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Insights and Analysis

Loper Bright Enterprises v. Raimondo: Decision summary

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In Loper Bright Enterprises v. Raimondo, the Supreme Court overruled the 40-year-old Chevron deference doctrine. Under Chevron, courts were required to defer to an agency's reasonable interpretation of an ambiguous statute that the agency administered.

With Chief Justice Roberts writing for a six-Justice majority, the Court overruled Chevron, holding that the Administrative Procedure Act (APA) requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency's legal interpretation simply because a statute is ambiguous. Justice Thomas and Justice Gorsuch concurred. Justices Kagan, Sotomayor, and Jackson dissented.

The majority opinion: The majority explained that, from the start, the Framers envisioned that courts would be the final authority on what the law says. To quote Marbury v. Madison, "[i]t is emphatically the province and duty of the judicial department to say what the law is." The APA was consistent with that approach: It requires courts to decide legal questions and does not mandate any deference to agencies. The deference Chevron required therefore cannot be squared with the APA. The Court also rejected the concept that "statutory ambiguities are implicit delegations to agencies." An ambiguity may result from

Congress's inability to answer the question or a failure to consider it entirely. And when courts confront statutory ambiguity in other contexts, they resolve it there is no reason to take a different approach simply because an ambiguity involves an executive agency. But when Congress has expressly delegated the power to interpret a statutory term to an agency – either expressly or through a term implying delegation, such as "reasonable" or "appropriate" – courts must review the agency's action under the more deferential arbitrary-and-capricious standards.

The Court also rejected the idea that agencies have special expertise that can assist with resolving statutory ambiguity. Courts hold that expertise – and there is no reason to think Congress intended to transfer that authority to the Executive Branch. The Court emphasized that courts can still look to the agency's expertise as "informative." The Court downplayed concerns that jettisoning Chevron would create inconsistency in the law or that would invite judges to engage in unlicensed policymaking. The majority also emphasized that Chevron was replete with practical difficulties. The doctrine had evolved to include many steps and sub-steps over time and was riddled with exceptions and limits. Indeed, the Supreme Court had not deferred to an agency's interpretation under Chevron since 2016.

Finally, the majority held that stare decisis – which governs when the judiciary will adhere to prior precedent – did not require retaining Chevron. "Chevron ha[d] proved fundamentally misguided" and "unworkable." It was impossible to define how much "ambiguity" must exist before the court will consider deferring to an agency or to define what constitutes a "reasonable" interpretation, such that deference was warranted. Because there could be multiple "reasonable" interpretations, Chevron also allowed agency flip-flopping, destroying reliance interests. The Court stressed, however, that previous cases holding "specific agency actions are lawful – including the Clean Air Act holding of Chevron itself" would still be subject to stare decisis.

Justice Thomas and Justice Gorsuch's concurrences: Justice Thomas and Justice Gorsuch joined the majority and also each wrote separately. Justice Thomas stressed that Chevron was not just unlawful under the APA; it is also unconstitutional because it violates the separation of powers by requiring judges to abdicate their constitutional duty to resolve statutory ambiguity. Chevron also unduly authorized the Executive Branch to exercise powers not given to it.

Justice Gorsuch shared his view that stare decisis did not require adhering to Chevron. First, he reasoned that the Supreme Court is not bound under stare decisis to adhere to a decision that departs from the Constitution or laws of the United States, and Chevron violates the text of the APA. Second,

although past judicial decisions merit respect, "judicial humility" required recognizing the limits of those past decisions – especially here, where Chevron was "jarringly inconsistent" with many other longstanding precedents on the role of the judiciary in resolving textual disputes, and Chevron had proved unworkable in practice. Third, judicial opinions are meant to be narrow and specific to the facts of a particular case, and Chevron has morphed over time to something far more than it was originally.

Justice Kagan, Sotomayor, and Jackson's dissent: The dissent would have upheld Chevron deference. The dissenters argued that rule was correct, workable, and appropriate, and the majority's decision overruling Chevron displayed a shocking lack of humility and self-awareness. The background presumption of Chevron was that Congress wanted agencies, not courts, to make judgment calls in the face of ambiguities. That makes sense. There are many questions that are not within the competence of courts, and which should be left to the subject-matter expert agencies – like whether and when an "alpha amino acid polymer" qualifies as a "protein" under the Public Health Service Act, or whether one population of squirrels is "distinct" from another under the Endangered Species Act. These are, at bottom, policymaking decisions. Chevron thus reflected an appropriate balance of power between the branches.

The dissent also argued that Chevron is far narrower than the majority suggests, comports with the APA, has consistently been used and relied on by litigants and lower courts, set forth a sensible default rule, is workable, and should be upheld under stare decisis. The dissent stressed that Congress was well aware of Chevron and had done nothing to displace it. The dissent accused the majority of artificially engineering Chevron's demise by steadfastly refusing to apply the doctrine for the last eight years, so that it could now say the doctrine was unimportant because the Supreme Court had not applied it for the last eight years. Finally, the dissent concluded by reiterating that the majority's decision fundamentally shifts the separation of powers from the Executive to the Judiciary, consistent with the Court's broader practice of "roll[ing] back agency authority, despite congressional direction to the contrary."

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Five Things Companies Can Do Now That Chevron Deference Is Dead

- ***Hogan Lovells attorneys advise post-Chevron: Don't panic***
- ***It's time to think creatively about administrative litigation***

The US Supreme Court issued its decision June 28 overruling the 40-year old *Chevron* deference, which required courts to defer to agency's reasonable interpretations of ambiguous or silent statutes. So what is a regulated party to do now?

Number 1: Don't panic. Just because a rule was previously upheld under *Chevron* doesn't automatically mean it will be overturned.

Not every Administrative Procedure Act case was a *Chevron* case—*Chevron* only applied when an agency interpreted an ambiguous or silent statute, and even then, only in a comparatively formal manner. *Chevron* never applied where Congress expressly delegated an issue to an agency; where an agency's interpretation came in informal, non-binding guidance; or where the agency was interpreting its own regulation.

Nor are the 70 Supreme Court cases or thousands of circuit court decisions holding "that specific agency actions are lawful" necessarily at risk of being overturned on a fresh post-*Chevron* look. The Supreme Court took pains to emphasize that those decisions "are still subject to statutory *stare decisis* despite [its] change in interpretive methodology."

It's not entirely clear what that means in practice. But even assuming that pre-*Chevron* decisions are back on the table, the only cases that would present a real risk of flipping are those where: the statute was silent or ambiguous at step one; the agency's interpretation was reasonable at step two; and the agency's interpretation of the statute was reasonable, but not the best. Not every decision would be safe, but neither would every decision be in mortal peril.

Number 2: Do consider whether existing rules are worth challenging.

That said, it's not entirely clear what this guarantee of "statutory *stare decisis*" actually means. At its narrowest, it simply means that parties can't seek to reopen a particular case decided under *Chevron* just because it was decided under *Chevron*.

But what if the same statutory-interpretation question arises in a new context? What if the agency changes position on an interpretation previously blessed under *Chevron*? We expect we'll see lots of discussion about this in the weeks and months to come as litigants and courts struggle to make sense of this language.

While we work to sort that out, however, now is a great time to reassess whether to challenge existing rules or prior statutory interpretations. Most *Chevron* cases were decided at step two—studies put the numbers around 50% to 70%—meaning that if there's a particular decision you dislike, odds are that it's worth considering whether to revisit it.

And the Supreme Court's decision in *Corner Post*—which will issue July 1—could also make that substantially easier than it was before. Previously, the APA's general six-year statute of limitations might have posed a hurdle for many older rules, but the Supreme Court is considering in *Corner Post* whether to authorize a workaround to that general rule.

If a potential *Corner Post* exception doesn't apply, you can also petition the agency to reconsider or reopen an older rulemaking. You can also disobey the rule and challenge its substance as a defense to an enforcement proceeding, but that approach carries with it additional risks.

Number 3: Don't expect the agency to defend its prior approach.

One feature of *Chevron* was that agencies could select among a range of "reasonable" interpretations, meaning that statutory interpretations changed with the administrations. As Chief Justice John Roberts wrote for the court, "*Chevron* foster[ed] unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty."

Now, there is only one best interpretation, and the court will decide what that is. If the agency leadership disagrees with the prior administration's policy approach, don't necessarily expect the agency to argue that the prior interpretation is the "best" one if challenged in court.

That means that litigation monitoring is even more crucial now. If a rule affecting your organization is challenged in court, think carefully about whether to intervene in support of the agency's interpretation. Sitting on your hands now could prove problematic later if the agency switches course.

Number 4: Do reassess your approach to comment letters, focusing on the best interpretation of the statute.

Comment letters can no longer rely on policy arguments to drive statutory interpretation. Agencies will now need to assess the best interpretation and adopt that approach or adopt the one that best serves their policy goals from the range of possible court outcomes.

That means agencies—and, in turn, commenters—must pay closer attention to things like dictionary definitions, plain meaning, canons of interpretation, statutory structure, and (in some courts) legislative intent. Comment letters that raise these kinds of arguments will be more useful to agencies and more advantageous in future litigation.

Number 5: Do think creatively about your approach to administrative procedure litigation—including the long game.

Think critically and creatively about other frontiers in administrative litigation. For example, the major questions doctrine and non-delegation doctrine could warrant more space in briefs now that *Chevron* is gone. Under the major questions doctrine, agencies can only regulate issues of "vast economic and political significance" if Congress clearly and explicitly delegated that power. And four justices have already signaled their support for a stronger version of the non-delegation doctrine, which governs when Congress can delegate power to the other branches.

Litigants should look for ways to further push the already "fuzzy" line between legislative rules (which are subject to notice-and-comment) and interpretive rules (which are not). *Chevron* incentivized agencies to use notice-and-comment procedures because only notice-and-comment rules were generally eligible for deference.

Without deference, agencies will likely look more to less-formal processes with increasing frequency. Consider arguing that the agency's supposed "interpretive" rule is actually legislative and impermissibly skipped the notice-and-comment process.

Finally, lawyers should think carefully about where to file suit, and be prepared for the possibility of circuit splits and the need for Supreme Court review. Although the US District Court for the District of D.C. is often still the best bet for district-court APA litigation, it's worth looking beyond the capital for circuits that may be receptive to your arguments.

And with more cases being filed in more circuits challenging the same rules, the long game—setting up and pursuing splits to the Supreme Court, if necessary—will become more important than ever.

The cases are Loper Bright Enterprises v. Raimondo, No. 22-451, and Relentless v. Department of Commerce, No. 22-1219, decided 6/28/24.

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Insights and Analysis

What is NOT a Loper Bright issue: A practical guide

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The Supreme Court's decision in *Loper Bright* striking down the *Chevron* doctrine is a momentous decision. But not every administrative-law question is a *Loper Bright* issue. Here is a practical guide on what *Loper Bright isn't.*

Loper Bright does not impact challenges involving:

- **Agency factual or scientific determinations**. Courts often defer to agencies on questions of fact or science. Post-*Loper Bright*, agencies are even more likely to frame disputes as factual in nature, emphasizing technical or scientific issues that invoke agency deference rather than framing the dispute as one turning on the meaning of a particular statutory term.

- **The adequacy of agency reasoning or the soundness of an agency's decision**. These challenges have always been subject to arbitrary-and-capricious review.

- **Agency interpretations of ambiguous *regulations***. These challenges are evaluated using the *Kisor* framework, under which an agency's interpretation of its own ambiguous regulation may be entitled to deference if the agency's interpretation was thoughtful. considered, and not an after-the-fact litigating position.

- **Agency decisions that did not invoke *Chevron* deference**. If the agency never invoked *Chevron* deference, a court reviews *de novo*, both before and after *Loper Bright*.

- **Agency decisions based on delegated interpretive authority**. If Congress directed that a certain term shall be defined by agency regulation, or that the agency's action be "reasonable" or "appropriate" or similar discretion-conferring words, the court will review the agency's action only to determine if it's arbitrary or capricious.

- **Agency decisions with constitutional infirmities**. Courts always review constitutional challenges *de novo*.

- **Agency decisions with procedural deficiencies**. Issues of agency procedure – like whether the agency had to go through notice-and-comment rulemaking – were never Chevron issues to begin with.

- **Agency decisions where the agency did not have authority to interpret the statute in question**. FERC's interpretation of an ambiguous provision of the Clean Water Act, for example, would never get deference even in the prior regime.

At bottom, *Loper Bright* changes the landscape *only* when an agency is interpreting an ambiguous term in a statute the agency has the power to interpret. There may be other problems with an agency's action – and we're here to help you identify and challenge them – but they are not *Loper Bright* problems.

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SCOTUS' Corner Post decision opens possibility of new challenges to old laws in some circumstances

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In *Corner Post v. Board of Governors,* the Supreme Court held that the default six-year statute of limitations for claims against the federal government, as applied to actions brought under the Administrative Procedure Act, does not begin to run until the plaintiff is actually injured by final agency action. Justice Amy Coney Barrett wrote for a six-Justice majority. Justice Kavanaugh concurred. Justices Jackson, Sotomayor, and Kagan dissented.

The decision opens the possibility for plaintiffs newly subject to a long-since-final regulation to bring a facial challenge to the regulation. But there are important restrictions on that ability, including that the regulation be one that is challenged under the Administrative Procedure Act directly (APA), rather than more-specific (and often more-limited) agency-review provisions.

The majority opinion: All suits against the federal government must be brought within six years of when the right of action "accrues," unless another statute provides a more-specific time-frame. In 2011, the Federal Reserve Board (the Board) published a regulation governing debit-card transaction fees, meaning the six-year limitations period for existing entities newly subject to the rule ran in 2017. In that time period, retail industry trade associations and individual retailers challenged the Board's regulations in the D.C. federal courts, with the regulations eventually upheld by the D.C. Circuit. Corner Post, a truck stop that accepts debit cards, opened its doors in 2018 and sought to challenge the Board's regulations in 2021 in an APA suit brought in the North Dakota district court, which was not bound by the D.C. Circuit's decision upholding the regulations. The district court dismissed the suit as untimely and the Eighth Circuit affirmed.

The Supreme Court reversed. Under the lawsuits against the federal government statute, which applies to more than APA suits, the plaintiff must sue within six years of when their right of action "accrues." The Court held that "[a] right of action 'accrues' when the plaintiff has a complete and present cause of action – i.e., when she has the right to file suit and obtain relief." To support that construction, the Court looked to dictionary definitions, historical precedent, background presumptions, and standard practice. For example, Congress knew how to depart from the traditional accrual rule and instead run a limitations period running the date of the agency's action, but did not do so here.

The Court rejected the Board's contrary argument that a facial challenge – that is, a challenge to the rule entirely, rather than simply as-applied to that particular plaintiff – accrues when the agency action is final, instead of when the plaintiff can assert her claim. The majority emphasized that it made no sense to peg the limitations period for this plaintiff's action to a time-period that had nothing to do with this plaintiff. Moreover, starting the clock on the date of the Board's final action rather than the date of the plaintiff's injury could create situations in which no one was injured in time and thus no one could ever challenge the agency's rule, which makes no sense.

Finally, the majority rejected the Board's policy concern that this decision will mean agency rules are never functionally final. Most major rules are challenged immediately, and the mere fact that an agency decision is subject to challenge does not mean the plaintiff will win. The majority dismissed the dissenters' concern that this decision would "devastate the functioning of the Federal Government" as "baffling" and "bizarre," because this case dealt only with the statute of limitations. And regardless, policy concerns can never override the text. The Court closed by noting that the "ball is in Congress's

court," as the Congress could always enact a distinct statute of limitations for APA claims with a different triggering event.

Justice Kavanaugh's concurrence: Justice Kavanaugh joined the majority and also wrote separately to explain his view that Corner Post could only obtain relief in this case because the APA authorizes vacatur of agency rules. The Board's rule does not regulate Corner Post directly – Corner Post pays transaction fees to the banks regulated by the rule – and so Corner Post would not be eligible to obtain an injunction preventing the Board from enforcing that rule against Corner Post. But Corner Post could obtain meaningful relief through an order vacating the rule. Justice Kavanaugh noted that the Government has recently argued the APA does not allow for vacatur (or the corresponding preliminary relief of a nationwide preliminary injunction), on the theory that the court can only enjoin the agency from enforcing a rule against a particular plaintiff. Justice Kavanaugh stressed that vacatur is supported by the text and history of the APA and longstanding judicial precedent. Moreover, vacatur is a key remedy under the APA; absent vacatur, many types of common APA suits would not be permitted, like suits by companies challenging rules that make it easier for others to compete or suits by unions challenging rules relaxing workplace safety standards. Justice Kavanaugh explained the Government's contrary arguments against vacatur found no basis in the text, logic, or legislative history.

Justice Jackson's dissent: The dissent would have found Corner Post's suit untimely. The dissenters argued that the statute's six-year period runs from when the "right of action first accrues," meaning we should use the earliest possibility opportunity. Moreover, "accrues" is flexible and context-dependent, and a right can accrue at the time of final action rather than the time of injury. Thus, courts must look to the plaintiff's specific claims to determine when they accrue. Congress always runs agency-action-specific limitations periods from the time of final agency action; thus, for APA claims, "a claim accrues at the moment of final agency action." The six year catchall limitations provision does not displace that background principle in any way. That rule makes sense in light of the APA's underlying focus on what the agency did, as well as the way that courts review agency action. Courts look at the rule or rulemaking process itself, not what happened to the plaintiff after the rulemaking. The dissenters also argued their rule made more sense, because under the majority's position, litigation will never end, courts may be called on to review decades old rules, and no agency decision will ever be final. The dissent warned that the majority's rule will create disastrous results, allowing regulated entities to challenge any old rule – including those "involving the most contentious issues of today," like workplace

safety, toxic waste, or consumer protection. That substantially disrupts reliance interests and runs the risk of manipulation. Indeed, this case was the “poster child” for those very concerns – there was evidence Corner Post was incorporated simply to tee up this issue. The dissenters closed by noting the interaction between Corner Post and Loper Bright, explaining that the Court has now eliminated two foundational administrative law principles in the same term, threatening a “tsunami of lawsuits against agencies” that have “the potential to devastate the functioning of the Federal Government.” The dissent called on Congress to “address this absurdity and forestall the coming chaos” by enacting a new limitations – period for facial APA challenges that runs from the date of the challenged agency action.

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