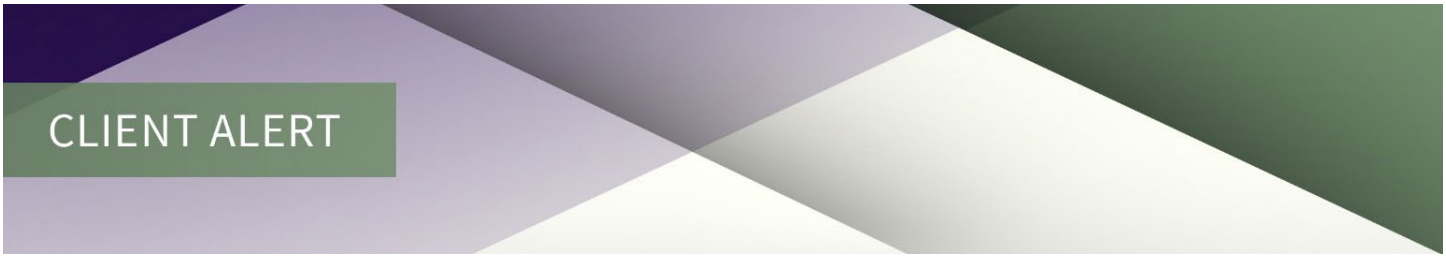

Supreme Court Overrules *Chevron* Deference to Administrative Agencies

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On Friday, June 28, 2024, the U.S. Supreme Court in a 6 to 3 opinion deciding *Loper Bright Enterprises v. Raimondo*[1] overruled its 40-year-old precedent *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[2] which had long provided the governing framework for deference to administrative agencies on questions of statutory interpretation. The decision reallocates authority from executive branch agencies to the federal courts and has important ramifications for federal administrative law.

Facts and Procedural History of *Loper Bright*

While the facts of *Loper Bright* are arcane, they provide a helpful illustration of how litigants might use the courts to challenge existing and future government regulations. The path to *Loper Bright* begins with the Magnuson-Stevens Fishery Conservation and Management Act of 1976 (the "MSA"). In response to unregulated foreign vessels' domination of fishing in international waters off the U.S. coast, Congress enacted the MSA that extended territorial U.S. fishing claims and established eight regional fishery management councils in the coastal United States. The councils are empowered to develop fishery management plans that are reviewed, approved, and promulgated as regulations by the National Marine Fisheries Service (the "NMFS") under a delegation from the Secretary of Commerce.

1 No. 22-451.
2 467 U.S. 837 (1984).

Under the MSA, plans developed by the councils may require that fishing vessels carry observers in order to collect data for the conservation and management of a fishery. The MSA specifies three groups that must cover the costs associated with observers. Although the statute specifically notes that vessels in the jurisdiction of the North Pacific Fishery Management Council must fund the costs of observers, it is silent with respect to the other seven fishery zones, including the Atlantic herring fishery.

Eventually, the NMFS adopted a rule requiring that, in certain circumstances, vessels in the Atlantic herring fishery would be required to contract with and pay for a government-certified third-party observer. Vessel operators in the Atlantic herring fishery challenged the rule in district courts in both the First and D.C. Circuits. The district courts rejected those challenges, and the First Circuit and D.C. Circuit each affirmed. Both courts of appeals applied *Chevron*, deferred to the agency's interpretation of the authorizing statutes, and rejected the petitioners' challenges.

Chevron Deference

Under *Chevron*, courts employed a two-step approach to evaluating administrative agency action that implicated questions of statutory interpretation. The first question was whether Congress had directly spoken to the precise question at issue. If a court concluded that Congress's intent was clear, that was the end of the inquiry, and the court would not defer to agency action that was inconsistent with Congress's unambiguous direction. However, when Congress had not directly addressed the issue, *Chevron* instructed a reviewing court to proceed to a second step, and consider whether the agency had offered a permissible construction of the statute. If so, the reviewing court was to defer to the agency's construction, even if that construction was not the reading that the court would have reached on its own. Thus, *Chevron* established a general rule of deference to agency interpretations in instances where the reviewing court concluded that congressional intent was not clear.

The *Loper Bright* Majority

The *Loper Bright* majority takes *Chevron* head on and concludes that it cannot be squared with the constitutional assignment of responsibility for declaring what the law is to the judiciary or with the Administrative Procedure Act of 1946 (the "APA"). Thus, instead of deferring to an agency's reading of an ambiguous statute so long as it is "permissible," a reviewing court must now use every tool at its disposal to determine the "best" meaning of the statute and resolve the ambiguity itself.

Referencing foundational documents back to *The Federalist Papers*, the majority acknowledges that the American judicial tradition has long accorded respect to executive branch interpretations of federal statutes, but the *Loper Bright* majority concludes that only respect, not deference, is required. According to the majority, "[t]he views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it."[3] According to the majority, this view of the import of executive branch interpretation persisted through the New Deal, most notably as reflected in *Skidmore v. Swift & Co.*, where

[3] Slip Op. at 9.

the Court explained that the "interpretations and opinions" of the relevant agency, "made in pursuance of official duty" and "based upon ... specialized experience," "constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance," even on legal questions.[4]

The *Loper Bright* majority then turns to an analysis of the APA. It focuses primarily on Section 706 of the APA, which directs reviewing courts to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action, and to hold unlawful and set aside agency action, findings, and conclusions not in accordance with the law.[5] The majority determines that if deference to agencies' statutory constructions was intended in the APA, Congress would have articulated as much, and that the language of Section 706 shows that Congress intended that agency actions not be entitled to deference.

Applying its interpretation of the APA to *Chevron*, the *Loper Bright* majority reasons that *Chevron* deference defies the command of the APA that courts–not agencies–are to decide relevant questions of law and interpret statutory provisions.[6] The majority concludes that *Chevron* cannot be reconciled with the APA and, citing cases from recent years that the Court has used to chip away at *Chevron*, the *Loper Bright* majority determines that *Chevron* was unworkable in its current form in any event.[7]

Finally, the majority evaluates whether stare decisis supports continued reliance on *Chevron* deference. Concluding that *Chevron* was "fundamentally misguided" and "unworkable" and had failed to foster "meaningful reliance," the *Loper Bright* majority concludes that *Chevron* "has undermined the very 'rule of law' values that stare decisis exists to secure" and need not be upheld.[8]

Because the D.C. and First Circuits had relied on *Chevron* in upholding the NMFS rule at issue, the Court vacated their judgments and remanded for further proceedings.

The *Loper Bright* Dissent

The dissenting justices frame *Chevron* as the "right" rule that, when Congress has left ambiguity in a statute, administrative agencies should be charged with giving content to the statute within the bounds of reasonableness. The dissent maintains that *Chevron* deference is rooted in congressional recognition that Congress is incapable of writing "perfectly complete

4 323 U.S. 134, 139-40 (1944).
5 *See* 5 U.S.C. § 706.
6 Slip Op. at 21.
7 Slip Op. at 26-29.
8 Slip Op. at 33-34.

regulatory statutes" and is a reflection of congressional intent that ambiguities in those statutes will be filled in by regulatory agencies.[9]

The dissent suggests that this congressional intent is animated by an understanding that agencies have an expertise; that they are staffed with experts that are capable of filling the regulatory gaps. The dissent cites a series of past cases involving regulations related to topics—like when does an alpha amino acid polymer qualify as a protein for purposes of FDA regulation—that it suggests draw on unique agency expertise that courts may not be as well positioned to address.[10]

The *Loper Bright* dissent argues that the majority's opinion "flips the script" on these congressional expectations that agencies would employ this expertise and instead gives the courts "exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law." The dissent asserts that the *Loper Bright* decision is little more than "a bald assertion of judicial authority" by a majority "grasp[ing] for power."[11]

After laying out its contrary interpretation of the APA and criticizing the majority's willingness to overrule precedent, the dissent moves to an assessment of the possible aftermath of the majority's opinion. According to the dissent, the *Loper Bright* result

> … gives courts the power to make all manner of scientific and technical judgments. It gives courts the power to make all manner of policy calls, including about how to weigh competing goods and values. … It puts courts at the apex of the administrative process as to every conceivable subject. … What actions can be taken to address climate change or environmental challenges? What will the Nation's health-care system look like in the coming decades? Or the financial or transportation systems? What rules are going to constrain the development of A.I.? In every sphere of current or future federal regulation, expect courts from now on to play a commanding role.[12]

Potential Implications

Loper Bright reflects the culmination of a sea change in administrative law. For roughly a decade, the Supreme Court has pared back *Chevron* and has now decisively overruled it. At this early stage, the implications are necessarily uncertain, but some outcomes seem likely.

First, it is possible that challenges to administrative actions—like the challenge in *Loper Bright*—will increase. While the Supreme Court itself had not deferred to an agency interpretation under the *Chevron* framework since 2016, before *Loper Bright* litigants in many of the federal district and circuit courts could still anticipate that a permissible agency interpretation

[9] Slip Op. (Kagan, J., dissenting) at 2.
[10] Slip Op. (Kagan, J., dissenting) at 5-6.
[11] Slip Op. (Kagan, J., dissenting) at 3.
[12] Slip Op. (Kagan, J., dissenting) at 32.

would be subject to judicial deference. Today, in all federal courts an agency interpretation is open to challenge on the ground that it does not represent the best resolution of a statutory ambiguity.[13]

Second, challenges to administrative action may lead to more divergent results around the country based on individual judges or circuits. With judges no longer deferring to an agency interpretation that resolves a statutory ambiguity in a "permissible" way, different judges who are now tasked with identifying the "best" reading of a statute may disagree with one another more frequently.

Third, *Loper Bright* may have an overall deregulatory effect. Administrative agencies may be slower to take any particular action in order to buttress the support for such action, incorporate more input from regulated industries in hopes of forestalling litigation, and may scale back the scope of regulatory action in an attempt to withstand eventual non-deferential judicial review.

Fourth, the *Loper Bright* decision, together with the Supreme Court's decision in *West Virginia v. Environmental Protection Agency*,[14] may lessen the ability of the executive branch to address significant policy issues through administrative action, as federal courts are now required to reject federal administrative action that does accord with the best reading of the relevant statute.

With that said, it will take time for all of *Loper Bright*'s implications to be worked out, and the practical import of the decision may turn out to be relatively limited. Most importantly, *Chevron*'s status has been uncertain for some time. Decisions of the Supreme Court had cabined the sorts of administrative actions and statutory questions that were subject to the *Chevron* framework in the first place, and in recent years many judges had become less willing to find statutory ambiguities of the sort that could be resolved by an agency under *Chevron*. Indeed, as noted above and as the *Loper Bright* majority opinion explains, the Supreme Court itself had not deferred to an agency interpretation under the *Chevron* framework since 2016. Moreover, the *Loper Bright* majority makes clear that in some cases the best reading of a statute is that it delegates discretionary authority to an agency. And the majority confirms that, in seeking to determine the best reading of a federal statute, a reviewing court may continue to seek aid from the interpretations of those executive branch officials charged with implementing the statute, especially when those officials' views are based on technical expertise. For those reasons, agency interpretations of statutory ambiguities may continue to play a meaningful role in challenges to administrative actions, even though they will no longer receive *Chevron* deference.

[13] On July 1, 2024, the Supreme Court issued an opinion in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, No. 22-1008, holding that an APA claim does not accrue for purposes of 28 U.S.C. § 2401(a) (the default six-year statute of limitations applicable to suits against the United States) until the plaintiff is injured by final agency action. *Corner Post*, in conjunction with *Loper Bright*, is likely to lead to an increase in challenges to administrative actions.

[14] 597 U.S. 697 (2022).

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