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Loper Bright and Agency Deference – The Future of Federal Agency Rulemaking Challenges

Chris Leason & Liam Vega Martin

Environmental Professionals of Arizona | Feb. 10, 2025

- Context for judicial deference
- US Supreme Court's decision in *Chevron*
- *Loper Bright* ends the era of judicial deference
- Aftermath & Tea Leaves

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The Roots of *Chevron*

"The history of the American administrative state is the history of competition among different entities for control of its policies. All three branches of government have participated in this competition .... [A]t different times, one or another has come to the fore and asserted at least a comparative primacy ... in this time, that institution is _____."

—Professor Elena Kagan, 2001

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The Roots of *Chevron*

"The history of the American administrative state is the history of competition among different entities for control of its policies. All three branches of government have participated in this competition .... [A]t different times, one or another has come to the fore and asserted at least a comparative primacy ... in this time, that institution is the Presidency."

—Professor Elena Kagan, 2001

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The Roots of *Chevron*

"Bureaus become gigantic machines that slowly and inflexibly grind along in the direction in which initially aimed, incapable of acting speedily or making necessary innovations."

—Professor Elena Kagan, 2001

(quoting Anthony Downs) (cleaned up)

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The Roots of *Chevron*

"[A]ll the claims of legislative control inadequately acknowledge the limits on Congress's ability to impose harsh sanctions. Statutory (including most budgetary) punishments require the action of the full Congress—action which is costly and difficult to accomplish."

—Professor Elena Kagan, 2001

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The Roots of *Chevron*

"The reviewing court shall— …

(2) hold unlawful and set aside agency action … found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, [or] power, …;

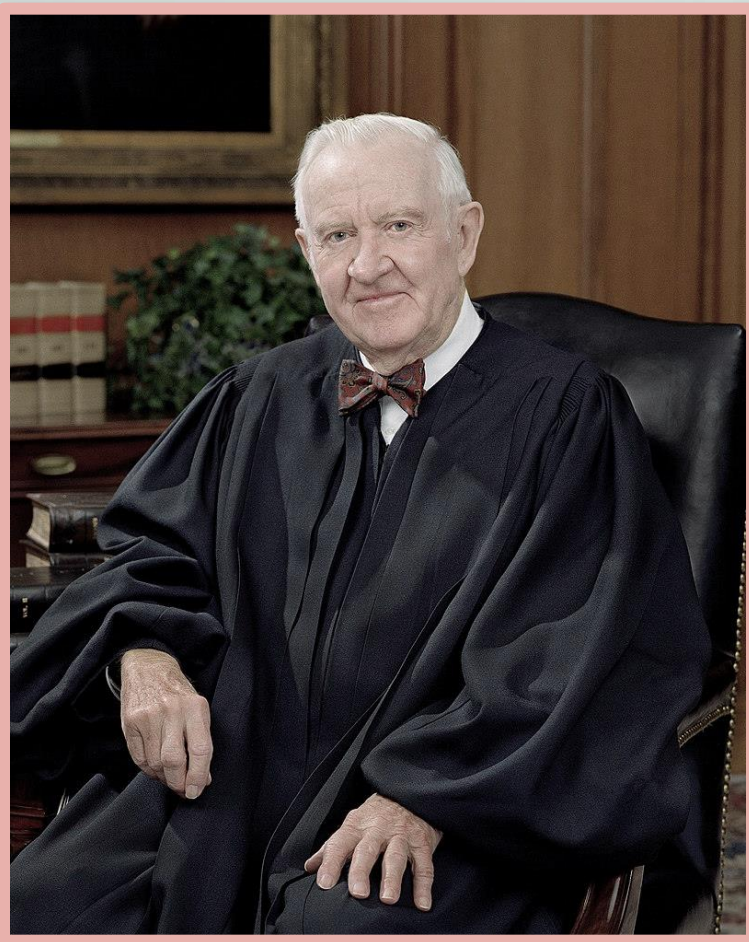
(C) in excess of statutory … authority, or limitations, or short of statutory right." 5 U.S.C. § 706.

Chevron U.S.A., Inc. v. Natural Res. Def. Council

- The Clean Air Act requires "new or modified major stationary sources" of air pollution in nonattainment areas.
- "Stationary source" was defined in one section as "any building, structure, facility, or installation which emits or may emit any air pollutant."
- In another section, "major stationary source" was defined to mean "any stationary facility or source which … has the potential to emit one hundred tons per year … of any air pollutant.
- EPA interpreted "stationary source" to mean an entire plant.

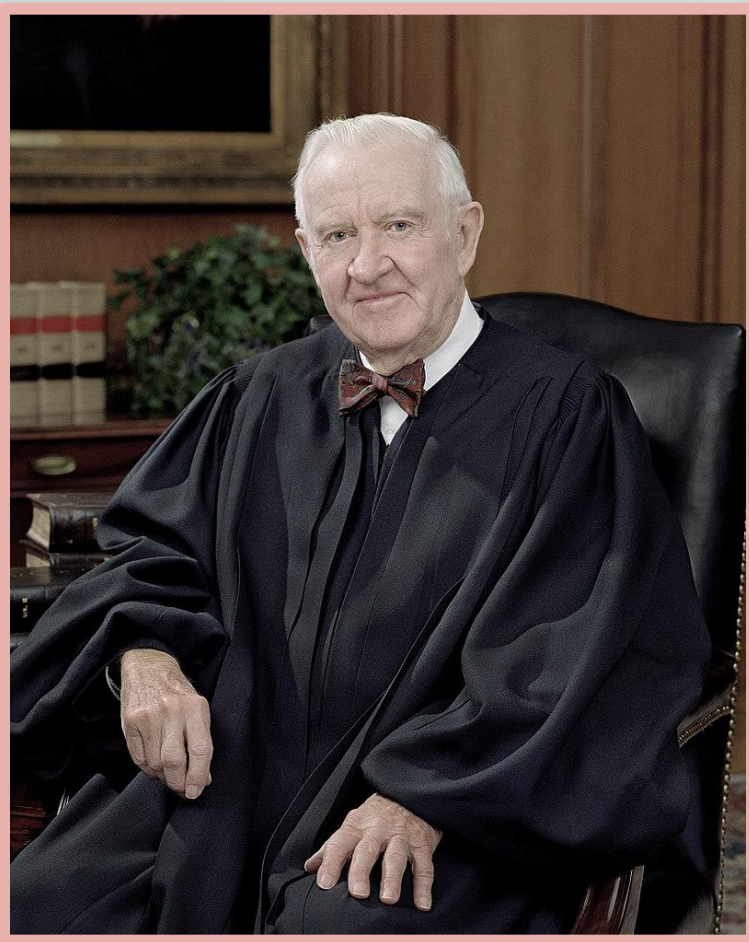
Chevron U.S.A., Inc. v. Natural Res. Def. Council

"We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress. We know full well that this language is not dispositive; the terms are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation."



Chevron U.S.A., Inc. v. Natural Res. Def. Council

"Judges are not experts in the field …. [I]t is entirely appropriate for [agencies] to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."



Chevron's Steps

CHEVRON STEP ZERO

- An agency has formally promulgated an interpretation of a statute it is tasked with administering.

CHEVRON STEP ONE

- Congress has not spoken to the precise question at issue.

CHEVRON STEP TWO

- The agency's interpretation is based on a "permissible" reading of the statute.

Loper Bright and Relentless

- 40 years later, *Chevron*'s days were numbered.
- The Magnussen-Stevens Fishery Conservation and Management Act provides that the government can require observers to be carried on fishing boats.
- But it doesn't specify whether government or industry must bear the cost of the observers.
- The NMFS allocated the cost to industry.
- Loper Bright and Relentless challenged the rule.
- Both the First Circuit and DC Circuit uphold the rule.

Loper Bright and Relentless

"Chevron defies the command of the APA that the reviewing court—not the agency whose action it reviews—is to decide all relevant questions of law and interpret ... statutory provisions. It requires a court to ignore, not follow, the reading the court would have reached had it exercised its independent judgment as required by the APA."

Loper Bright and Relentless

"[E]ven if some judges might… consider the statute ambiguous, there is a best reading all the same—the reading the court would have reached if no agency were involved. It … makes no sense to speak of a "permissible" interpretation that is not the one the court … concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible."

Era of Chevron Deference

"Today, the Court flips the script: It is now the courts (rather than the agency) that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris…. [T]he majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law."

The Aftermath of *Loper Bright*

Status of *Loper Bright* and *Relentless*

- *Loper Bright Enters., Inc. v. Raimondo* (D.C. Cir.): In July 2024, the D.C. Circuit vacated its decision and ordered supplemental briefing.
  - Briefing occurred in August – September 2024 (including an intervenor brief filed by Relentless).
  - Oral argument occurred on November 4, 2024.
  - Decision anticipated in Spring 2025.

Status of *Loper Bright* and *Relentless*

- *Relentless Inc. v. U.S. Dep't of Com.* (1st Cir.): In July 2024, the First Circuit vacated its decision and remanded the case to the U.S. District Court for the District of Rhode Island for further consideration in light of the *Loper Bright* decision.
  - District Court ordered briefing on each party's position of the "best" reading of the statutory provision at issue.
  - Briefing occurred in September – November 2024.
  - Initial case in District Court decided on the pleadings (motion for summary judgment); anticipate Spring 2025 decision based on supplemental pleadings.

Supreme Court's Vacatur and Remand of Decisions Relying on *Chevron*

- In addition to vacating and remanding *Loper Bright* and *Relentless* back to the D.C. Circuit and First Circuit, respectively, the Supreme Court also vacated and remanded nine other cases to Federal Courts of Appeal based on the *Loper Bright* decision.
  - Two of the nine cases deal with environmental/health and safety matters.

Supreme Court's Vacatur and Remand of Decisions Relying on *Chevron*

- *Foster v. Dept. of Agriculture* (8th Cir.): Under *Chevron*, the Eighth Circuit affirmed a District Court decision upholding the Secretary of Agriculture's decision that petitioner's farmland is a wetland under the "Swampbuster Act."
  - In November 2024, the Eighth Circuit vacated its decision and remanded the case to the U.S. District Court for the District of South Dakota for further consideration in light of the *Loper Bright* decision.
  - January 2025 briefing in the District Court on the most "logical" interpretation of the ambiguous statutory provision at issue.

Supreme Court's Vacatur and Remand of Decisions Relying on *Chevron*

- *Secretary of Labor v. KC Transport* (D.C. Cir.): Under *Chevron*, the D.C. Circuit vacated a FMSHRC decision that vacated MSHA violations alleging a trucking company providing services to a mine site is a "mine" for purposes of the FMSHA.
  - In August 2024, the D.C. Circuit vacated its decision and ordered supplemental briefing to "independently assess[] the best meaning of the [FMSHA's] definition of a "mine."
  - Oral argument held on January 24, 2025.
  - On January 31, 2025, the D.C. Circuit ordered supplemental briefing on certain constitutional issues.

Environmental Litigation in the Wake of *Loper Bright*

- Sixth Circuit: Challenge to EPA's CAA exceptional events policy as applied to Detroit air quality monitoring due to Canadian wildfires.
  - Two exceedances of the ozone NAAQS were excluded due to the wildfires.
  - After the conclusion of briefing, Petitioners and EPA filed supplemental briefs identifying the *Loper Bright* decision as pertinent (both sides asserted its position was the most "logical" reading of the statutory provision).
  - Oral argument held on December 12, 2024.
  - Decision anticipated in Spring 2025.

Environmental Litigation in the Wake of *Loper Bright*

- D.C. Circuit: Denial of a motion for rehearing *en banc* on the denial of a stay of a NESHAP for integrated iron and steel plants.
  - Petitioners seeking stay sought rehearing of the D.C. Circuit's denial in light of the *Loper Bright* decision.
  - Court's decision denying the motion for reconsideration did not address *Loper Bright*.
  - Briefing underway on the merits.

Reading the "Tea Leaves"

- Levels the playing field between a party challenging a final agency rule and the administrative agency that promulgated the rule.
  - Will equally benefit industry and environmental groups challenging final rules.
- Courts may defer to an administrative agency, but not call it deference (*i.e.*, call it the "best" or most "logical" reading).
  - *Skidmore*: An agency's interpretation "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance."

Reading the "Tea Leaves"

- Creating a record for potential litigation is important.
- This will likely not be the last we hear from the Supreme Court on the interpretation of ambiguous statutory provisions and Congress' intent (application of *Loper Bright* will likely result in conflicting court decisions regarding the same provision).
- Will Congress provide more specificity in statutes? (but, it is unable to remove all ambiguity and, as such, the courts will still need to ascertain the "best" meaning of the provision at issue).

Thank you!

Chris Leason
(602) 530-8059
chris.leason@gknet.com

Liam Vega Martin
(602) 530-8138
liam.vegamartin@gknet.com