CARLTON FIELDS

The End of Chevron – Bite-Sized Analysis for the Fourth of July

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Near the conclusion of a tumultuous term, the Supreme Court issued what may be its most consequential opinion, jettisoning *Chevron* deference and 40 years of administrative law. In *Loper Bright Enterprises v. Raimondo*, a six-justice majority held that the court's 1984 decision in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, cited more than 19,000 times since issuance (the court's third most cited opinion), was wrongly decided. According to Chief Justice John Roberts' opinion for the majority, *Chevron* was "fundamentally misguided" and in conflict with the Administrative Procedure Act's direction that courts, not agencies, will decide "all relevant questions of law" arising on review of agency action, including agency construction of "ambiguous" statutory terms. The changes resulting from *Loper Bright* are significant and material, but are not the "end of the administrative state," as some have bellowed. Below we address what the *Chevron* doctrine was and the impact of its demise on past, present, and future cases.

1. **What was *Chevron* deference?**

In summary, *Chevron* held that when a statute contains an ambiguity or gap, courts should presume that Congress intended the agency to resolve the ambiguity, or fill that gap. When the agency did so, *Chevron* directed courts to defer to the agency's interpretation if reasonable, even if the court would come to a different conclusion in reviewing the text *de novo.* For a deeper dive on *Chevron* see our opinion preview here. *Chevron* can be considered a variation of baseball's rule that "the tie goes to the runner." If the agency and court agreed on the interpretation of an ambiguity, *Chevron* did not matter. If they disagreed, reasonable agency constructions were endowed with the force of law even when in conflict with a judicial construction.

2. **What's wrong with that?**

The petitioners, majority, and two concurrences (by Justices Clarence Thomas and Neil Gorsuch) varied in their condemnation of *Chevron* in one critical way. The petitioners asked the court to overturn *Chevron* on two grounds: (i) separation of powers principles embedded in the Constitution's structure, which assigns the ultimate authority to "say what the law is" to the judiciary, not to

Congress or administrative agencies; and (ii) Section 706 of the APA's mandate that courts have final authority over "all relevant questions of law." Justices Thomas and Gorsuch would have overturned *Chevron* on both grounds. The majority opinion, despite containing strong hints that *Chevron* was out of tune with separation of powers principles, is textually limited to a holding that the APA and *Chevron* could not be squared.

3. **Does it matter that *Chevron* was overturned on statutory (and not constitutional) grounds?**

In theory it makes a significant difference. Because the court found *Chevron* deference is not authorized by the APA, Congress can amend the APA, authorize agencies to resolve ambiguities and fill in regulatory gaps, and direct courts to defer to those actions if reasonable. In practice, at least Justices Thomas and Gorsuch would deem that amendment an unconstitutional appropriation of judicial authority. The other four justices in the majority – the court's other conservatives – did not embrace that view, but did not reject it either. In finding the APA "codifies for agency cases the unremarkable, yet elemental proposition … that courts decide legal questions by applying their own judgment," *Loper Bright* strongly suggests that mandated agency deference is out of step with more than just the APA. Moreover, the notion that Congress and the President, now or in the foreseeable future, could pass a pro-regulation "*Chevron* Deference Restoration Act" appears, in the modern political climate, far-fetched.

4. **Is this the "end of the administrative state?"**

No. *Loper Bright's* direct impact is limited to the National Marine Fisheries Service regulation that it construed. The broader and lasting impact will be felt in a discreet set of cases involving new regulatory challenges. It does bear emphasis that overturning *Chevron* only matters in cases in which a material statutory term is ambiguous (or the statute is silent), and a court finds that the agency's resolution of the ambiguity (or gap-filling) was (i) reasonable, but (ii) wrong. If history is a guide, these types of cases arise in a minority of regulatory challenges. Moreover, *Loper Bright* expressly held that past precedents based on the application of *Chevron* remain good law and are subject to *stare decisis.* That does not foreclose challenges, but does put a significant damper on them. The greenest pastures – challenges unsullied by *Chevron's* deference mandate – will be found by looking ahead, not behind.

5. **How will *Loper Bright* impact pending cases?**

Under Supreme Court case law, when the court applies a rule of federal law to the parties before it, that rule is the "controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[1] That means that the new opinion should apply to all *pending* cases, regardless of when filed.

6. **What will *Loper Bright's* larger impact be?**

Though it is not the administrative state's death knell, *Loper Bright* is a landmark decision, with material impact on Congress, regulators, the regulated community, and the judiciary. Congress will need to write legislation with fewer ambiguities and gaps, and include express delegations of authority to define terms, issue rules, and the like. Congress can, for example, shield any regulatory program or agency interpretation it likes by codifying the agency's regulations as law. In the absence of assistance from Congress, regulators are likely to grow more conservative. Its interpretations will only receive, at most, so-called "*Skidmore*" deference, according to which courts "defer" to agency interpretations if they are persuasive, and the court agrees with them.

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[1] *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993).

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