Updates

The Supreme Court of the United States has overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

For 40 years, if an agency was interpreting an "ambiguous" provision of a statute it administers, the agency's interpretation need not be the *best* or *most* reasonable interpretation. The agency's interpretation was "permissible" so long as a reviewing court found it "reasonable." Agencies were then free to change their minds, and in some instances, important questions of public policy would swing back and forth with changing presidential administrations. One prominent example cited by advocates was the "set of flip flops by the FCC concerning the proper classification of internet services providers under the Telecommunications Act of 1996." [1] But other examples abound across virtually every industry with a dedicated federal regulator. Among many issues with such indeterminacy, prominent commentators worried that regulated parties held back on important

investments because critical questions of regulatory authority could not get settled and had little prospect of ever being settled.[2]

After *Loper Bright Enterprises, et. al. v. Raimondo, et. al.,* No. 22-451, decided on June 28, 2024, deference to merely reasonable agency interpretations is over, as is agency flip-flopping rooted in "*Chevron* deference." Agency interpretations may be considered along with everything else in a judge's toolkit but will no longer receive deference. At bottom, the Court reasoned, determining the "best" interpretation—an adjective the Court used multiple times—is the proper province of an independent judiciary.

The long-term result will be to empower courts and regulatory challengers at the expense of executive branch agencies, and the change may be significant in some places. Thorough review of any regulatory issue warped by "*Chevron* deference" is essential, and though it may take years, there will be a final resolution of many important questions of regulatory authority. Review of what regulated parties believe to be the "best" interpretation is critical.

Analysis

The decision in *Loper Bright.* After trimming *Chevron*'s reach over the years, the Court definitively overruled it. Writing for the majority, Chief Justice John Roberts asserted that *Chevron* had been wrongly decided, given the traditional role of the courts in deciding what the law is and the terms of the Administrative Procedures Act (APA), enacted in 1946. Section 706 of the APA requires courts to decide all relevant questions of law, with no suggestion they defer to an agency's interpretation of a statute. *Chevron* had taken no account of Section 706, as many commentators and judges have pointed out over the years.

The majority contended that *Chevron* "destroys" the "reliance interests" of the regulated public because it is "a license authorizing an agency to change positions as much as it likes" and thereby "undermines 'rule of law' values." Changes in administrations in recent years, for instance, have seen agency reversals of rules interpreting Clean Water Act jurisdiction and the extent of environmental review under the National Environmental Policy Act, among many others. In that respect, *Loper Bright* aligns with the legal realism of the Court's recent embrace of the "major questions" doctrine, which holds that courts should not presume Congress intended for executive branch agencies to regulate substantial portions of the economy unless the legislative body clearly said so.[3]

With respect to *stare decisis*, the Court noted how *Chevron* deference had become riddled with exceptions contrary to reliance interests and unworkable in practice. The Court itself had not invoked *Chevron* since 2016. In the Court's view, no doubt reflecting the Justices' view of regulatory reality in the nation's capital, *Chevron* "fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty." Notably—and consistent with concerns for reliance interests, rule of law, and stability—the majority only applied its holding prospectively.

Justice Elena Kagan dissented, joined by Justices Sonia Sotomayor and Ketanji Jackson, accusing the majority of judicial "hubris" because federal agencies have both more expertise and political legitimacy. Justice Kagan punctuated her dissent with examples of especially intricate statutory determinations related to questions of chemistry and ecology for which some level of technical expertise may be necessary. Justice Kagan also contended that the majority showed insufficient sensitivity toward *stare decisis*.

The majority rejected those criticisms, pointing out that *Chevron* had been applied to any statutory ambiguity, regardless of its technical complexity. The majority also noted many instances where the dissenters were on the side of overruling precedent they viewed as out-of-step or unworkable.

A previous analysis of *Loper Bright* can be found here. Both *Loper Bright* and its companion case concerned a regulation implemented by the National Marine Fisheries Services under the Magnuson-Stevens Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801–1884. The substance of those disputes wound up playing essentially no part in the Supreme Court's decision; the cases were remanded for further proceedings.

What Next?

Starting at the agency level, *Chevron*'s overruling may decrease the number of agency flip-flops because agencies will view their statutory discretion as more limited (*i.e.*, policy choices under the *most* reasonable interpretation of a statute from a *court's* perspective may be far narrower than all *reasonable* choices from an *agency's* perspective across different administrations). Then, whatever the current agency decides, a court (and if need be, the Supreme Court) will eventually answer the question with finality. Thus, there will not be decades of judicial determinations of whether changing interpretations are nevertheless reasonable.

The narrowing of agency choices, the new framing of the interpretive question, and the now-certain prospect of finality as to interpretive questions that have been the source of so much back and forth presents a starkly new world for agencies, regulated parties, and courts. Any industry heavily regulated by a federal agency must take account of the opportunities and risks created by that new reality. Below are just a few examples of federal agency policymaking where the discretion previously afforded by *Chevron* is now open to serious question and challenge:

- **Wage and hour regulations.** Under primarily the Fair Labor Standards Act (FLSA), Republican and Democratic administrations have a long-running battle on the definition of "employee" and who employers may designate as independent contractors. This played out at the subregulatory level until the Trump administration completed notice and comment rulemaking in 2021, implementing a test designed to allow employers to more easily designate workers as independent contractors. In January of this year, the Biden administration published its own rule based on a six-part test, which effectively made it more difficult to designate workers as independent contractors. We explain that rule here. Both rules have been challenged, and the demise of the *Chevron* test has made it certain that judges will determine the confines of employee and independent contractor status, as neither administration's reading will be subject to deference.
- **Overtime regulations.** A recent Biden administration rule increases the baseline salary threshold to be eligible for overtime to $43,888. Questions related to whether the Department of Labor (DOL) exceeded its authority under the FLSA and the application of the major questions doctrine will likely dominate the legal challenges.
- **Retirement planning and management.** In 2024, the DOL published a rule broadly interpreting the definition of "fiduciary" in the Employment Retirement Income Security Act (ERISA) to require that financial professionals act in the best interest of investors. This expansion of fiduciary duties widens the range of responsibilities for investment managers and increases the discretion of the DOL's Employee Benefits Security Administration to investigate and penalize practices that do not meet the fiduciary obligation test. Many financial professionals' trade associations have challenged the rule, alleging that the DOL's definition of "fiduciary" is too broad. The demise of *Chevron* deference will present a headwind to the DOL's ability to support its legal case.
- **Noncompete agreements.** The U.S. Federal Trade Commission's (FTC) recent final rule banning most employee noncompete agreements rests significantly on the FTC's shoehorning of such agreements into the "contract[s] ... in restraint of trade" language into the federal antitrust laws, including the Sherman and Clayton Acts. This expansive reading of the law to encompass employment-related practices is likely an aggressive expansion of the FTC's legal authority. Assuming the government can establish that the FTC has authority to issue the rule, the lack of *Chevron* deference will likely lead to judges taking different

positions related to the scope of the FTC's ban.

- **National Environmental Policy Act (NEPA) review.** Major infrastructure projects like mines, pipelines, and energy-generating facilities—particularly in the West, where federal and tribal land is abundant and where there are many large-footprint projects with a federal nexus—have long been plagued by NEPA delays. Continued revisions of the uniform NEPA rules issued by the Council on Environmental Quality (CEQ) has exacerbated those delays. In the short term, courts are even less likely to pay much heed to CEQ's already embattled April 2024 rulemaking, which called for an increased focus on environmental justice. CEQ's authority to make rules arises from an executive order issued by President Jimmy Carter. That leaves for certain guidance only the handful of Supreme Court NEPA opinions. The Court next term will address whether agencies must evaluate issues they do not directly regulate in *Seven County Infrastructure Coalition v. Eagle County*.
- **"Waters of the United States."** Major infrastructure projects in or near "waters of the United States," wet or not: For more than 50 years, the U.S. Environmental Protection Agency (EPA), Army Corps of Engineers, the courts, and regulated industry have struggled to define what sorts of "waters of the United States" are subject to federal regulation under the Clean Water Act. Congress has failed to define the term. As administrations have changed, the agencies have periodically rescinded and reissued rules trying to define the term. Other than during the Trump administration, EPA and the Corps have attempted to regulate more fringe waters than the Supreme Court considers appropriate. The agencies may not agree, but the only sure definition of jurisdictional waters for now is contained in the Court's May 2023 opinion in *Sackett v. Environmental Protection Agency* (No. 21-454) (*Sackett II*).

We encourage anyone with significant regulatory oversight by a federal agency to consider a thorough review of what this decision could portend for future regulation and judicial challenges. At the agency level, *Loper Bright* should encourage advocacy that agencies have fewer options than they might have entertained previously, and we should expect to see more challenges in court. Indeed, there will be numerous regulatory challenges returned to lower courts and agencies for reconsideration in light of *Loper Bright*. The Supreme Court has already granted, vacated, and remanded nine cases for such reconsideration. When the Court next issues orders, there are likely to be many more. It is an interesting question on current cases whether lower courts will offer agencies a chance at reconsideration or whether courts will simply embrace the role of authoritative *judicial* interpretation and forge ahead.

The long-term result of *Loper Bright* will be to empower courts and regulatory challengers at the expense of executive branch agencies, and the change may be significant in some places. District courts and regional circuits tended to rely upon *Chevron* deference the most. Like the brave new world for agencies themselves, judges who relied heavily on *Chevron* deference will now be forced to determine the single best interpretation. There will almost certainly be more splits. By contrast, *Chevron* deference had not been seen in the Supreme Court in eight years, so little will change at the highest court in terms of statutory interpretation. But a significant change at the high court may be a larger caseload resolving circuit splits.

At the policy level, many important statutory questions will finally get resolved with certainty. But it will take several years. It is common for federal appeals to take three years, and if the Supreme Court awaits a circuit split to develop, a final resolution of the single best interpretation will take even longer. In the meantime, there will be a great deal of litigation, but the problem of agency flip-flopping on interpretive questions and the consequences on investment of never-ending uncertainty should dramatically diminish. If regulated parties can get comfortable with what they view as the single best interpretation of regulatory authority, they can order their affairs accordingly, without awaiting the Supreme Court's final word. Thus, spending some resources to assess what courts are likely to conclude is the single best interpretation may be time and money well spent.

Endnotes

[1] Thomas W. Merrill, The *Chevron* Doctrine: Its Rise and Fall, and the Future of the Administrative State at 317 n.28 (Harv. Univ. Press 2022); *see generally Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

[2] Richard J. Pierce, The Combination of *Chevron* and Political Polarity has Awful Effects, 70 Duke L. J. Online 91-108 (2021).

[3] *See, e.g., West Virginia v. EPA*, 597 U.S. 697, 721-23 (2022).

Authors

Stephanie Olson

Counsel
SOlson@perkinscoie.com 206.359.3025

Eric B. Wolff

Partner
EWolff@perkinscoie.com 206.359.3779

Michael R. Huston

Partner
MHuston@perkinscoie.com 202.434.1630

Christopher D. Thomas

Partner
CThomas@perkinscoie.com 602.351.8045

Christopher Wilkinson

Senior Counsel
CWilkinson@perkinscoie.com 202.661.5890

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