supersede judgment by the courts and should only be relied upon to inform judicial thinking. This harkens back to so-called *Skidmore* deference, the pre-*Chevron* rubric by which a court may accord an agency's interpretation based on its expertise to give a "regulatory scheme" respect "proportional to its power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (internal quotations omitted). The Court further noted that Supreme Court deference to federal agency determinations prior to *Chevron* never reached so far as to extend to legal interpretations.

B. The Administrative Procedure Act

The Court held that *Chevron* deference cannot be squared with the statutory requirements of the APA. Specifically, the Court notes that *Chevron* deference defies the APA's requirement that the reviewing court, rather than the administrative agency, decide all relevant questions of law and interpret the statutory provisions. The Court adds that statutory ambiguities do not equate to implicit delegations to agencies. Further, the Court insists that agencies have no special competence to resolve statutory ambiguities, while courts do. The Court added that the APA "incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions." Nevertheless, the Court did concede that a statute may authorize an agency to exercise a degree of discretion, either to give meaning to a statutory term, "fill up the details," or to otherwise use "appropriate" or "reasonable" flexibility. When a statute does delegate such discretion to an agency, the court's role under the APA is to effectuate the will of Congress. Ultimately, the role of the courts in such instances under *Loper Bright* is to fix the boundaries of delegated authority and ensure that the agency has engaged in "reasoned decision making" within those boundaries.

C. The Judiciary's Expertise for Statutory Interpretation

Specifically, the Court focused on what it viewed as the misguided presumption underlying *Chevron*—that agencies have specialized competency to resolve statutory ambiguities. The Court resoundingly rejected this idea. The Court explained that the Constitution

was designed with the intent that the courts alone would resolve statutory ambiguities by exercising their independent legal judgement. This constitutional aim is not disrupted when the ambiguity a court interprets involves interpretations of an agency's power.

The Court rejected the Department of Justice's argument that deference to federal agencies is required in order to ensure federal law is interpreted uniformly. The Court explained that reliance on agency statutory interpretations is not necessary to ensure resolution of an ambiguity is informed by subject-matter expertise. The Court noted that it would be improper to assume that Congress's goal is to promote uniformity in administrative design rather than legally sound interpretations of law. The Court further rejected the notion that interpretations of administrative ambiguities could be deemed policymaking rather than traditional statutory interpretation, a power exclusively reserved to the courts.

Notably, the Court's opinion did not question the viability of prior cases that relied on *Chevron*. In so doing, the Court explained that "[t]he holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in interpretive methodology." This may provide comfort for regulations where the Supreme Court has already upheld rulemaking, but it may lead to little protection for many other regulations that have not yet been challenged.

GROOM INSIGHT: The preservation of prior decisions that relied on *Chevron* could create an inference that regulations that had not previously been challenged because of a low likelihood of success under *Chevron* might now be ripe for litigation under the APA. While previously-adopted agency rulemaking that was not litigated may be less susceptible to suit, newly finalized rules appear much more likely to be challenged. For heavily-regulated employee benefit plans and health insurance, the *Loper Bright* decision could have significant impacts both in terms of cabining agency flexibility, requiring Congressional action for the imposition of additional regulatory requirements, and creating uncertainty as finalized rules may face greater odds of being overturned.

D. Dissent

Justice Kagan authored a dissent, joined by Justices Sotomayor and Jackson, noting that the Court's ruling "will cause a massive shock to the legal system." Justice Kagan characterized the majority opinion as follows:

Today, the Court flips the script: It is now "the courts (rather than the agency)" that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris. In recent years, this Court has too often taken for itself decision-making authority Congress assigned to agencies.

Her dissent noted that courts often find that statutes contain ambiguities or gaps, and a choice must be made as to who should give content to Congress's intent when the instructions are unclear. *Chevron* said it usually should be the agency, and Justice Kagan said that the majority decision here now hands that discretion to the courts. She added that agencies are staffed by experts who know things about a statute's subject matter that "courts could not hope to," particularly when it comes to scientific or technical subject matter. Justice Kagan concludes that the majority's belief that *Chevron* was wrongly decided does not justify such a large-scale disruption that would overhaul precedent that has become a "cornerstone of administrative law."

The Court's Ruling in *Corner Post*

In *Corner Post*, a truck stop incorporated in 2017 that began doing business in 2018 challenged a 2011 rulemaking establishing the maximum amount for interchange transaction fees. At oral argument, Justice Sotomayor was skeptical: "[t]here's no injury, in my mind, when you enter a business knowing its structure and accepting rules that have been final." Indeed, most circuits held that the six-year statute of limitations applicable to APA claims begins to run when the agency takes final action—such as by publishing the final rule—even if the plaintiff did not yet exist, like in *Corner Post*. The Sixth Circuit Court of Appeals, however, adopted a different approach in *Herr v. United States Forest Serv.*, holding that, "When a party *first* becomes aggrieved by a regulation that exceeds an agency's statutory authority more than six years after the regulation was promulgated, that party may challenge the regulation without waiting for enforcement proceedings." 803 F. 3d 809, 822 (6th Cir. 2015) (emphasis in original). Writing for a 6-3 majority, Justice Barrett explained that a cause of action does not accrue until the plaintiff can file suit and obtain relief.

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The Court's decision in *Loper Bright* appears to revert back to the Court's holding in *Skidmore*, which held that agency interpretations, while not binding on the courts, may be given some credence depending "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 134 U.S. at 140. This limits judicial deference to the agency's considered interpretation to the extent it is persuasive—essentially no deference at all or putting the agency on equal footing with other litigants. That said, the Court noted that deference may be accorded when "a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency." And such deference, such as it is, must be applied consistent with the APA. Even so, the concurring opinions suggested that Article III requires a non-deferential standard of judicial review. Congress may be prompted to speak more directly to the issue of judicial review in post-*Chevron* legislation.

Thus, the Court's *Loper Bright* opinion stops short of requiring *de novo* review in every challenge, but provides limited guidance on what framework will evolve in place of the *Chevron* two-step analysis. The closing of the opinion explains that, "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring the agency acts within it." The decision may serve as a prompt for more Congressional clarity, at least going forward. But how are agencies—and courts—to discern whether Congress intended to or in fact did expressly delegate authority, particularly for statutes enacted against the forty-year backdrop of *Chevron* where, arguably, Congress may have intended that ambiguities would function as delegations?

Corner Post on the other hand opens the door for new challenges to longstanding regulations, perhaps even by newly formed entities located in favorable venues. As Justice Jackson's dissent noted, the combined effects of *Loper Bright* and *Corner Post* may result in a "tsunami of lawsuits against agencies . . ." As a result, absent Congressional action, we anticipate the next several years will see a rapid evolution of administrative challenges and standards.