

Oral Arguments Signal Sea Change in Future of Administrative Law

February 14, 2024

On Jan. 17, the US Supreme Court heard oral arguments for two cases widely seen as vehicles for the current court to overturn the judicial doctrine of *Chevron* deference: *Relentless v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo*.

The doctrine was created by the court's 1984 decision in *Chevron v. Natural Resources Defense Council*, and directs courts to defer to reasonable agency interpretations of ambiguous statutes. The decision remains one of the most significant administrative law cases in the court's history.

The two cases involve a rule by the National Marine Fisheries Service that requires private fishing vessels to pay for federal observers on their vessels.

The fishing companies appealed those decisions, and the oral argument makes clear that, as expected, the court is using these cases to decide the larger question of whether to overrule *Chevron*. Whether the court abandons the doctrine entirely or limits it in a narrower holding will have ripple effects that could produce a litany of challenges to agency actions and rules, and affect how agencies write rules in the future.

Attorney Roman Martinez argued first for the fishing companies in *Relentless* that *Chevron* "reallocates interpretive authority from courts to agencies, and it forces courts to adopt inferior agency constructions that are issued for political or policy reasons."

Paul Clement, counsel for the fishing companies in *Loper Bright*, later argued "[t]here is no justification for giving the tie to the government or conjuring agency authority from silence."

But US Solicitor General Elizabeth Prelogar argued in favor of preserving *Chevron* as "a bedrock principle of administrative law with deep roots in this court's jurisprudence" that encourages national uniformity in how courts treat agency interpretations. Justice Ketanji Brown Jackson indicated *Chevron* helps protect the separation of powers, and expressed her concern "about the courts becoming uber-legislators" if *Chevron* were overturned.

Justice Brett Kavanaugh disagreed. He noted *Chevron* itself "ushers in shocks to the system every four or eight years when a new administration comes in," causing "massive change." Clement similarly referred to



the doctrine as a "reliance-destroying doctrine because it facilitates agency flipflopping."

Justice Elena Kagan wondered how Congress would regulate a complex and fast-developing area like artificial intelligence if courts did not defer to agency experts' interpretation of a hypothetical AI statute passed by Congress. She asked, "[w]hen the normal techniques of legal interpretation have run out, on the matter of artificial intelligence, what does Congress want?"—and answered, "What Congress wants is for people who actually know about AI to decide those questions."

Flood of Future Litigation

A key concern raised by these cases is a "flood of litigation," as Justice Amy Coney Barrett put it, that could ensue if *Chevron* is overturned. Jackson asked, "isn't it sort of impractical and chaotic to have a world in which every undefined term in a statute is subject to litigation if you're trying to govern?"

A preview of those challenges might be found in a slew of hotly contested proposed rulemakings regarding per- and polyfluoroalkyl substances, or PFAS by the Environmental Protection Agency.

One of these is EPA's September 2022 proposal to designate two PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act the first of its kind.

The EPA received reams of public comments on the proposal, some of which referenced *Chevron*, since EPA, as the agency charged with administering CERCLA, must provide a reasoned explanation for its action. Once final, the rulemaking is sure to be challenged, and the elimination of *Chevron* deference could provide another basis for challenging EPA's rulemaking based on its interpretation of CERCLA.

We will know this term whether the court's decision is, as Prelogar argued, "just a question of whether the [*Chevron*] Court drew the right line in identifying when a delegation has occurred" or, as Clement concluded, "[g]ood old fashioned statutory interpretation can do the job."

For more information, contact Jessica Rosell, Jackson Hobbs, Gillan Wener or your regular Lathrop GPM contact.

The cases are *Relentless v. Department of Commerce*, U.S. No. 22-1219, argued 1/17/24; and *Loper Bright Enterprises v. Raimondo*, U.S., No. 22-451, argued 1/17/24.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

Reproduced With Permission. January 22, 2024. Copyright 2023 By Bloomberg Industry Group, Inc. (800-372-1033) [Http://www.bloombergindustry.com](http://www.bloombergindustry.com)