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Agency Challengers Get a More Even Playing Field Post-Chevron


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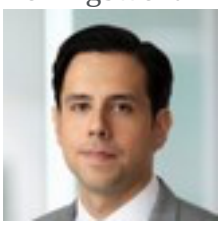
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- *Hollingsworth attorneys analyze impact of Loper Bright ruling*
- *Ending Chevron deference also could end Auer deference*

While tremendous scholarship will doubtless go into analyzing the US Supreme Court's June 28 decision ending *Chevron* deference to federal agencies, here we focus on the ruling's practical importance to private litigants under the Administrative Procedure Act.

There are two key holdings to the court's ruling in *Loper Bright Enterprises v. Raimondo*. First, contrary to the deference created 40 years ago in the *Chevron case*, the APA doesn't give administrative agencies any special authority to interpret the statutes they administer (although other statutes may do so in specific instances). Second, under the principle of

stare decisis, a past judicial decision invoking *Chevron* doctrine is alone insufficient to revisit precedent that decision established.

Looking ahead, challenges to new agency regulations under the APA will move forward on a much more level playing field. Agencies no longer will have their thumb on the scale when courts interpret regulations in the first instance.

The greater prospect of success may lead to an overall increase in APA challenges. Courts may see an immediate spate of challenges to existing regulations from litigants who had been deterred from suing by the difficulty of winning under the *Chevron* doctrine or who were biding their time until the *Loper Bright* decision.

For regulations that have already been upheld by courts applying *Chevron*, the opinion in *Loper Bright* provides only a narrow possible path forward for litigants.

The principle of stare decisis prohibits courts from revisiting holdings of earlier cases, absent a "special justification" beyond just an incorrect ruling. The Supreme Court in *Loper Bright* and other decisions considered the quality of earlier reasoning as one factor in whether stare decisis should apply. Other factors to consider include the workability of the rule established, public reliance on the existing rule, and whether intervening factual or legal developments have made the precedent irrelevant or unjustifiable.

The key question for potential litigants wishing to revisit rulings that relied on *Chevron* is whether *Loper Bright* has at least lowered the bar for courts to find special justifications for disregarding past precedent. If the poor judicial reasoning in *Chevron* is seen as infecting the decisions relying on it, then courts may be open to revisiting earlier decisions when an additional factor is implicated.

For example, post-*Loper Bright*, a court may be willing to revisit precedent relying on *Chevron* that creates an unworkable rule when it wouldn't have done so before. This is a critical issue that APA litigants should monitor closely.

The reasoning behind *Loper Bright* also raises a question about the future of other types of judicial deference to federal agencies, particularly deference recognized in 1997 by *Auer v. Robbins*. While the *Chevron* doctrine required courts to give considerable weight to agencies' interpretation of their statutes, agencies' interpretations of their own regulations are afforded even greater deference under the Supreme Court's decision in *Auer*.

In 2019, the Court significantly limited the scope of *Auer* deference in *Kisor v. Wilkie* but declined to overrule it outright. The decision relied in part on an argument that Congress intended agencies to have interpretative power and invoked stare decisis as another basis for leaving *Auer* in place. With *Loper Bright*'s majority rejecting similar arguments, *Chevron*'s fall could take *Auer* with it. This would even further shift power from federal agencies to the courts.

We are seeing a generational change in APA litigation. New laws must grow to fill the gaps. The coming days will bring new opportunities to shape the regulatory landscape for

businesses and individuals who can clear the APA's many procedural hurdles. We are excited to see what this post-*Chevron* world will bring.

The cases are Loper Bright Enterprises v. Raimondo, U.S., 22-451, 6/28/24, and Relentless v. Department of Commerce, U.S., 22-1218, decided 6/28/24.

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