



U.S. Supreme Court Overrules *Chevron* **A Shift of Interpretive Power From the Administrative State to the Courts**

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In *Loper Bright Enterprises v. Raimondo*, No. 22-1219, 2024 WL 3208360 (June 28, 2024), the U.S. Supreme Court, in a 6-3 opinion, overruled *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which required courts to use a two-step framework to interpret statutes administered by federal agencies. In *Loper*, the Court held that courts must exercise independent judgment in determining the meaning of statutory provisions, in accordance with the Administrative Procedure Act (APA), which means that courts are to decide *all* relevant questions of law arising on review of agency action—even those involving ambiguous laws.

The fundamental issue addressed by *Loper* and *Chevron* is whether ambiguous aspects of the statutes Congress enacts should be interpreted by courts or by the administrative agencies that administer them. *Chevron* allocated that power toward administrative agencies and *Loper* has now shifted that power toward the courts.

Under the now-overruled *Chevron* framework, after a court determined that a case satisfies certain preconditions for *Chevron* to apply, a reviewing court would first assess whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that was the end of the matter, and courts were therefore to reject administrative constructions which are contrary to clear congressional intent. To discern such intent, a reviewing court would employ traditional tools of statutory construction. But if the court determined that the statute is silent or ambiguous with respect to the specific issue at hand, the court would, at *Chevron*'s second step, defer to the agency's interpretation if it "is based on a permissible construction of the statute."

In one of the closing paragraphs of the majority opinion in *Loper*, the Court declared that *Chevron* is overruled. It then explained that courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, while noting that careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not defer to an agency interpretation of the law simply because a statute is ambiguous.

The following are the principal take-aways from the Court's decision in *Loper*, based on my analysis, that I thought would be of interest to Coalition members.

- The Court reasoned that the fundamental form of our nation's government envisioned that the final "interpretation of the laws" would be the proper and peculiar province of the courts. The Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches. The Court also recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes, so that in the construction of a doubtful and ambiguous law, the

contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.

- A concurring opinion by Justice Thomas emphasized this point. He explained that to provide “practical and real protections for individual liberty,” the Framers drafted a Constitution that divides the legislative, executive, and judicial powers between three branches of Government. *Chevron* deference compromises this separation of powers in two ways. It curbs the judicial power afforded to courts, and simultaneously expands agencies’ executive power beyond constitutional limits.

Under *Chevron*, a judge must accept an agency’s interpretation of an ambiguous law, even if he thinks another interpretation is correct. *Chevron* deference thus prevents judges from exercising their independent judgment to resolve ambiguities. And *Chevron* deference cannot be salvaged by recasting it as deference to an agency’s “formulation of policy.” If that were true, *Chevron* would mean that agencies are unconstitutionally exercising ‘legislative Powers’ vested in Congress. *Chevron* expands agencies’ power beyond the bounds of Article II by permitting them to exercise powers reserved to another branch of Government.

- The Court expressed especially strong antipathy toward the regulatory practice of an agency issuing new regulations that supersede prior regulations on the same subject matter, noting that *Chevron* authorized agencies to change positions with respect to a statutory interpretation, without any change in the law itself, even when Congress had given them no power to do so. This practice, the Court explained, created systematic bias in favor of whichever political party currently holds the levers of executive power, which resulted in affected individuals never being sure of their legal rights and duties. To illustrate this point, a concurring opinion by Justice Gorsuch provides the following example:

National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U. S. 967, concerned a law regulating broadband internet services. There, the Court upheld an agency rule adopted by the administration of President George W. Bush because it was premised on a “reasonable” interpretation of the statute. Later, President Barack Obama’s administration rescinded the rule and replaced it with another. Later still, during President Donald J. Trump’s administration, officials replaced that rule with a different one, all before President Joseph R. Biden, Jr.’s administration declared its intention to reverse course for yet a fourth time. Each time, the government claimed its new rule was just as “reasonable” as the last. Rather than promoting reliance by fixing the meaning of the law, *Chevron* deference engenders constant uncertainty and convulsive change even when the statute at issue itself remains unchanged.

- The Court emphasized numerous times that Executive Branch interpretations warrant “respect” by courts when the interpretations were:
 - issued roughly *contemporaneously* with enactment of the statute, and
 - remained *consistent over time*.

But even then the views of the Executive Branch should inform the judgment of a court, but not supersede it.

- The Court indicated that deference to an administrative agency’s interpretation of a statute is “least appropriate” when the ambiguity is about the scope of the agency’s own power.
- The Court appeared to endorse the standard of judicial review set forth in its decision in *Skidmore v. Swift & Co.*, 323 U. S. 134 (1944), under which the interpretations and opinions of the relevant administrative agency, made in pursuance of official duty and based upon specialized experience, constituted a body of experience and informed judgment to which courts and litigants could properly resort for guidance, even on legal questions. The weight of such a judgment in a particular case would depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.
- The decision also recognized that in certain statutes Congress delegated discretionary interpretative authority to an agency. In those cases, the role of the reviewing court is to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. A court fulfills this role by recognizing the constitutional delegation, fixing the boundaries of the delegated authority, and ensuring that the agency engaged in reasoned decision-making within those boundaries. Stated differently, in such cases, a court needs to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that the agency exercises its discretion consistent with the Administrative Procedure Act.
- The Court cautioned that its overruling of *Chevron* does not necessarily call into question prior decisions that relied on the *Chevron* framework.

It remains to be seen how courts will react to the Court’s decision in *Loper*. One set of regulations – of particular interest to Coalition members – that could be affected by the decision are the regulations the U.S. Department of Labor (“DOL”) under the Biden Administration issued in January 2024 interpreting the term “employee” for purposes of the Fair Labor Standards Act (“FLSA”). The regulations interpret a term in the FLSA that was enacted in 1938 (more than 80 years ago). The regulations would supersede certain regulations interpreting the same term that DOL issued in 2021 during the Trump Administration. The 2024 regulations are the subject of multiple legal challenges.

The 2024 regulations do not appear to satisfy the conditions for obtaining judicial deference under *Loper*, inasmuch as the regulations were not issued roughly *contemporaneously* with enactment of the statute, and the DOL’s interpretation of the term has not remained *consistent over time*. Rather, the DOL will have accorded the term “employee” two materially different interpretations, each while DOL was controlled by a different political party. These heterogenous interpretations issued by an agency while controlled by different political parties appear to fit the profile of the type of regulatory actions the Court found particularly offensive. Moreover, the interpretation given the term “employee” arguably involves the scope of DOL’s power and authority, inasmuch as the agency’s regulatory authority ends at the outer edge of the term “employee” and does not extend to independent contractors. It follows that the DOL’s interpretation of the term “employee” arguably involves the scope of its own power, which the Court indicated is “least appropriate” for judicial deference.

While it is impossible to predict the outcome of the legal challenges to the 2024 regulations, the foregoing suggests that the *Loper* decision would tend to make the 2024 regulations more susceptible to being invalidated. But the same might be true with respect to the 2021 regulations. Another possibility is that courts deciding cases involving the definition of “employee” under the FLSA might simply disregard the DOL’s regulations, even if they are not held invalid, by according them little if any deference.

As a general matter, the *Loper* decision is likely to cause federal agencies to exercise greater restraint when interpreting statutes. During the past several Administrations, federal agencies (of both political parties) appeared to become more aggressive in adopting strained interpretations of statutes in order to accomplish political objectives. This practice is likely to end. Under *Loper*, companies can likely expect more predictability and stability in the interpretations given the federal statutes governing their operations.

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If you have any questions or comments concerning the foregoing, please let me know, at rhollrah@iecoalition.org or (202) 659-0878.

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