SQUIRE PATTON BOGGS

Chevron Has Fallen:

Supreme Court Seismically Shifts Regulatory Power From Agencies to Courts

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On June 28, 2024, in a 6-3 decision in *Loper Bright Enterprises v. Raimondo*, the Supreme Court overturned the *Chevron* doctrine, a decades-old precedent that largely pressed federal courts to defer to federal agency interpretations of ambiguous statutes under their jurisdiction. The full implications of this decision merit ongoing attention and preparation for a changed environment.

Washington can only begin to outline the impacts of this decision. At a minimum, the ruling signals a new era for the administrative state marked by a hobbled executive, an empowered judiciary, and a Congress that must now more explicitly delegate any authority left to the federal agencies. In the near term, questions and uncertainty merit active attention to the anticipated outcome for plaintiffs and defendants, businesses and advocacy groups. The decision also will spur countless legal challenges to existing and future federal regulations, including environmental, banking and financial services, health and safety, and labor regulations implemented over decades.

Both conservative and liberal justices acknowledged that their ruling upends the present-day policymaking structure of the federal government. Chief Justice John Roberts, writing for the conservative majority, indicated that *Chevron* has become "unworkable." He stated that *Chevron* relied on a misguided presumption that agencies are best suited to decide complex statutory interpretation questions in federal laws. Joining him, the majority held that the courts are well capable of resolving statutory ambiguities. Justice Elena Kagan, writing for the Court's three liberal justices, however, likened the Court's majority to an "administrative czar," warning that the decision strips power from Congress and the executive branch to the benefit of the courts.

Over the past two decades, the Supreme Court has both expanded the *Chevron* doctrine and hardened it, but yet also eroded its foundations. How sweeping and fundamental the overruling of *Chevron* actually is will be worked out in the decades of litigation unleashed by *Loper Bright*.

Key Aspects of the Decision

The *Loper Bright* decision does not actually say that a court should never defer to an agency's statutory interpretation. Rather, it eliminates the previous doctrine, extrapolated from *Chevron*, that a court should *always* defer to the agency so long as the statute is ambiguous. The result is that now responding to an agency's interpretation or application of statutory language will be a case-by-case decision that depends on the details of the statute at issue and the question presented.

Many statutes give agencies the explicit power to interpret statutory terms. The Supreme Court cited several examples of these, such as a Fair Labor Standards Act provision that called for the Department of Labor to issue regulations elaborating who qualifies as an "employee."

The key move that made *Chevron* different was a presumption that Congress always *implicitly* delegates that authority to an agency to fill in any statutory ambiguity in a statute the agency administers. Under *Chevron*, instead of a court's asking whether a given statute conferred the pertinent authority on the agency, the question was reversed. Congress was assumed to want agencies to interpret ambiguous terms, unless the statute indicated (typically expressly) otherwise. That "implicit delegation" is what *Loper Bright* overturned. As the Court explained in *Loper Bright*, "[w]hen the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress" as expressed in the governing statute.

For decades, federal courts have operated with a constant assumption that nearly every statute implemented by a regulatory agency includes a delegation of interpretive authority to the agency. After *Loper Bright*, that assumption no longer holds sway. To assess how much weight a given agency interpretation will carry in court, it is now necessary to know what authority that particular statute gives to the agency. In addition, the Supreme Court noted that the reviewing court "effectuate[s] the will of Congress subject to constitutional limits." What those limits are, and how they affect regulatory work across the administrative state, will generate significant debate.

What's At Risk – And Where There Are Opportunities

To be clear, every sector of government, business and even consumer interests will review the decision and potentially find both threats and opportunities. Some of the most challenging issues to come will involve past regulatory decisions. The potential for vast disruption was obvious even as the Supreme Court heard oral arguments, because decades of regulatory policy have been built on the *Chevron* presumption.

While the presumption does not have much impact in some situations – where the agency's interpretation is roughly the same as what a court would have or previously had done anyway or where the delegation from Congress to the agency is clear – the doctrine instructed a court to accept an agency's interpretation even if the court considered it not the best reading of the statute.

Notably, under the *Brand X* decision of 2005, a court was supposed to do that even if the court had previously pronounced the best reading and the agency then adopted something different. These situations will generate the most tension.

The Supreme Court tried to limit the effect of *Loper Bright* on past decisions. In a short paragraph towards the end of the majority opinion, it announced that reliance on *Chevron* would not automatically mean a prior judicial decision is necessarily overturned. That won't settle the matter. If nothing else, there are past circuit court decisions that expressed serious tension between a given agency interpretation and the court's view of the best reading. Many lower courts might well revisit those decisions. Further, there are agency regulations in place that have never been challenged because, under the *Chevron* regime, the challenges might not have seemed worthwhile. Those challenges might well now come to active reconsideration.

As just one example, the Treasury Department's Office of Foreign Assets Control (OFAC) which implements sanctions imposed under the International Emergency Economic Powers Act (IEEPA) and the Global Magnitsky Act, among others, could be severely affected. Courts routinely rely on *Chevron* in adjudicating (and almost always, denying) challenges to OFAC decisions.

As one court recently wrote "[a] review of a decision made by OFAC is extremely deferential because OFAC operates in an area at the intersection of national security, foreign policy, and administrative law. Indeed, OFAC is entitled to *Chevron* deference in its interpretations of IEEPA." Again, this is but one example – policies related to artificial intelligence, student loan debt, environmental policy, and potentially even aspects of the Inflation Reduction Act are all among the wide range that may be open to challenge following this decision.

The opportunities, the challenges, and the uncertainty will grow for a long time before the dust settles from *Loper Bright*. In every interaction with the federal government, it is now necessary to do a fresh assessment of just how much discretionary authority the agency actually has. *Chevron*, whatever its merits or faults, made that question comparatively straightforward. *Loper Bright*, however, also opens the door for companies and industries to revisit and potentially challenge long-held agency interpretations that were previously insulated under *Chevron* and otherwise seek to more effectively shape future agency rulemaking, given the invitation to do so that was offered by *Loper Bright*, and the rewards that might accrue as a result.

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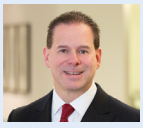

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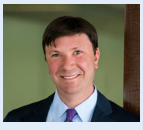

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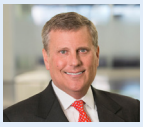

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