Insight

Chevron's Wake

DAN GOLDBECK | JUNE 28, 2024

EXECUTIVE SUMMARY

- In a 6-3 opinion on the case of *Loper Bright v. Raimondo*, the Supreme Court held that *Chevron* deference – the long-standing judicial doctrine instructing courts to defer to agency interpretation of ambiguous statutory authority – is overruled.
- While this decision no doubt represents a significant restructuring of the balance of power between the legislative, executive, and judicial branches of government that will affect some significant rulemakings, the regulatory state will survive.
- The future of certain regulatory programs will primarily depend upon agencies *and* Congress taking a more detail-oriented approach to policymaking.

INTRODUCTION

In a 6-3 opinion, delivered by Chief Justice John Roberts in the case of *Loper Bright v. Raimondo*, the Supreme Court struck down the doctrine of *Chevron* deference. As the American Action Forum (AAF) noted last year in this examination of the doctrine and its potential demise either legislatively or judicially:

> *Foremost among the deference doctrines is Chevron deference, named after the Supreme Court's 1984 decision in Chevron v. Natural Resources Defense Council. In its unanimous decision, the Court set forth a two-part test to determine whether agencies should be afforded deference in their interpretations of a statute that was enacted by Congress. First, if Congress has clearly addressed the precise question at issue, then the agency must abide by the legislature's stated interpretation thereof. If, however, the statute does not address the precise question or if its treatment thereof is ambiguous, courts must defer to the agency's interpretation of the statute provided that its interpretation is "reasonable."*

Per the Court's main holding in *Loper Bright*:

> *The Administrative Procedure Act 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 interpretation of the law simply because a statute is ambiguous; Chevron is overruled.*

The Court's decision will effectively make certain agency rulemakings more vulnerable to judicial challenges since agencies can no longer depend on the "tie goes to runner" determination that became the default of *Chevron*-based rulemaking defenses. This has led to concerns, including those expressed by the dissenting justices in the case, that the decision will lead to a wholesale elimination of critical health and safety regulations. A brief examination of some of the most consequential rules in recent years suggests that, while some may now face greater legal jeopardy, others are likely still safe from such challenges. Going forward, the onus for making sure regulatory actions are properly and firmly established will rest with the legislative branch reasserting its capacity to write more detail-oriented laws and agencies making the connection of their rules to underlying statutory authority clearer.

IMPLICATIONS FOR AGENCIES

AAF's examination of the *Chevron* landscape last year looked at research that identified which issues areas and agencies relied upon such deference most often. The core findings were the following:

> *Federal courts have been the most deferential to agencies when the subject matter at issue relates to telecommunications, followed by Indian affairs, the federal government, pensions, education, health and safety, and entitlements. The issue area in which agencies have been afforded the least deference is civil rights, followed by housing, prisons, tax, employment, energy, and immigration.*
>
> *The analogous data for agencies show that the agencies afforded the most deference were the Surface Transportation Board , Federal Communications Commission , Department of the Treasury, National Labor Relations Board , Department of Commerce, Department of Defense, Food and Drug Administration , and Department of Education. The Equal Employment Opportunity Commission had the lowest rate of deference, followed by the Department of Housing and Urban Development , Department of Energy, Federal Trade Commission , Department of Justice, Internal*

> *Revenue Service , Bureau of Prisons, and Social Security Administration.*

Those areas and agencies that relied on *Chevron* more often will inevitably be subject to greater scrutiny under *Loper Bright*. Such judicial determinations, however, will still likely take years to wind themselves through the courts. As such, one should not necessarily expect that whole swathes of rulemakings will be rescinded in the near-term. Additionally, the result of *Loper Bright* is not somehow prescriptive of how each individual case will go; the ultimate decision will rest on what kind of case the agency can make in asserting that its statutory authority is valid. A cursory look at some of the most significant rules included in AAF's RegRodeo database in recent years reveals some notable case studies of rules that should still be safe from post-*Loper Bright* challenges.

Take, for instance, the Financial Crimes Enforcement Network (FinCEN) rule on "Beneficial Ownership Information Reporting Requirements." At $84.1 billion in total costs, the rule represents a sizable regulatory burden on covered entities, but an examination of its statutory authority section seems to confirm the underlying law, the Corporate Transparency Act (CTA), is quite explicit about its regulatory directions in such passages as:

> *"The statute prescribes the basic outline of reporting requirements."*
>
> *…*
>
> *"To ensure that BOI collected under 31 U.S.C. 5336 is only used for these statutorily described purposes, the CTA includes specific restrictions, requirements, and security protocols, and it authorizes FinCEN to implement this security framework."*
>
> *…*
>
> *"In particular, the CTA directs FinCEN to rescind the specific beneficial ownership identification and verification requirements of 31 CFR 1010.230(b)-(j), while retaining the general requirement for financial institutions to identify and verify the beneficial owners of legal entity customers under 31 CFR 1010.230(a)."*

Another example comes in the form of the Environmental Protection Agency rule regarding "Control of Air Pollution From New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards." That rule comes with $39 billion in total costs for covered entities. While most of the attention on recent vehicle emissions rules has, rather justifiably, centered upon those addressing greenhouse gas (GHG) emissions, this rule focuses more on "criteria pollutants" such as NO_x , PM, HC, and CO. The GHG-focused rules rely on a more novel

reading and interpretation of the Clean Air Act as the foundation of their regulatory authority. This rule's statutory authority section can point to specific, well-established aspects of the Act as its basis, likely making it relatively safe from a challenge on those grounds.

IMPLICATIONS FOR CONGRESS

As the above examples – and likely other, less-significant ones – show, the key going forward in a post-*Chevron* world will be the level of direction from Congress. Statements of authority taking the form of "the Secretary/Administrator/etc. may…" that undertake some general objective will have much weaker backing in this new *Loper Bright* world. Legislators will need to exert greater care and attention to drafting legislation that includes more specific directives to the relevant agencies to carry out particular tasks. Such a new paradigm, however, will require a significant (and probably worthwhile) readjustment in modern policymaking approaches.

As AAF identified in a 2021 analysis, the volume of legislative activity has been in a steady decline for some time. Additionally, even when Congress produces large bills – those that one might typically think to thus be more detailed and precise – the legislation is question is either focused on fiscal outlay and revenue matters or bringing about sweeping regulatory programs such as the Affordable Care Act and Dodd-Frank Act. This trend has largely been attributable to the compounding factors of Congress' diminished institutional capacity and the relative political expediency that policymaking-via-executive action brings. *Chevron* likely helped to cement both trends even further in recent decades since there were not strong incentives for either branch to change course. While these dynamics need to change in a *Loper Bright* world, the question that remains is whether those involved have the resources and willpower to do so in a timely fashion.

CONCLUSION

The end of the *Chevron* era represents a consequential shift in the nation's balance of governing power, and this decision can be viewed as a victory for those concerned about ever-expanding executive authority. Harried concerns about some complete elimination of basic regulatory standards are likely overstated. While many rulemakings may now be placed under the microscope, such challenges will take some time and, indeed, some current actions are likely able to withstand such scrutiny. For those concerned about the state-of-play after this decision, the answer is clear: Focus on getting Congress to make its aims clearer and more specific and make sure agencies do not expend their resources in pursuing doomed rules that exceed their granted authority. Time will tell if the parties

involved will be able to course-correct.