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A (*Loper*) *Bright* Future?

AGENCY RULE CHALLENGES WITHOUT *CHEVRON*

Big year for administrative law

- *Securities & Exchange Commission v. Jarkesy*
- *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*
- *Loper Bright Enterprises v. Raimondo*

What is *Chevron* deference, anyway?

- How to apply *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*. 467 U.S. 837 (1984)?
- Two steps (sort of):
  - Step zero: Did the agency speak with force of law (rule or adjudication) on a statute it administers? Do other "step-zero" obstacles exist?
  - Step one: Did Congress speak directly to the precise question at issue?
  - Step two: Is the agency's construction of the statute reasonable?

Why defer?

- *Chevron*'s answer
  - Congressional intent—Congress wanted the agency to fill gaps.
  - Expertise—judges are not technical experts.
  - Political accountability of agencies.
- Good reasons?

Which step was the biggest limit on deference?

- Step zero (force of law)?
- Step one (ambiguity)?
- Step two (reasonableness)?

Offramps from the road to deference

- Beware step zero:
  - Constructions lacking force of law.
  - Procedurally defective rules, e.g., adopted without adequate explanation.
  - Implicit delegation on questions of "extraordinary" importance.
- Dig deep at step one:
  - Courts must use "traditional tools of statutory construction."
- Look back at step two:
  - The agency construction should fall within the bounds determined using step-one tools.
  - Judicial opinions holding statute is unambiguous bind the agency.
  - But agency inconsistency is OK, if explained.

How far should a court go at step one?

- When does a court stop applying tools of statutory construction?
  - Does this question show *Chevron*'s flaw?

Is it deference if you agree?

- Many offramps from *Chevron* deference lead to *Skidmore.*
- Is so-called *Skidmore* deference really deference?
  - "The weight [given an agency's] judgment in a particular case will 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." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).
  - "[T]he cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation." *Kisor v. Wilkie*, 588 U.S. 558 (2019) (Roberts, C.J. concurring).

What work did *Chevron* do?

- How often did *Chevron* make a difference?
  - If the agency's construction is persuasive, *Skidmore* applies and there is no need for *Chevron*.
  - If the agency's construction is not reasonable, *Chevron* does not apply.
- How many decisions fall into the gap between persuasive and reasonable?

What did *Loper Bright* change?

- *Chevron* deference cannot be squared with Article III and with the Administrative Procedure Act. Courts must exercise "independent judgment."
- But each of Article III and the Administrative Procedure Act leaves room to consider the agency's view.

Does this make a practical difference?

- To rule challenges?
- To rulemaking?

Article III is incompatible with "binding" deference—but not "due respect"

- Article III makes courts responsible for final interpretation of the law.
  - But "due respect to Executive Branch interpretations of federal statutes" often justified.
  - "Executive Branch interpretation [that] was issued roughly contemporaneously with enactment of the statute and remained consistent over time" warrants "great weight."
  - Possible deference to "factbound determinations" of statutory meaning.

The APA requires courts to decide—except when the best decision is the agency should decide

- The Administrative Procedure Act requires courts to "decide all relevant questions of law."
  - In exercising independent judgment, "courts may . . . seek aid from the interpretations of those responsible for implementing particular statutes."
  - Some statutes' meaning "may well be that the agency is authorized to exercise a degree of discretion."
    - Express delegation is an "example" of this.
    - So is rulemaking authority when accompanied by words like "appropriate" or "reasonable."
    - But delegation may not be presumed.

What did *Loper Bright* leave unchanged?

- Prior Supreme Court rule-specific holdings under *Chevron*.
  - These are protected by statutory stare decisis.
- Probably prior circuit court rule-specific holdings under *Chevron*.
  - Assuming no en banc review.
  - But watch for rule challenges in new circuits.
- Probably Washington law.
  - Washington has a *Chevron*-like doctrine. *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 99 P.3d 386 (Wash. 2004).
  - But *Chevron* is not frequently cited.
  - And many Washington cases give "great weight" to agencies because of agency expertise. *Port of Seattle v. Pollution Control Hearings Bd.*, 90 P.3d 569 (Wash. 2004).

Some rules will be invalidated

- *Van Loon v. Dep't of Treasury*, --- F. 4th --- (5th Cir. 2024)
  - Holds computer code used in cryptocurrency transactions is not "property" capable of being blocked by the Office of Foreign Assets Control under the International Emergency Economic Powers Act.

Look for limitations to *Loper Bright*

- *Lopez v. Garland*, 116 F.4th 1032 (9th Cir. 2024).
  - Gives *Skidmore* "deference" to a Board of Immigration Appeals determination that petty larceny is a crime involving moral turpitude under the categorical approach.
    - This is notable because the categorical approach is one courts address de novo in other contexts.
  - Reaffirms prior Ninth Circuit holding under *Chevron* deferring to Board of Immigration Appeals decision on what counts as a "single scheme of criminal misconduct."
    - *Loper Bright* is <u>not</u> an intervening Supreme Court decision warranting panel reversal of "clearly irreconcilable" Ninth Circuit precedent.

Look for exceptions

- *United States v. Trumbull*, 114 F.4th 1114 (9th Cir. 2024)
  - Gives so-called *Auer* deference to an application note to the U.S. Sentencing Guidelines defining a "large capacity magazine" as 15 rounds or greater.
  - But concurrence argues for limiting *Kisor v. Wilkie*, 588 U.S. 558 (2019), in light of *Loper Bright*.
- *Rana v. Jenkins*, 113 F.4th 1058 (9th Cir. 2024)
  - Holds *Loper Bright* has no bearing on deference to the Executive in foreign affairs.

What rules are vulnerable?

Vulnerable	Secure
New rules construing old statutes.	Rules already upheld.
Rules reflecting agency constructions contrary to pre-rule judicial constructions of statutes.	Rules reflecting unchanged statutory construction that dates to near time of enactment.
Rules reflecting a change in the agency's construction of a statute.	Rules implementing express delegation by Congress to gap-fill.
Others?	Rule implementing heavily implied delegation by Congress to gap-fill (e.g., mandates for agencies to do the "appropriate" or "reasonable").

How will agencies react?

- What about extremely technical rules, such as the *Loper Bright* dissent invoked?
  - When does an alpha amino acid polymer qualify as a protein under the Public Health Service Act?
  - How much aircraft noise in the Grand Canyon is consistent with providing "substantial restoration of the natural quiet"?

Skidmore will likely be important

- The weight a court gives agency judgment under *Skidmore* depends on:
  - Thoroughness evident in the agency's consideration.
  - Validity of [the agency's reasoning.
  - Consistency with earlier and later pronouncements.
  - Other factors bearing on persuasiveness.

Does *Loper Bright* make it harder for agencies to trim rules?

- Bear in mind this is what gave rise to *Chevron* in the first place.
- Thoughts?

QUESTIONS?

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