Chevron Overturned
Court Ruling Reshapes Legal Landscape

Rusty Adams
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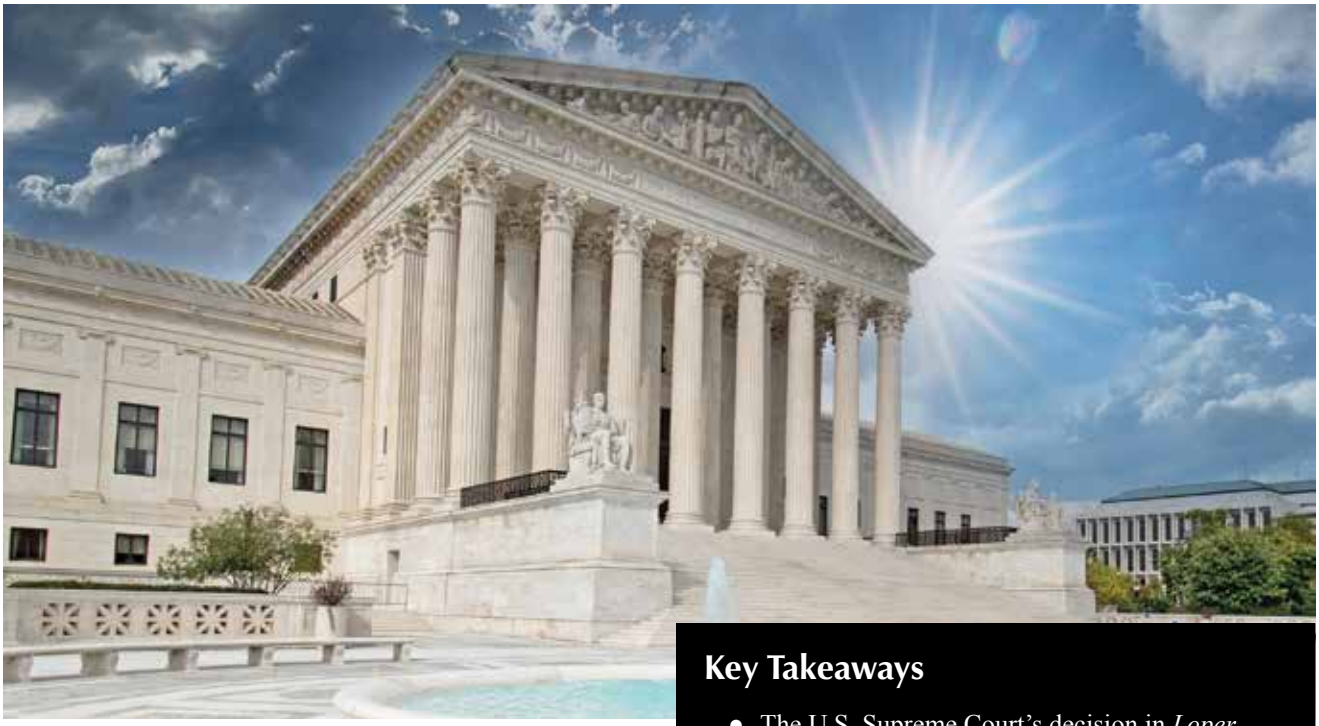

Key Takeaways

- The U.S. Supreme Court's decision in *Loper Bright* overturned the *Chevron* doctrine, which had allowed federal agencies broad discretion in interpreting ambiguous statutes.
- The court reaffirmed the judiciary's role in interpreting laws independently, rejecting the idea that agencies should have final say on statutory interpretations.
- Expect increased judicial scrutiny of agency regulations and actions, potentially leading to more challenges and reversals of agency decisions deemed to exceed statutory authority.
- The decision may prompt Congress to provide clearer statutory guidance to agencies, and agencies themselves may need to be more precise in adhering to statutory limits in their rulemaking.

It is emphatically the province and duty of the judicial department to say what the law is.

***Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).**

On Friday, June 28, 2024, the United States Supreme Court handed down its opinion in *Loper Bright Enter v. Raimondo* and its companion case, *Relentless, Inc. v. Department of Commerce*, 144 S.Ct. 2244 (2024). The decision may signal a dramatic transfer of power in terms of federal agencies. In a 6-3 decision, the Court examined and overruled its opinion in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which established the doctrine of "*Chevron* deference." A short discussion of administrative law will set the stage.

I'm Just a Bill

How are federal laws made? As everyone of a certain age knows, they start with a sad little scrap of paper, sitting on the steps of the Capitol. He's just a bill, only a bill. But if they vote for him on Capitol Hill, he's off to the White House for the president to sign, and then he'll be a law.

Indeed, Article I of the United States Constitution vests all legislative powers in the U.S. Congress, composed of 535 elected members. Article II grants executive power to the president, who shall take care that the laws be faithfully

executed. Article III grants judicial power to the federal courts.

Schoolhouse Rock! notwithstanding, today the majority of federal laws are not made by Congress; they're made by unelected officials in administrative agencies, which fall under Article II. Administrative agencies are created by Congress, and Congress delegates certain authority to them through enabling statutes, which define the scope of the agencies' authority. Agencies are authorized to promulgate "rules," which have the force of law. While administrative agencies have been around almost as long as the Constitution itself, they really proliferated during the New Deal era and have been an important part of law in the United States ever since.

Court challenges to federal agency rules often arise when an agency, in promulgating or enforcing a rule, is alleged to have exceeded the authority granted to the agency. The courts must then interpret the statutes and rules accordingly. The *Chevron* and *Loper Bright* cases deal with who has the final say in interpreting the statute that gives the agency its authority.

Pre-*Chevron*

Prior to *Chevron*, in interpreting federal statutes (dealing with agencies or otherwise), courts exercised their own independent judgment "according due respect to Executive Branch interpretations." However, while courts showed respect to those views, they were not bound to follow them.

In particular, courts generally deferred to agencies' findings of fact, as long as the requirements of due process were provided and the findings were not arbitrary. As to questions of law, however, the courts remained the final arbiters.

In 1946, Congress enacted the Administrative Procedures Act (APA), which set forth procedures for agencies and "delineated the basic contours of judicial review." That portion of the Act says that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." It also requires the court to set aside agency actions if they are—among other things—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations; or short of statutory right. 5 U.S.C. § 706. The Act does not set forth any standards for deference.

The *Chevron* Doctrine

In 1984, the Supreme Court decided *Chevron*, in which it set forth the following test. First, courts were to determine whether Congress had directly spoken to the precise question at issue. If the intent of Congress was clearly expressed in the statute, courts were to construe the statute accordingly. That is, they applied the intent of Congress. At the second step, if the statute was silent or ambiguous with respect to the issue, a court was required to defer to the agency if it had offered a "permissible" construction of the statute. That is, the court was required to approve any reasonable agency interpretation, even if the court disagreed.

The decision rested on the presumption—a judicial creation—that Congress left ambiguity in the statute with the intent that the agency resolve the ambiguity. Thus, delegation of interpretive authority was implied. Over the next 40 years, the doctrine caught hold and was invoked in thousands of cases, giving agencies a very loose rein. As long as a statutory ambiguity could be found, agencies had the freedom to adopt any interpretation they desired, and change it whenever they desired, as long as the interpretation was "permissible."

Interestingly, *Chevron* did not even mention the APA.

Loper Bright

In *Loper Bright*, the Supreme Court overruled the *Chevron* doctrine. Writing for the Court, Chief Justice Roberts said that *Chevron* was "fundamentally misguided," and stated simply, "The text of the APA means what it says."

Citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and Alexander Hamilton's Federalist No. 78, the Court noted that the framers of the Constitution envisioned that the courts would be the final interpreters of the law, and that courts have held that role throughout U.S. history.

The Court held that the APA requires courts to exercise their own independent judgment rather than deferring to the agency's interpretation. *Chevron*, it said, requires the court to ignore its own reading of the law, rather than follow it, and is incompatible with the APA. An ambiguity in a statute, according to the Court, does not show congressional intent to delegate anything to anyone, much less to delegate interpretation of statutes to federal agencies. A court's inquiry into the meaning of a statute does not change because an administrative interpretation is in play.

The correct question, says the Court, is whether the statute authorizes the challenged agency action. The Court goes on

to say that if Congress disagrees with a judicial interpretation of a statute, it can revise the statute, *Schoolhouse Rock!* style.

The Court specified that they "do not call into question prior cases that relied on the *Chevron* framework." Courts are required to exercise their independent judgment as required by the APA, but they may not defer to an agency interpretation just because a statute is ambiguous.

There were also two concurring opinions penned by Justice Thomas and Justice Gorsuch. Thomas joined the Court's opinion and wrote separately to emphasize that *Chevron* violates the constitutional separation of powers. *Chevron* deference gives the power of statutory interpretation to Article II agencies, when that is properly the province of Article III courts. Likewise, it effectively vests Article I legislative power in Article II agencies.

Justice Gorsuch joined the Court's opinion and wrote separately to expound on the doctrine of *stare decisis*—the idea that courts must follow earlier judicial precedents. After examining the history of the doctrine, he notes that while past decisions may bind the parties to a dispute, they are not an "inexorable command," requiring the Court blindly to follow previous cases, especially if they are wrong in the first place. To do so, he says, turns *stare decisis* "from a tool of judicial humility into one of judicial hubris."

Gorsuch quoted from the law journal, *Supreme Court Review*, regarding the idea that Congress leaves ambiguity in a statute intending for agencies to resolve them. According to the article's authors, this idea, on which *Chevron* rests, is a "fictionalized statement of legislative desire." One of the authors was Justice Kagan, who wrote the dissent.

Gorsuch also addressed the separation of powers issue, noting that an independent judiciary was important to the framers of the Constitution, having just witnessed the efforts of King George to control colonial judges. This grievance was important enough to have been mentioned in the Declaration of Independence. *Chevron* deference, he writes, undermines that, forcing judges to change their interpretation of the law when the political branches demand it. Allowing bureaucrats to change the rules at their whim, without action by Congress, would replace judicial independence with a new rule: "The reasonable bureaucrat always wins."

"[T]hat transfer of power," Gorsuch says, "has exactly the sort of consequences one might expect."

Justice Kagan's dissent, joined by Justices Sotomayor and Jackson, defended the doctrine. Apart from citing policy reasons and agency expertise, she observed that Congress sometimes passes statutes with ambiguities and gaps. She cited *Chevron* for the idea that perhaps they intended for agencies to fill those gaps, given their expertise. "Perhaps," she noted, "Congress was unable to forge a coalition on either side," and "decided to take their chances with" the solution offered by the agency. Resolving statutory ambiguities, she said, is "often more a question of policy than law."

Ultimately, the majority rejected this as an end run around the lawmaking process outlined in the Constitution and played during Saturday morning cartoons in the 1970s. After all, Congress makes laws to reflect policy. Courts interpret laws as Congress writes them. Where Justice Kagan argues that agencies are better suited to interpret statutes "because they *are* part of a political branch" of government, the majority believes just the opposite.

All in all, *Loper Bright* represents a new and significant obstacle for agency power. Challenges to agency actions should be expected, and many will now have a much greater chance of success. Going forward, Congress may be more precise in defining agency powers, and agencies must be more precise in exercising them. This may have a dramatic impact on the regulatory environment in the real estate industry and elsewhere.

Nothing in *TG* should be considered legal advice. For advice or representation on a specific situation, consult an attorney.

Rusty Adams, J.D. (r_adams@tamu.edu) is a member of the State Bar of Texas and a research attorney for the Texas Real Estate Research Center.