The 'Chevron' Doctrine in Peril: A Closer Look at 'Loper'

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In Chevron U.S.A. v. NRDC, the U.S. Supreme Court upheld the Environmental Protection Agency's (EPA) regulatory definition of "stationary source" as a reasonable construction of the Clean Air Act. Although important for administering the statute, the precedential reach of Chevron was far broader.

The *Chevron* doctrine, as it is commonly called, instructs federal courts to defer to an administrative agency's reasonable interpretation of a statute that the agency is authorized to administer where the statutory language is silent or ambiguous. As a result, courts reviewing agency regulations will, at *Chevron* Step 1, examine whether Congress has spoken clearly on the question at issue. If the statutory language is ambiguous or silent on the question posed, at *Chevron* Step 2, courts will evaluate whether the agency's interpretation is reasonable; not whether in the court's view the agency's interpretation is best.

Chevron's deference to agency regulations interpreting ambiguous statutory language or filling gaps where the statute is silent has served as a foundation of administrative law for almost 40 years. In this Supreme Court term, however, *Loper Bright Enterprises v. Raimondo* presents the question of whether *Chevron* should be overruled or limited. Because in prior cases several members of the court have questioned whether judicial deference to administrative agencies is appropriate, *Chevron*'s continued viability is in doubt.

At issue in *Loper* is the interpretation of the Magnuson-Stevens Fishery Conservation and Management Act, a statute designed to protect the nation's fishery resources from overfishing. To meet this goal, the act establishes specific programs for the placement of monitors on fishing boats and also authorizes the National Marine Fisheries Service (NMFS) to administer fish management plans containing measures necessary and

appropriate to prevent overfishing. NMFS adopted a regulation amending the Atlantic fishery management plan requiring owners of regulated vessels to hire third-party observers to monitor certain herring fishing trips at the owners' expense. The vessel owners challenged the imposition of these costs as beyond NMFS' authority. The court of appeals found the statute to be ambiguous, and citing *Chevron*, upheld NMFS' regulation as reasonable.

On appeal to the Supreme Court, the vessel owners seek to overrule or limit *Chevron*. They argue that *Chevron* violates the Constitution's separation of powers principles by transferring Article III judicial power and Article I legislative power to executive agencies established under Article II. In their view, statutory interpretation is the province of the courts, not executive agencies. They similarly contend that Section 706 of the Administrative Procedure Act, which requires a reviewing court to decide all questions of law and interpret constitutional and statutory provisions, precludes deference to administrative agencies. They further assert that the *Chevron* doctrine conflicts with pre-*Chevron* precedent and violates the due process clause by favoring administrative agencies over citizens challenging agency action, and that the doctrine is unworkable.

The United States strongly disagrees. In its view, *Chevron* properly recognizes that when enacting a statute, Congress intends regulatory agencies to reasonably resolve statutory ambiguities and fill statutory gaps. Congress relies on agencies to utilize their scientific and technical expertise and knowledge of the statutes they administer to promulgate rules of uniform national application. Absent deference to agency regulations, judicial rulings may vary among, or even within, judicial districts depending on the personal views of judges who lack the agency's expertise and experience.

The United States further argues that in addition to fulfilling Congress' intent, deference to administrative agencies on policy matters keeps those decisions where they belong—in a political branch of government. Unlike unelected judges, administrative

agencies are part of the executive, and answerable to the public through election of the president. Moreover, as an additional check on policymaking, the other political branch, Congress, may override the policies of agencies through legislation.

The parties also disagree on whether stare decisis principles weigh heavily against overruling *Chevron*. The government describes *Chevron* as a cornerstone of administrative law providing a stable background rule against which Congress has legislated and upon which regulated entities and the public have relied for 40 years. In contrast, petitioners describe the *Chevron* doctrine as merely a methodology that is entitled to at most weak weight, and is egregiously wrong, unworkable, disincentivizes Congress to make policy decisions, promotes challenges by objecting states, and unjustifiably slants judicial decisions in favor of agencies and against citizens.

The opinions of the justices in *Kisor v. Wilkie*, a recent case narrowly upholding judicial deference to administrative agencies' interpretations of their own regulations (not, as in *Chevron,* interpretations of a statute), reveal that *Chevron*'s days may be numbered. The majority opinion narrowly limited the circumstances in which deference would apply. The regulations must be genuinely ambiguous after a court has resorted to all standard tools of interpretation, and the agency's interpretation must be reasonable. In addition, the character and context of the agency's interpretation must show that it is the agency's official, authoritative position, that it implicates the agency's substantive expertise or policy expertise and is not a question naturally falling into a judge's bailiwick, and that it represents the agency's fair and considered judgement. In the majority's view, these factors reveal whether Congress would want the agency to resolve the regulatory ambiguity.

Four of the justices in *Kisor* would overrule precedent and assign to the courts the work of selecting the best and fairest reading of the regulation at issue. A vigorous opinion by Justice Neil Gorsuch makes many of the arguments that the *Loper* petitioners repeat in their brief. In Gorsuch's view, interpreting the law is a core judicial function. Judges should

exercise their independent judgment and follow the agency's view only to the extent it is persuasive. The debate among the justices in *Kisor* suggests that *Loper* may overrule *Chevron* and reinstitute the pre-*Chevron* doctrine articulated in the 1944 decision in *Skidmore v. Swift & Co. Skidmore* instructed reviewing courts to give weight to an agency's interpretation of a statute based on its power to persuade.

Under the *Skidmore* regime, whether an agency exercised its expertise, supported its decision by valid data and reasoned analysis, and demonstrated consistent application of a long-held statutory interpretation are among the factors influencing the persuasiveness of its opinion. As Chief Justice Roberts noted in his concurring opinion in *Kisor*, the majority opinion in *Kisor* and Gorsuch's opinion both set forth similar factors to be considered by a court reviewing an agency's interpretation of a regulation. These factors seem similarly relevant to interpreting a statute.

The principal question to resolve in *Loper* may not be the factors to be considered, but whether courts must defer to an agency's reasonable interpretation of an ambiguous statute. Unlike *Chevron*, *Skidmore*, requires the court to adopt the agency's interpretation only if the court is persuaded that the agency's interpretation is correct.

If the *Loper* court overrules *Chevron*, it has the opportunity to adopt a practical approach to guide courts in adjudicating challenges to regulations interpreting statutes with ambiguous provisions or gaps. Where an agency uses its expertise and experience to promulgate a regulation interpreting an ambiguous statute it is authorized to administer, cogently documents its reasoning in the administrative record, and applies its interpretation consistently, a reviewing court should ordinarily adopt the agency's interpretation. Even if the *Loper* court determines that under these circumstances courts are not bound by an agency's statutory interpretation, courts should nevertheless give the agency interpretation great weight.

This result is a type of *Skidmore* deference that would further Congress' intent to empower administrative agencies to impose consistent and uniform nationwide requirements when implementing statutes. It would, however, permit courts to reject new statutory interpretations caused by a change in presidential administration rather than cogent expert analysis. A doctrine promoting more consistent interpretations of statutes, by agencies and by courts, will facilitate reliance by the public and allow Congress to focus on changing those statutory interpretations with which it disagrees.

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