



LOPER BRIGHT: Navigating the new era of regulatory deference

In June 2024, the Supreme Court (The Court) announced their decision in the case, *Loper Bright Enterprises et al. v Raimondo* (Loper Bright), in favor of the plaintiffs, ruling in a 6-3 vote that the National Marine Fisheries Service overstepped its agency authority in requiring a private business to pay for the federal agency observers who were monitoring operation on their fishing vessels. The justices also affirmed that this decision overruled the 1984 case, *Chevron U. S. A. Inc. v. Natural Resources Defense Council*, otherwise known as the Chevron doctrine.

INTRODUCTION

Often, when Congress passes legislation, there is ambiguity in language, gaps in directives, or conflicting interpretations of regulations that need to be addressed. Until last June's *Loper Bright* decision, interpreting these ambiguities, differences, and gaps usually fell to federal agencies, as enacted by the Administrative Procedure Act (APA), the 1946 federal law that governs how federal agencies create and implement rules and regulations and how courts review agency actions. This was governed by the *Chevron* deference, which offered a two-step framework for courts to review how agencies interpret statutes in accordance with the APA:

1. Determine if a statute is clearly written. If it is clear, apply the statute as written.
2. If the statute or legislation is determined ambiguous or leaves an administrative gap, then courts should defer to an agency's 'reasonable interpretation' – "even if a court, left to its own devices, would interpret it differently."¹

In its *Loper Bright* ruling, The Court diminished the deference given to federal agencies and found that the APA "requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous."² The ruling emphasizes a stricter interpretation of statutory authority and limits the discretionary powers of agencies in areas where Congress has not explicitly granted authority.³

Lower courts can now apply a different evidentiary standard when a federal rule is challenged in the district courts. Courts may choose to defer to an agency interpretation, particularly with respect to expertise and practice – but agencies will no longer have broad discretion in issuing, defending, and enforcing their regulations when a statute is ambiguous or leaves an administrative gap. It is important to note that *Loper Bright* does not invalidate or eliminate any existing regulations based on the application of *Chevron* deference.

KEY POINTS

Loper Bright alters the landscape of administrative law and necessitates careful examination of how federal agencies conduct their regulatory functions. This is likely to impact companies across many industries, as well as pending and future court cases. In reviewing this ruling’s impact on business and industry, companies should consider several factors:

- + **Increased litigation:** With courts no longer required to defer to agencies, there is likely to be a surge in legal challenges to agency rules and regulations, especially where ambiguity exists in the underlying statute. The increased litigation will likely significantly increase defense costs for entities embroiled in legal disputes in multiple states.
- + **Stricter scrutiny of agency interpretations:** Courts must now carefully analyze and interpret agency actions independently, potentially leading to more in-depth review processes.
- + **Focus on Congressional intent:** To determine the best interpretation of a statute, courts will likely place greater emphasis on understanding the clear intent of Congress when drafting legislation and prompt more precise language within the legislation as well.
- + **Impact on various industries:** Sectors heavily regulated by federal agencies, like life sciences, healthcare, and manufacturing, could see significant changes as courts re-evaluate existing regulations under the new standard.
- + **Potential for legislative response:** Some lawmakers may attempt to codify a version of *Chevron* deference through legislation to address concerns about the potential disruption caused by the *Loper Bright* decision.
- + **Stare decisis holds:** In the *Loper Bright* decision, the justices included a paragraph stating that courts will need to follow previous agency actions upheld under the *Chevron* framework when similar issues arise.

CASE STUDY: THE FCC AND NET NEUTRALITY

In January of this year, the U.S. Court of Appeals for the 6th U.S. Circuit Court of Appeals (Sixth Circuit) ruled against the Federal Communication Commission’s (FCC) 2024 restoration of the net neutrality rules, holding that the agency should regulate the telecommunications services as a lightly regulated “information service” instead of a highly regulated “telecommunications service.”⁴ Under the Obama administration, the FCC implemented net neutrality, which required internet service providers to treat internet data and users equally rather than restricting access, slowing speeds, or blocking content for certain users. The rules also forbid special arrangements in which ISPs give improved network speeds or access to favored users. Under the Trump administration, the FCC repealed this ruling.

The Sixth Circuit directly cited *Loper Bright* in its ruling. “But unlike past challenges that the D.C. Circuit (United States Court of Appeals for the District of Columbia Circuit) considered under *Chevron*, we no longer afford deference to the FCC’s reading of the statute. ... Applying *Loper Bright* means we can end the FCC’s vacillations.”⁵ The issue the Sixth Court looked to address was the continuous back-and-forth rulings set by the FCC on how to classify broadband communications, which goes back to the Clinton administration, even when the statute remained unchanged. According to Judge Griffin: “As Congress has said, the Internet has “flourished, to the benefit of all Americans, with a minimum of government regulation.” 47 U.S.C. § 230(a)(4).⁶ The Federal Communications Commission largely followed this command from the Telecommunications Act of 1996 by regulating the Internet with a light touch for nearly 15 years after enactment. However, since then, the FCC’s approach has been anything but consistent. Broadband ISP is now defined as an Information Service and, therefore, cannot be regulated by the FCC utilizing the *Loper Bright* rule.

IMPACT ON OTHER INDUSTRIES

In just two months since the ruling, there were 110 federal cases in which parties or judges cited *Loper Bright*.⁷ These federal cases covered a wide range of issues and industries, from overtime regulations and airline fee disclosure to banning non-compete clauses. Industries with substantial agency oversight or those who are governed by multiple agencies are likely to see a greater impact from *Loper Bright*, such as:

+ Life Sciences

The *Loper Bright* decision is likely to significantly impact the life sciences industry by making it easier for companies to challenge federal agency regulations, potentially leading to increased litigation against the Food and Drug Administration (FDA). The ambiguity of FDA regulations has long been disputed. In 1989, the D.C. Circuit was called to interpret the FDA’s requirement that a drug’s intended use have medical significance in order to be “effective in use.” The Court sided with the FDA, declining to examine “whether the statute compels the agency’s ... reading” and “turn[ed] directly to the question whether the agency’s interpretation, as applied to this case, is permissible under the second step of *Chevron*.”⁸ Post *Loper Bright*, courts are tasked with determining what “the statute compels” rather than making a simple determination of whether the FDA’s interpretations are “reasonable”. This could both present opportunities to challenge regulations and increase risks related to regulatory uncertainty and potential delays in product approvals.

+ Healthcare

This ruling dramatically changes the landscape for the healthcare industry, whose many sectors are heavily regulated and often at odds with the agencies that regulate them.⁹ Already, *Loper Bright* has had an impact; shortly after the ruling was handed down, courts in Mississippi and Texas cited The Court’s decision when they declined to defer to rulings made by the Department of Health and Human Services. As cases evolve, regulatory challenges are expected, and each industry will need time to navigate these complexities due to oversight by multiple agencies.

+ Manufacturing

Numerous agencies exercise regulatory oversight over the many manufacturing sectors, such as OSHA, FDA, FTC, or FSIS, and *Loper Bright* is likely to have a considerable impact. Even court rulings not directly tied to the industry may have an effect on businesses, such as the recent finding by a federal court in Texas indicating that the Department of Labor's rule to increase the minimum salary level for exempt employees would not survive under *Loper Bright*.¹⁰ This clearly limits the power of agencies in the regulatory process, and though previous agency rulings may hold under stare decisis, experts expect an increase in legal challenges.

+ Energy

The energy industry encapsulates a wide range of sectors that fall under a wide scope of federal agencies' oversight. Ending the *Chevron* deference now allows courts to exercise independent judgment in reviewing agency interpretations of their statutory authority and could open doors for potential litigants to feel strongly enough about a case to challenge agency actions. The energy industry should prepare for an uptick in litigation and potentially more unpredictable outcomes as courts navigate this new terrain.¹¹



ANOTHER IMPACTFUL CASE

Another Supreme Court decision issued a few days after *Loper Bright* may make it easier for affected persons to bring legal challenges to longstanding regulations. In *Corner Post, Inc. v Board of Governors of the Federal Reserve System*, the Court determined that the Administrative Procedure Act's six-year statute of limitations for challenging a regulation doesn't begin when that regulation is established, but rather when the regulation first affects a person or entity bringing the legal challenge. In *Corner Post*, the Court found that a recently incorporated business's challenge to an existing regulation wasn't time-barred since it was newly subject to that rule. Coupled with *Loper Bright*, this ruling could invite even greater legal challenges to longstanding regulations and agency enforcement.

CONCLUSION

Since its ruling, *Loper Bright* has generated mixed reactions. There is optimism among companies who see an avenue to challenge agency interpretations of statutes and limit their enforcement. It also offers an opportunity for agencies to strengthen regulatory frameworks and enhance their effectiveness. But, as this is an uncharted regulatory territory, there are many questions. In an already overburdened federal legal system, how will the courts manage the additional caseload? Will companies look to 'shop' for jurisdictions that they believe are more ideologically favorable?

The Court's ruling comes during a period of regulatory uncertainty, with numerous court cases already citing *Loper Bright* and a new administration's focus on deregulation. Companies in industries that have federal agency oversight can begin to seek legal and insurance counsel to understand the potential impacts of *Loper Bright*, in order to adjust to any immediate and future impacts.

INSURANCE AND RISK MITIGATION CONSIDERATIONS

Vacillating court options and judgments are not new. If you look at the history of the FCC and Net Neutrality, there are 90 years of dithering on whether telecommunications can be regulated under the FCC; the underlying question pondering telecommunications service versus information service starting in the 90s. Federal decisions can have a direct impact on risk mitigation and insurance portfolios for commercial entities as they push more power to states.

Preparations for turbulent times can be as simple as keeping up with regulations and litigation in your space. Working with your broker to delve into contractual specifics and modeling worst-case scenario simulations based on your geographic footprint will be imperative as you work to protect your bottom line.



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