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Agency Action Challenges In The Second Trump Administration

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Agenda for Today

- How has the Supreme Court reshaped administrative law, and are there new pathways for relief from agency action?
  - *Chevron* and *Loper Bright*
  - *Kisor* deference
  - Major questions
  - *Corner Post*
  - Interpretive rules
- Although the administration has articulated an aggressive use of executive power, are there defined limits that can check agency overreach?
  - Executive orders
  - Non-enforcement
  - The “good cause” exception

Common Issues to Look For When an Agency Acts

Factors to Consider When Seeking an Administrative or Litigation Remedy

- What is the source of the agency's action and authority; is it
  - A statute
  - A regulation
  - A sub-regulatory manual or similar publication
  - An individual agency official's position
- Does the agency's action create new substantive law, impose new obligations, or are there concrete legal consequences that flow from the agency's action?
- Is the agency's action really a final agency decision?
- Is the agency's action insulated from administrative or judicial review?
- Is there an administrative review process that must be followed, or are there reasons why exhaustion can be waived?
- What are our litigation options?

Loper Bright and *Chevron's* Demise – A Refresher

- *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984) established the basic test for judicial review of agency interpretations of the statutes that they administer.
- The *Chevron* Court set out a two-part test:
  - (1) Did Congress speak directly to the precise question at issue? If yes, then a reviewing court should apply the law as written
  - (2) If the statute is ambiguous, then a reviewing court should defer to the agency's interpretation as long as it is "based on a permissible construction of the statute."
- In practice, plaintiffs had a good chance of winning at Step One, but rarely won a Step Two case

Loper Bright and *Chevron*'s Demise

- *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024)
- The majority decision focused on the language of 5 U.S.C. § 706 of the Administrative Procedure Act, which states that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions . . . ."
- The majority concluded that *Chevron* was inconsistent with the APA and overruled *Chevron* on that basis.
- "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."
- The Court did not articulate an alternate test or criteria for applying Section 706

What is the Impact of *Loper Bright*?

- *Loper* refers to conclusions of law – courts are supposed to exercise their independent judgment
- Findings of fact are still entitled to deference, and should only be set aside if they are unsupported by substantial evidence
- *Loper* decision does not permit courts to reject discretionary determinations made when Congress has delegated the power to make that determination to the agency
- Court stated that the mere fact that a prior case relied on *Chevron* is not a sufficient basis for overturning it now

Will *Loper* Revive the *Skidmore* Doctrine?

- The Court did not disturb the 1944 decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which permitted lower courts to "respect" and, depending on the facts of each case, rely on an agency's interpretation of the statute. There is no particular level of deference, but a court can consider a sliding scale of factors including:
  - the thoroughness of the agency's consideration of the issue,
  - the formality of the agency's procedures,
  - the validity of the agency's reasoning,
  - whether the agency's interpretation has been consistent,
  - how the agency has demonstrated the exercise of its expertise,
  - whether the agency's interpretation is a new or long-standing agency position, and
  - whether the interpretation is contemporaneous with the enactment of the statute that the agency relies on as its authority.

Kisor Deference to Agency Interpretations of Their Own Regulations is Still With Us

- The *Loper Bright* decision also did not overrule or limit the Court's decision in *Kisor v. Wilkie*, 588 U.S. 558 (2019), which addressed deference to agency interpretations of their own regulations.
- The Court concluded that deference to an agency's interpretation of its regulations is appropriate only after a reviewing court has made several findings:

  - The regulation is "genuinely ambiguous" after exhausting all of the traditional tools of construction
  - The agency's interpretation is "reasonable"
  - The agency's interpretation must be "the agency's 'authoritative' or 'official position' authorized by the agency's head
  - The regulatory interpretation must implicate the agency's "substantive expertise"
  - The regulatory interpretation must reflect the agency's "fair and considered judgment" rather than a "convenient litigating position" or "*post hoc* rationalizatio[n] advanced" to "defend past agency action against attack."
  - It cannot result in an "unfair surprise" or disrupt expectations based on prior interpretations

Limiting Agency Action When There is a Major Question

- In *West Virginia v. EPA*, 142 S.Ct. 2587 (2022) the Court referred to the “major questions doctrine”, which allows a court to sidestep any deference question if there is something extraordinary about the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority.”
- The Court’s rationale was that agency action can be set aside if the agency’s asserted authority to regulate involves an issue of “vast economic and political significance” and Congress has not clearly expressed its intent that the agency exercise its rulemaking authority in that area.
- Nevertheless, the Court has not defined what distinguishes a “major question” from other questions, or what Congress has to do to indicate that a specific matter has been delegated to an agency.

When Can You Bring An Action to Challenge Regulations?

- *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 144 S. Ct. 2440 (2024)
- Under the APA, a cause of action accrues for limitations purposes when the plaintiff is injured by final agency action, regardless of when the regulation that the agency relied on was published
- Does that mean that a regulation can be challenged at any time, making the statute of limitations open-ended?
  The decision does not address this directly, but the dissenters did.
  - As a result, can a new business be created for the purpose of challenging a regulation?
    The consensus is yes.

Agency Actions Based on Interpretive Rules

- Interpretive rules are not subject to notice and comment rulemaking, but as a result do not have the force of law in any adjudication. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015).
- The distinction between interpretive rules and substantive rules is not always clear, but many courts follow an explanation by the D.C. Circuit that "legislative rules impose new legally binding requirements, whereas interpretive rules set forth the agency's explanation of existing legal requirements." *Natural Resources Defense Council v. Wheeler*, 955 F.3d 68, 91 (D.C. Cir. 2020; *Poet Biorefining, LLC v. EPA*, 970 F.3d 392, 407 (D.C. Cir. 2020).

Therefore, did an agency rely on a manual or other subregulatory publication that imposes a new requirement, or is the agency asserting an authority that is not evident from the face of the statute or regulation to take an adverse action?

Executive Orders – Are There Limits?

- On April 17, the Supreme Court agreed to review three injunctions barring the implementation of the President's executive order limiting birthright citizenship. Oral arguments are scheduled for May 15.
- In previous cases, courts have defined limits for the President's authority to act through executive orders based on the scope of a statutory delegation of authority:
  - *Kentucky v. Biden*, 23 F.4th 585 (6th Cir. 2022), the Sixth Circuit ruled that the President's reliance on the Federal Property and Administrative Services Act of 1949 ("FPASA") was limited to improving economy and efficiency in federal procurement, and did not authorize issuing an executive order requiring that all employees of federal contractors must be vaccinated against COVID-19.
  - *Bradford v. U.S. Dep't of Labor*, 101 F.4th 707 (10th Cir. 2024) and *State of Nebraska v. Su*, 121 F.4th 1 (9th Cir. 2024) reached opposite conclusions as to whether FPASA authorized the President to issue an executive order directing the Secretary of Labor to publish regulations setting a minimum wage of $15 per hour for federal contractors.

What if an Agency Doesn’t Enforce Its Rules?

- “This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. . . . This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.” *Cheney v. Heckler*, 470 U.S. 821, 831 (1985)
- But note that *Cheney* did not alter the longstanding rule that agencies must follow their own regulations *(Accardi* doctrine*)*
- While agencies can be held to account when they do act, it is harder to hold them to account when they do not.

Will The Administration Exploit the APA "Good Cause" Exception?

- The APA generally requires notice and comment rulemaking by agencies, but exempts matters "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."
- April 9, 2025 Executive Order ("Directing the Repeal of Unlawful Regulations")
  - "In effectuating repeals of facially unlawful and potentially unlawful regulations, agency heads shall finalize rules without notice and comment, where doing so is consistent with the 'good cause' exception in the Administrative Procedure Act."
  - "The repeal of each unlawful regulation shall be accompanied by a brief statement of the reasons that the "good cause" exception applies."
- On March 3, HHS directed its agencies to rely on the good cause exception "in appropriate circumstances", a much broader instruction than the 1971 policy instructing the department to rely on the good cause exception "sparingly" as with amendments for minor technical matters.

Will The Administration Exploit the APA "Good Cause" Exception?

Courts are Generally Skeptical of "Good Cause" Arguments

- In the absence of a genuine emergency or natural disaster, courts have generally construed the "good cause" exception narrowly
- *Biden v. Missouri*, 142 S.Ct. 647 (2022): upheld a COVID vaccine mandate for health care workers at health care facilities receiving federal funds
- *Sorenson Communications, Inc. v. FCC*, 755 F.3d 702 (D.C. Cir. 2014): Court rejected FCC's argument that its determination of good cause was entitled to deference
- *California v. Azar*, 911 F.3d 558 (9th Cir. 2018): Court rejected HHS's argument that the good cause exception applied to matters involving "legal and regulatory uncertainty" in implementing the Affordable Care Act's requirement for contraceptive coverage
- *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018): Court rejected the government's assertion of good cause that publishing a proposed rule restricting immigration would cause a surge in illegal border crossings; it described the government's position as "speculative".

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Questions and a Thank You