Hughes Hubbard & Reed

Litigation after the Demise of Chevron Deference

Client Advisories

Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

Attorney advertising. Readers are advised that prior results do not guarantee a similar outcome. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. For information regarding the selection process of awards, please visit https://www.hugheshubbard.com/legal-notices-methodologies.

July 15, 2024 – As widely anticipated, the Supreme Court last month overruled *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*,[1] which directed federal courts to defer to an administrative agency's "reasonable" interpretation of ambiguous terms in a Congressional statute authorizing the agency to act. In *Loper Bright Enterprises v. Raimondo*,[2] the Court held by a 6-3 vote that the Administrative Procedure Act (APA) requires Article III judges to interpret ambiguities in statutes without regard to reasonable agency interpretations, consistent with the general primacy of Article III courts in declaring and interpreting federal laws. A ringing dissent by Justice Kagan (joined by Justices Sotomayor and Jackson) decried the dismantling of the modern U.S. administrative state that they asserted the death of *Chevron* deference would trigger.

This Hughes Hubbard & Reed client advisory analyzes possibilities and opportunities for future litigation in the aftermath of *Loper Bright*. Justice Kagan in dissent noted that "at last count, *Chevron* was cited in more than 18,000 federal-court decisions."[3] By contrast, the *Loper Bright* Court downplayed the extent of disruption that overruling *Chevron* would entail, noting that *Chevron* deference was relatively new, in current disuse, and incoherent in the face of doctrinal modifications since its inception. But *Loper Bright*'s formal overruling of the precedent is a significant event and opens up diverse new avenues for challenging federal administrative regulations.

The demise of *Chevron* deference raises at least two critical questions for clients and others who operate in industries or fields subject to federal agency rules and regulations. First, what happens to regulations anchored in reasonable agency interpretations of key statutory terms that the Supreme Court or a lower federal court upheld relying on *Chevron* deference in the 40 years between *Chevron* (1984) and *Loper Bright* (2024)? May those federal rules and regulations now be challenged and if so, how, where, when, and by whom? Second, moving from the retrospective to the prospective implications of *Loper Bright*, what does the end of *Chevron* deference mean as we look forward, both in terms of current and soon-to-be-filed lawsuits challenging federal agency regulations and how agencies will go about making future rules and regulations knowing that Article III courts will no longer defer to their reasonable interpretations of statutory terms?

1. Challenging Rules Upheld by Federal Courts Relying on *Chevron*

The *Loper Bright* Court sought to curtail invalidation of past agency regulations upheld by federal courts based on *Chevron*, but it is not clear that its attempt to constrain lawsuits attacking those existing regulations will work. Specifically, the Court qualified that "we do not call into question prior cases that relied on the *Chevron* framework" [4] and that "the holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology." [5] This statement appears to mean that prospective litigants cannot point to a judicial decision that relied on *Chevron* to uphold an agency interpretation of a key statutory term and ask for that interpretation to be rejected on that basis, presumably with the consequence that the regulation adopting the interpretation would be invalidated. Nor could a party who initially sued in federal court and lost because of *Chevron* deference file a motion to reopen the final judgment, unless the time to appeal has not yet expired.

However, a new litigant subject to the relevant regulation may, on advice of counsel, refuse to comply with it, arguing that the agency's interpretation of the key term, though reasonable, is not the interpretation that an Article III judge would apply and therefore not lawful. Subsequently, if the agency were to sue in federal court to enforce the regulation at issue, the new litigant could raise its interpretative argument to the agency's enforcement action defensively before an Article III judge. Moreover, the Supreme Court's decision issued three days after *Loper Bright* in *Corner Post Inc. v. Board of Governors of the Federal Reserve System* [6] construing the APA's six-year statute of limitations to run from the date the plaintiff is allegedly injured by the regulation effectively means that a newly formed entity may sue decades after the challenged regulation was originally promulgated. This means that any federal regulation going back to the New Deal and beyond would be potentially subject to challenge by newly created entities, unless expressly exempted under Section 701 of the APA. In such a prospective lawsuit, *Loper Bright* would seem to require federal judges to adhere to what they conclude are the best interpretations of applicable statutes, not the agency's interpretations upheld because of *Chevron*. Such a litigant may risk the possibility that an Article III court will decide that the agency's interpretation remains the best interpretation of the relevant statutory term, and so should weigh the costs and benefits of invalidating the regulation as against adhering to it in the event of court affirmance even without *Chevron* deference. But in instances where compliance with regulations entail significant financial costs, it may be prudent and efficient to challenge the regulation at issue.

2. Considerations in Challenging Regulations in the Immediate Future

Loper Bright does not mean that agency interpretations are never entitled to any weight in interpreting statutory terms, despite the overruling of *Chevron*. The Court listed three circumstances in which Article III courts should "respect" agency interpretations of statutes. [7] First, respect for an agency interpretation would be "especially warranted" if it was "roughly contemporaneous" with the enactment and "remained consistent over time." [8] Second, deference would be warranted when Congress "expressly delegated to an agency the authority to give meaning to a particular statutory term" such as by specifying, for instance, "as such terms are defined and delimited by regulations of the Secretary." [9] What specific statutory language qualifies as express Congressional delegation is sure to be the subject of litigation and controversy. Third, "although an agency's interpretation of a statute 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within the [agency's] expertise." [10] This is so-called *Skidmore* deference. [11]

The government will likely rely more on these three qualifications in *Loper Bright* for "respect" in defending agency regulations going forward. By adverse inference, the same three guideposts help to identify agency regulations that are especially vulnerable to challenge after *Loper Bright* because *Chevron* deference is unavailable and arguments for *Skidmore* respect are weak. Specifically, this would include interpretations of regulations that were not promulgated contemporaneously with their enabling statutes, not consistent over time, not grounded in statutes with language arguably delegating to the agency explicit power to define terms, and not implicating relatively uncontroversial and policy-free factual determinations (*e.g.*, whether a blank day planner is a diary), where deference to agency expertise operates at zenith.

Administrative agencies have been operating under the shadow of *Chevron*'s potential demise for about a decade—as

noted in *Loper Bright*, the Supreme Court itself has not relied on *Chevron* deference since 2016.[12] Additionally, the federal lower courts have also tried to avoid overt reliance on *Chevron* during this uneasy period. Furthermore, with the advent of the Supreme Court's "major questions" doctrine,[13] the agencies have been on notice that *Chevron* would not provide cover on big, controversial policy questions. Consequently, it is not clear how much the formal overruling of *Chevron* deference in *Loper Bright* will alter agency interpretations of ambiguous statutory terms, all other things being equal (*e.g.*, the regulatory ideology of the administration in power).

Loper Bright is part-and-parcel of a series of decisions the Supreme Court decided in this and recent terms cabining the administrative state and focusing the power to declare and interpret law in Article III courts. The appointment of Article III judges will likely be even more politically charged going forward. A logical corollary will be an increase in appellate forum-shopping: challengers will be more mindful than ever about bringing suit in circuits where the balance of power skews in favor of deregulatory judges. Specifically, there will be more attempts to avoid the D.C. Circuit as currently constituted. Perhaps as important is the change in jurisprudential tone that *Loper Bright* signals. As far as the federal courts are concerned, the administrative state in this country has been operating with a tailwind since the New Deal era. The winds have changed, and the presumption has turned against the administrative state when it purports to declare and interpret law and also to decide cases.[14] There appears no more propitious time than the present to sue in Article III courts to strike down agency regulations based on an agency's expansive interpretations of statutory authorizations.

For more information on this important Supreme Court decision, please reach out to your primary contact at the Firm.

---

1. 468 U.S. 837 (1984). ↩
2. 144 S. Ct. 2244 (2024). ↩
3. *Id.* at 2307 (Kagan, J., dissenting) (citation omitted). ↩
4. *Id.* at 2273. ↩
5. *Loper Bright*, 144 S. Ct. at 2273 (citing *CBOCS West, Inc. v. Humphries*, 553 U. S. 442, 457 (2008)). ↩
6. 144 S. Ct. 2440 (2024). ↩
7. *Loper Bright*, 144 S. Ct. at 2258. ↩
8. *Id.* ↩
9. *Id.* at 2263 & n.5. For instance, the judicial review provisions of the APA do not apply to "statutes that preclude judicial review" and to "agency actions[s] committed to agency discretion by law." 5 U.S.C. § 701. ↩
10. *Loper Bright*, 144 S. Ct. at 2267. ↩
11. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). For a modern application of *Skidmore* deference, see *United States v. Mead Corp.*, 533 U.S. 218, 234-235 (2001), in which the Court upheld the United States Custom Service's tariff classification of blank "day planners" as "diaries . . . bound," entailing a 4 percent tariff. ↩
12. *Loper Bright*, 144 S. Ct. at 2269. ↩
13. *See, e.g., West Virginia v. EPA*, 597 U.S. 697 (2022); *Biden v. Nebraska*, 600 U.S. 477 (2023). ↩
14. *See SEC v. Jarkesy*, 144 S. Ct. 2117 (2024). ↩

Related People

Thomas H. Lee

William R. Stein

Tyler Bloom

Related Areas of Focus

Antitrust & Competition
Appellate
Class Actions
Complex Business Disputes
Construction Litigation & Arbitration
Data Privacy & Cybersecurity
Defense Industry
Employment & Unfair Competition
Global Investigations, Enforcement and Compliance
Intellectual Property
Life Sciences
Litigation
Product Liability
Regulatory Compliance
Sanctions, Export Controls & Anti-Money Laundering
Securities Enforcement
Securities Litigation
Toxic Torts & Environmental
White Collar & Regulatory Defense