A New Chevron: The End of the Chevron Deference Doctrine

By Jahnavi Kari

Which of the following two options should beget more trust from the populace, more surety in the idea that a given law will be the best in accomplishing its intended job: facts or opinion? Nonfiction or fiction? Experts or politicians? While the former was relied upon more often than not prior to June 28, 2024, now it seems that the latter will soon become our new legislative reality. “Due to what?” one may ask. The answer is the Chevron deference doctrine, the very thing overturned by the United States Supreme Court last Friday [June 28, 2024] in the landmark cases Loper Bright Enterprises v. Raimondo, 603 U.S. ___ (2024), and Relentless, Inc. v. Department of Commerce (citation pending).

This article will explore the history behind the Chevron deference doctrine, its overturning, the implications of its overturning, and what the world will look like without it. After all, in the words of prominent Canadian suffragist Nellie Letitia McClung, “People must know the past to understand the present, and to face the future.”[1]

I. History in the Making: What is the Chevron deference doctrine?

> The Chevron deference doctrine was established in the 1984 Supreme Court case Chevron U.S.A., Inc. v. Natural Resources Defence Council, Inc., 486 U.S. 837 (1984). The case involved Chevron, an American multinational energy corporation that specializes in oil and gas, defending a Clean Air Act regulation established by the Environmental Protection Agency (EPA) that allows states to treat all pollution-emitting devices in the same industrial grouping as one “bubble”, thereby allowing for the installation and modification of a single piece of equipment without a permit if it didn’t change overall emission levels.[2] Several pro-environmental groups, including the Natural Resources Defence Council, challenged the agency-established bubble provision as being contrary to the Clean Air Act, but in an unanimous court decision, the Supreme Court held that the bubble regulation was a reasonable definition and interpretation of the “stationary

source" in the Clean Air Act. More broadly, the Court instituted the Chevron deference doctrine, which held that government agencies must conform to any clear legislative statements when interpreting and applying a law but are given deference by the courts in ambiguous situations as long as their interpretation/answer is deemed not unreasonable.[3]

Through this, Chevron enabled the federal bureaucracy, especially agencies, and the President, by extension, to legislate outside of Congress with the last words on implementation and regulation in their hands. As one of the most integral parts of administrative law, Chevron has enabled a number of major acts including but not limited to new Environmental Protection Agency climate regulations, the Federal Trade Commission's ban of non-competes, and the Department of Labour's expansion of overtime pay eligibility.[4, 5]

II. Reliving It: The Overturning of the Chevron Deference Doctrine

While there were inklings of the overturning of the doctrine already present at the beginning of this current Supreme Court term, the first major step was taken not with Loper Bright Enterprises v. Raimondo nor Relentless, Inc. v. Department of Commerce, but with Sackett v. Environmental Protection Agency, which was decided nearly a year earlier on May 25, 2023. Sackett v. Environmental Protection Agency, 598 U.S. ___ (2023), dealt with the case of the Sacketts litigating the EPA over their [EPA's] block of the construction of their home as, by the EPA's definition of navigable water, the Sacketts were violating the Clean Water Act by obstructing wetlands, which they [EPA] defined to be "navigable water", with the construction. However, in a 5-4 decision, the Supreme Court sided with the Sacketts, stating that the agency's definition for "waters of the United States" was far too broad, thereby limiting the power of the Chevron deference doctrine. [6] Related cases that follow this recent trend of judicial curbing of bureaucratic power include Corner Post, Inc. v. Board of Governors of the Federal Reserve System, 603 U.S. ___ (2024),[7] and Securities and Exchange Commission v. Jarkesy, 603 U.S. ___ (2024).[8, 9, 10]

Succeeding Sackett was Loper Bright Enterprises v. Raimondo, 603 U.S. ___ (2024), and Relentless, Inc. v. Department of Commerce, both of which dealt with cases involving challenges to a rule that required fishing businesses to pay the salaries of observers that they were required to carry on board if eligible under federal law. The rule, which was introduced under the 1976 Magnuson-Stevens Act by the National Marine Fisheries Service, was argued to be illegal by the petitioners, various fishing businesses, as the Act did not "authorize" the imposition of those costs on them, despite the precedent established under the Chevron deference doctrine.[11] Strikingly, in a 6-3 decision, the Supreme Court rescinded the Chevron deference doctrine and remanded the case, finding that the doctrine conflicted with the 1946 Administrative Procedure Act, which required courts to exercise their independent judgement when deciding whether or not an agency has acted within its statutory authority in a given instance. Specifically, the Court elaborated that, under this Act, courts can not defer to an agency's interpretation of the law solely on the basis of the establishing statute's ambiguity.[12] While courts may continue to defer to agency interpretations as outlined explicitly by Justice Roberts in the Court's opinion in Skidmore v. Swift & Co., 323 U.S. 134 (1944),[13] much will still be left to case-by-case decisions, leaving the specifics up in the air and reliant upon a given court's whims.

Something of note in regards to the overturning of the Chevron deference doctrine was that, in the case of Loper Bright, it was not brought solely by the affected herring fishermen: tax filings have linked the attorneys involved in the case to the Koch network, the right-wing fundraising coalition led by billionaire and long-time anti-regulation activist Charles Koch. In addition, the fishermen's court representation is from the oversight group Cause of Action, which is a part of Koch's Stand Together network and is funded primarily by allies Americans for Prosperity (led by Koch) and Stand Together, previously known as the Seminar Network.[14] In regards to this, in 2022, Stand Together through economic policy analyst Jorge Lima stated their intent to "double down" on their strategy to overturn Chevron and litigate the Supreme Court through carefully selected cases "that can

prompt the type of decisions" they are seeking. Similarly, in Relentless, the petitioners were backed by the New Civil Liberties Alliance, which has been notably donated to by Charles Koch and right-wing judicial activist Leonard Leo, as revealed by tax filings.[15, 16, 17] Previously, Leonard Leo has stated his major priorities to include the overturning of the "administrative" state, which he says is "a huge, glaring issue" and is "the next step in the national debate about the proper role of the courts."[18]

Nonetheless, the overturning of the Chevron deference doctrine is a monumental decision and, while it has no direct effect on past actions of the executive branch, it will mean everything to the state of the United States and, in relation, the world.

III. Outliving It: A World Without the Chevron Deference Doctrine

But, that very future is already at the US' doorstep. Just hours after the Supreme Court's decision, a District Court Judge already halted the Department of Labour's expansion of overtime eligibility for public employees in Texas starting July 1 with a signaled nationwide ripple effect.[19] Following this precedent, the legal landscape surrounding both the Supreme Court and the lower courts is likely to be significantly affected with cases like Consumer Financial Protection Bureau v. Townstone Financial, which deals with the Chevron framework in the context of mortgage redlining regulated under the Equal Credit Opportunity Act,[20] in deliberation and on the horizon. More concerning is the upheaval of the entire regulatory industry landscape that is likely to occur within the following months with several groups and law firms having already expressed interest in pursuing further litigation against bureaucratic actions, especially in front of sympathetic judges.[21]

Specifically, the industries likely to be most affected by the upending are energy (environmental regulation), financial services (consumer protection regulations), and healthcare.

A. Energy & Environmental Regulation

It has already become quite clear that the interpretation and implementation of a variety of federal regulations and policies, forecasted and executed, concerning oil, gas, and mineral development on federal lands and waters will be challenged, following the newly established standard of judicial review concerning agency action. Before the decision, the 5th U.S. Circuit Court of Appeals was facing a pending case from the Western Energy Alliance, a Denver-based oil and gas organization, and a coalition of Republicans that challenged a Department of Labour rule that elevated environmental, social, and governance (ESG) factors in investment income returns for retirees and workers. Likely to be re-evaluated due to its proposal under the Employee Retirement Income Security Act, the case alongside objections to Federal Energy Regulation Commission's Order 1920, a landmark rule on transmissions that allowed states a large rule in transmission planning and overhauled financing for U.S. power grids, are one of many to follow.[22]

B. Financial Services & Consumer Protection Regulations

Regulations by the Consumer Financial Protection Bureau (CFPB), well-known for its aggressive behavior in maintaining consumer protection statutes, are the most likely to be challenged and overturned. Already, its [CFPB's] UDAAP authority regarding discrimination beyond any specific anti-discrimination laws, its small business lending data collection and reporting rule, its credit card late fee rule, and its payday lending rule are facing challenges in the Fifth Circuit and may be re-evaluated in light of the Chevron upturning. Other regulations likely to be challenged include its Buy-Now, Pay-Later interpretive rules, regulations concerning the establishment of non-bank registries of judgements and consent orders, overdraft fees (proposed), NSF fees (proposed), open banking (proposed), larger participant rules for payment providers (proposed), and a proposed amendment to the Fair Credit Reporting Act concerning the reporting of medical debt.[23] Regulations by other agencies are also in jeopardy, chiefly the new rules issued (by the Federal Reserve Board, the Office of The Comptroller of The Currency, and the Federal Deposit

Insurance Corporation) under the Community Reinvestment Act (facing challenges in the Texas federal district court), Federal Trade Commission regulations around car dealer practices (facing challenges in the DC Circuit Court of Appeals),[24] and a variety of regulations from the U.S. Securities and Exchange Commission.[25]

C. Healthcare

Unlike the two previous industries, the Chevron deference doctrine has been somewhat limited in its applications regarding the healthcare industry, but will, nevertheless, still have a marked effect on bureaucratic regulation. While many regulations are likely to go unchallenged like safety requirements for U.S. Food & Drug Administration (FDA) approval or Centers for Medicare & Medicaid Services' decisions on Medicare/Medicaid treatment coverage, other regulations from the U.S. Department of Health and Human Services (HHS), the U.S. Food & Drug Administration, the HHS Office of Civil Rights, the Centers for Medicare & Medicaid Services, and other agencies are likely to face increased challenges, considering their wide purview and technical nature.[26]

In addition to the aforementioned areas, regulations concerning real estate, education, transportation, telecommunications, and taxes are also likely to be significantly affected. In other words, no matter the area, the discarding of the Chevron deference doctrine is likely to have an effect of some sort.

IV. Living Without It: A Future Without the Chevron Deference Doctrine

While the impact of the overturning of the Chevron deference doctrine on industry is incredibly salient, the far more concerning impact that it will have is on the legal landscape of America, and, in relation, the World.

Although the overturning of the doctrine has brought along increased scrutiny on agency regulation and helped the balance of power between the executive branch and the legislative and judicial branches, the overturning

has also placed ill-suited responsibilities in the hands of the legislators and judges. Namely, the fact that the overturning asks judges and legislators to make decisions on content areas that they have little to no knowledge about. While agencies are made up of staff that are knowledgeable in the areas that a given agency regulates, the United States Congress and the US court system simply do not have that. How could one expect a person with just general knowledge on a wide variety of areas (ie. a judge or legislator) to make decisions on what qualifies as a protein in biological products (U.S. Food & Drug Administration) or what constitutes as "distinct population segments" of imperiled plants or animals under the Endangered Species Act (U.S. Fish & Wildlife Service)?[27] They can't, simple as that: judges have limited resources for sourcing outside expertise[28] that are often mistaken or skewed[29] while legislators have been scrambling to source resources (staff and access to high quality, non-partisan expertise) in the first place.[30] Furthermore, in the case of judges, with a wide spectrum of ideologies that are all vested with the same interpretative authority regarding Chevron, significant conflicts in implementations are likely to arise with the only counterbalances being either higher judges or Congress, both of which involve processes that take a lot of time that can not be afforded in the case of regulation.[31] Either way, a recipe of chaos for both the legal system and industry has been generated.

In summary, this article has explored the history behind the Chevron deference doctrine, its overturning, the implications of its overturning, and what the world will look like without it. No matter the eventual ending, the overturning of the Chevron deference doctrine is the start of a new era for the US and the world. All that is left is to wait and see the result:

"The future is completely open and we are writing it moment to moment."[32]

Endnotes

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