

# Judicial Challenges to Agency Action

The Changing Landscape for Nonprofits in a *Post-Chevron* World



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# What We Will Cover Today

## Setting the Stage

Judicial Review of Agency Decisions

## Overview of the Case

Two Consolidated Cases with a Very Specific Issue

## *Chevron* and Its Application

Deference to Agency Decisions Above All

## The Court's Decision

Courts Get to Interpret Statutes

## Implications of *Loper*

The Good, the Bad, and the Ugly?

## Practical Implications

Pluses and Minuses of *Loper* and How to Adjust

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# Setting the Stage

## Judicial Review of Agency Decisions

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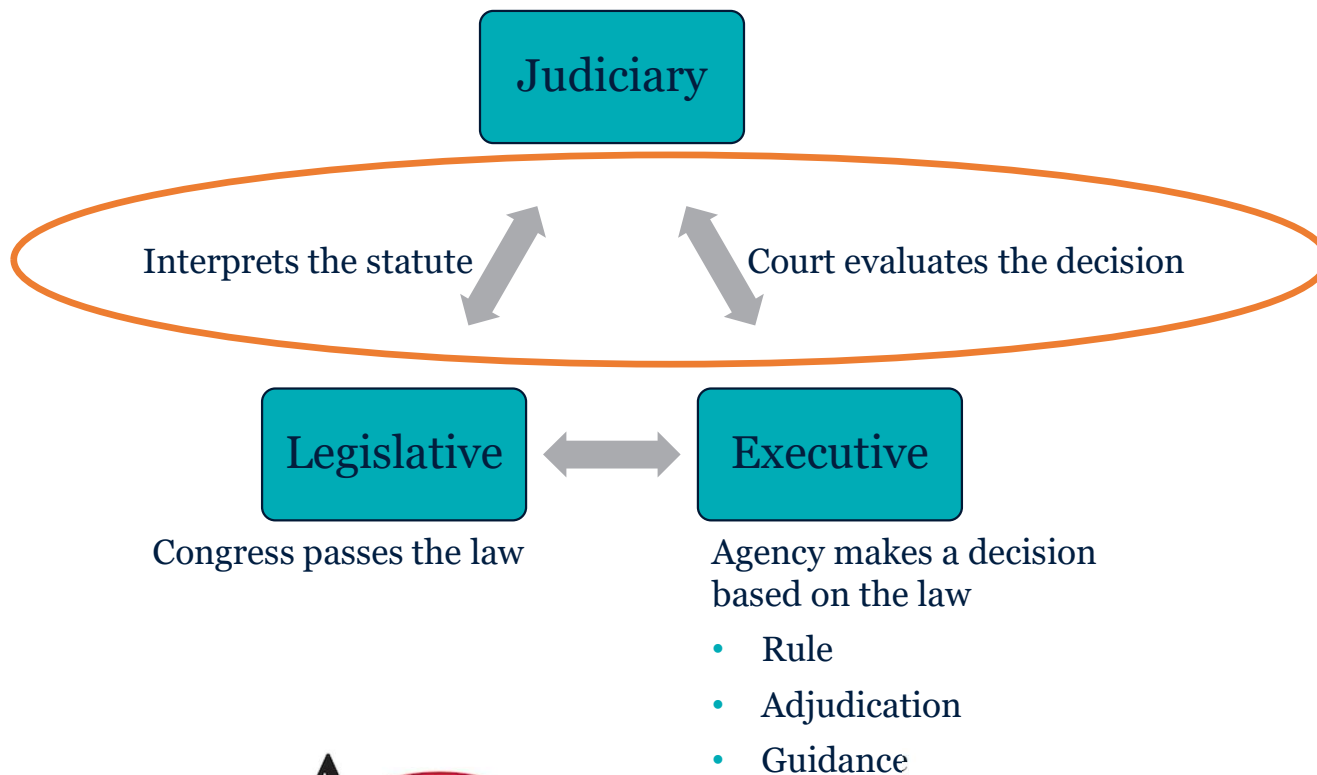
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# What We're Talking about

How a court reviews an agency decision



# Two Frameworks at Odds

## Administrative Procedure Act

### **Section 706:**

To the extent necessary to make a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

### **Section 706(2)(A):**

Courts must “hold unlawful and set aside agency action, findings, and conclusions found to be...not in accordance with law.

## *Chevron*

Created two-step framework

**Step 1:** Whether Congress has spoken to the precise question at issue.

- If the intent of Congress is clear, that is the end of the matter and courts must reject administrative constructions that are contrary to clear congressional intent employing traditional tools of statutory construction.

**Step 2:** If the statute was silent or ambiguous with respect to the specific issue.

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# Overview of the Case

Two Consolidated Cases with a Very Specific Issue

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## Specifics of Statute and Agency Action



- Magnuson-Stevens Fishery Conservation and Management Act
- Regional councils develop fishery management plans to be approved by National Marine Fisheries Service (NMFS) (Department of Commerce)
- Plans require observers on vessels to be certain catch limits are complied with
- Statute says three groups can be required to pay:
  1. Foreign fishing vessels
  2. Vessels in limited access privilege programs
  3. Vessels in the North Pacific Council jurisdiction
- Case brought by Atlantic herring fishers arguing that the statute did not authorize NMFS to charge them for observers

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## Two Challenges

### *Loper Bright Enterprises v. Raimondo*

- Brought case in D.D.C. under the APA
  - D.D.C. granted summary judgment to government
    - MSA authorized the rule
    - Even if ambiguous, then *Chevron* deference to agency's interpretation would prevail
  - D.C. Circuit Affirmed
    - “Not wholly unambiguous”
    - “Some question” as to congressional intent
    - Interpretation reasonable under *Chevron*

### *Relentless Inc. v. Dep. of Commerce*

- Brought suit in the District of Rhode Island under the APA
  - District court deferred under *Chevron* to NMFS
  - First Circuit affirmed
    - “Default norm” that regulated entities bear costs of compliance
    - Applied *Chevron*'s two-step framework but not clear as to how it was doing so
    - “Agency's interpretation of its authority...does not exceed the bounds of the permissible”

Supreme Court granted cert on question of whether to overrule *Chevron*

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# ***Chevron* and Its Application**

**Deference to Agency Decisions Above All**

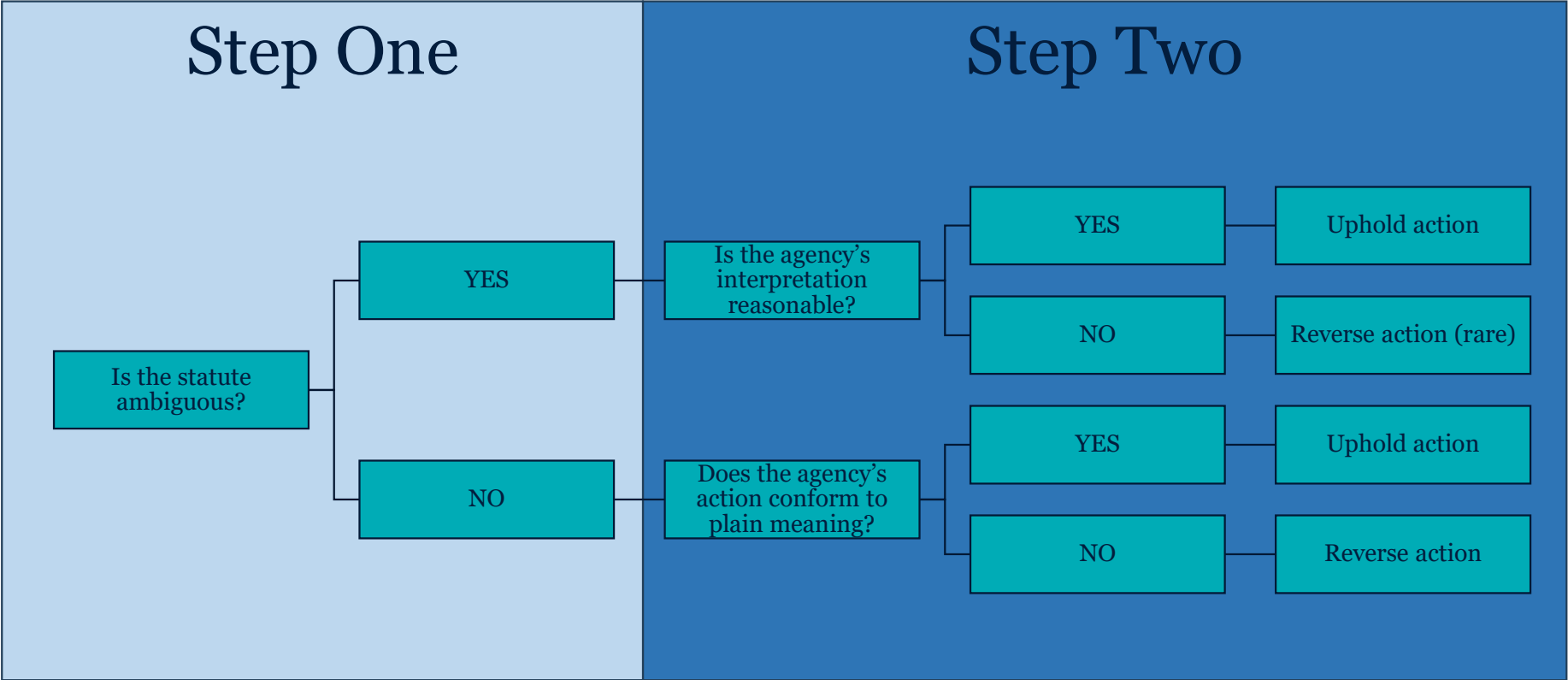
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# The Chevron Two-Step



## Some Examples

- *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 501 (2nd Cir. 2017) (reversing District Court holding that Agency’s interpretation was unreasonable).
  - “It may well be that [the Agency’s] interpretation of the Clean Water Act is not the interpretation best designed to achieve the Act’s overall goal of restoring and protecting the quality of the nation’s waters. But it is nonetheless an interpretation supported by valid considerations [...]. **While we might prefer an interpretation more consistent with what appear to us to be the most prominent goals of the Clean Water Act, Chevron tells us that so long as the agency’s statutory interpretation is reasonable, what we might prefer is irrelevant.**”
- *Orloski v. Fed. Election Com.*, 795 F.2d 156, 165, 167 (D.C. Cir. 1986) (granting deference to the FEC “[n]otwithstanding [its] failure to produce a detailed analysis in support of its interpretation”).
  - The Court provides four principal reasons for granting deference to the FEC’s interpretation, but notes that the **FEC’s “interpretation carries with it a greater potential for abuse than does the interpretation advocated by [Petitioner]. Indeed, it can be argued that [the FEC’s] interpretation is at the outer bounds of permissible choice.** But because it is still a ‘reasonable choice within a gap left open by Congress . . . [Petitioner’s] challenge must fail.’”

## Some Examples

- *Am. Mun. Power-Ohio v. EPA*, 98 F.3d 1372, 1375 (D.C. Cir. 1996) (finding the EPA’s interpretation of the thermal energy exception reasonable even if “shortsighted”).
  - The Court concedes in various sections that the “Petitioner has a point,” and “Petitioner’s definition [is] plausible.” Additionally, “Petitioner’s credible argument that a broader exception would encourage [better energy efficiency among the regulated community] suggests only **that EPA’s definition may be shortsighted, not that it is implausible**. Whether the environmental benefits from [Petitioner’s interpretation] outweigh the environmental costs of [EPA’s interpretation] is a question for EPA and Congress, not this Court.” (emphasis added)
- *Pharm. Research & Mfrs. of Am. v. Thompson*, 362 F.3d 817, 824 (D.C. Cir. 2004) (finding that under *Chevron* the Secretary of HHS “reasonably chose an interpretation consistent with the literal meaning of the statutory language,” even though neither party’s interpretation was “entirely satisfactory.”)
  - The court acknowledged that “there is tension, if not actual inconsistency, between the broad prior authorization power granted under [the statute],” and “the apparent intent of the formulary provision to broaden drug availability.” However, “[t]he tension is a necessary consequence of the language the Congress drafted.”
  - “The [Agency’s] construction is to be given its plain meaning, albeit with a somewhat anomalous result.”

## Policy Rationale

“ A presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

*Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996)  
*see also National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005)

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# Chevron Pros and Cons

## Positives

- Gives agencies wide authority to regulate
- Allows agencies to update rules for new technology and new issues
- Reduces or avoids judicial second-guessing
- Gives the policymakers the ability to make policy
- Agencies can change their mind and reach different policy positions

## Negatives

- Easy for the court to become a rubber stamp
  - You can always find ambiguity
  - Easy to defer to the agency's expertise
- Encourages agencies to push the bounds of their authority
  - If source of authority is not clear, then ambiguity tilts the scale
- Thumb is always on the scale for the agency

## Where Does This Come Up?

### Interpreting a statutory phrase

- *Chevron*
- Interpreting stationary source in Clean Air Act

### Applying facts to law in adjudication

- KC Transport (see slide below): agency found a truck maintenance yard to be a coal or other mine even though not at or adjacent to a mine

### Finding authority to take an action

- *Loper*: collecting costs for observers
- *West Virginia v. EPA*: major questions doctrine

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# The Court's Decision

Courts Get to Interpret Statutes

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## What Did the Court Decide?

- Outcome for the herring fishermen is very limited for now
  - *Chevron* is reversed and the cases remanded to lower courts to decide without using *Chevron* framework or deference
  - Court did not decide the merits of the cases—the lower courts will have to decide whether the agency has authority
- More broadly:
  - Questions involving statutory interpretation will be resolved very differently
  - *Chevron* framework no longer applies

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# The Opinion

1. Discussed the history of courts interpreting statutes
  - A. Pre-New Deal history
  - B. New Deal history
  - C. 1948 APA enacted
2. Dismantling the *Chevron* decision
  - A. The *Chevron* framework conflicts with the APA
  - B. It is not apparent the Congress wanted agencies to interpret statutes rather than the courts
  - C. The Court has had to make many modifications to *Chevron* to make up for problems with its concept of Congress delegating through ambiguity to agencies
3. *Stare decisis* does not require the Court to keep *Chevron*



## The Core Holdings

Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.

Careful attention to the judgment of the executive branch may help inform that inquiry.

When a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it.

Courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

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## Other Key Points

There is a plain meaning for the courts to decide

- The basic nature and meaning of a statute do not change when an agency happens to be involved.
- Nor does it change just because the agency has happened to offer its interpretation through the sort of procedures necessary to obtain deference, or because the other preconditions for *Chevron* happen to be satisfied.
- **The statute still has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit.**

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## Other Key Points

*Chevron's* framework misses the point

At best, our intricate *Chevron* doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action?

## What About Earlier Decisions?

By doing so, however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—and are still subject to statutory *stare decisis* despite our change in interpretive methodology. Mere reliance on *Chevron* cannot constitute a “special justification” for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, “just an argument that the precedent was wrongly decided.” That is not enough to justify overruling a statutory precedent.

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# Implications of *Loper*

The Good, the Bad, and the Ugly?

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## Remands of Pending Cases

### Foster v. U.S. Department of Agriculture

- National Resource Conservation Service determined that a puddle on a farm that forms when snow melts is a “wetland” subject to certain rules
- Courts had all deferred to agency under *Chevron* on claim that the operable regulation for reviewing the determination was not consistent with the Swampbuster Act

### KC Transport v. Secretary of Labor

- Cited for mining safety violations even though does not operate a mine
- D.C. Circuit found the interpretation to be ambiguous and remanded for agency to find a justification

## Agency Oversight – A Broader Trend

### Statute of Limitations

- *Corner Post, Inc. v. Board of Governors*
- 6-year statute of limitations only begins when plaintiff is injured
- Regulations adopted in 2011 could be challenged in 2021 because the plaintiff was formed in 2018

### Right to Jury Trial

- *SEC v. Jarkesy*
- When SEC seeks civil penalties, defendant entitled to jury trial
- Internal SEC forum does not satisfy Seventh Amendment

# Is the Sky Falling?

Yes

Agencies will be hamstrung and won't be able to act

Special interests will thwart agency action

Unelected judges will be making policy decisions

Less democratic accountability

No

Agencies will be limited to the power delegated to them

The regulated will be able to challenge agency overreach

Courts are given the role of interpreting statutes

Less bureaucratic overreach and more accountability

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# What About Broad Statutes?

FTC, FCC, CFPB, EPA?

And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it.

To stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA. By forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* does not prevent judges from making policy. It prevents them from judging.

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# Legislative Issues

Congress will have to be clear about who gets to decide

- Clear delegations of rulemaking authority

- Clearer definitions

- Understanding that if things aren't clear, courts will make determinations

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# Practical Implications for Nonprofits

Pluses and minuses of *Loper* and how to adjust

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# Dealing with Agencies

## Adopting New Rules

How clear is the statute?

Can you help support the agency's interpretation?

Does the agency have express rulemaking authority?

Are there technical or scientific issues delegated to the agency for determination?

Can you provide technical support?

## Challenging New Rules

Can you demonstrate the agency's reading is not the best?

Is the agency using ambiguous language to expand its authority?

## Enforcement Actions

Are the rules at issue grounded in the statute?

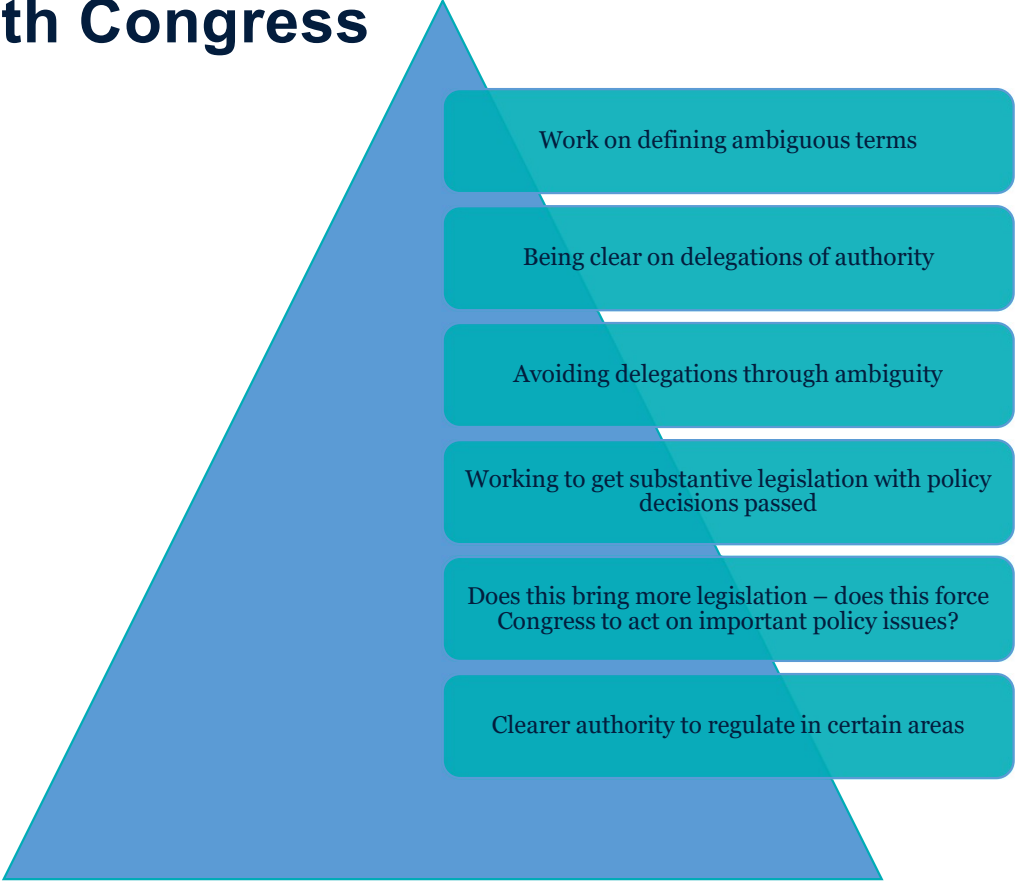
Is the agency's position based on ambiguous authority?

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# Dealing with Congress



## Dealing with Courts

- Will need to demonstrate textual arguments against agency decisions
- Will no longer need to worry whether the statute is ambiguous
- Will need to demonstrate the best interpretation of a statute

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## Other Issues

- When dealing with compliance issues, is the regulation consistent with the statute?
- If an agency rule is being challenged, how will members be affected if it is struck down?

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