Letting Chevron Go:
Loper Fully Restores Judicial Review Under the APA - Lessons and Strategies for Government Affairs Organizations

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On June 28, 2024, the U.S. Supreme Court overturned four decades of judicial precedent that required deference to federal agency interpretations of ambiguous or absent statutory text. In deciding *Loper Bright Enterprises v. Raimondo* ("*Loper*") the high court's 6-to-3 decision declared the 1984 precedent set in *Chevron USA, Inc. v. Natural Resources Defense Council* ("*Chevron*") "is overruled" and that to ensure meaningful reliance on the law rather than allow agencies to change course the Court must "leave *Chevron* behind."

This important decision is based on the Court's analysis of the federal Administrative Procedure Act ("APA") enacted in 1946, requiring courts to exercise their independent judgment in deciding whether an agency is acting within its statutory authority. The deference that the *Chevron* precedent required of courts in reviewing agency action "cannot be squared with the APA" the Court concluded. Going forward, statutory ambiguity or silence cannot be presumed as implied delegations to agencies, the Court stated.

The Court's opinion notes that *Chevron* was most recently already disfavored by the Supreme Court. Chief Justice Roberts observed in the opinion that the High Court has not deferred to an agency interpretation under *Chevron* in any opinion since 2016. However, federal district courts, and to a lesser extent, federal courts of appeals, have continued to apply *Chevron* deference in litigation involving statutory ambiguities or statutory silence.

For government affairs organizations going forward after *Loper,* this means that "words matter." *Loper* concludes that the Constitution's separation of powers principles demand that Congress be more disciplined and clearer in its statutory enactments. Federal courts exercising judicial review of agency interpretations of law will first apply traditional tools of plain meaning and clear writing to resolve statutory ambiguities. Government affairs entities are not mere spectators but must be vigilant, engaged, and mindful of the meaning of legislative text.

Lesson One: The Congress Comes First Before Judicial Review of Agency Rules

The legislative process will require more attention to detail and its consequences. Congress will be required to be more precise in expressing the purpose of legislation and in the use of statutory text to implement that purpose. Where Congress chooses to delegate authority to the executive branch agencies, the legislation will have to

be explicit and more specific. If Congress chooses to prohibit agencies from making certain interpretations it must say so. These are demands appropriate to the legislative branch but may further inhibit an already impaired process.

Government affairs operations must be more attentive to detail in the legislative process with a clear eye toward future agency rulemaking and the boundaries of the statutory text. The *Chevron* doctrine developed due to statutory ambiguities and statutory silence. The focus of the *Loper* decision is on the review of the statutory text and whether an agency has acted within the boundaries of its statutory authority under the plain meaning of the law's text. Permissible delegations by Congress to agencies must not amount to statutory amendment by an agency.

Government affairs operations must, at the very least, be subject matter experts to review and scrutinize the text of introduced legislation, and where legislation is being sought, provide recommended text and analysis to legislators and staff. When testifying on a particular legislative proposal witnesses must speak not only to the public policy issues attendant to the proposal but also include an analysis of the possible legal issues related to ambiguity or silence that are raised by the text in order to assist legislators in addressing possible judicial review concerns.

Standard legislative text authorizing the secretary of an agency to issue rules "as may be necessary" must now be written employing more specific directives to establish boundaries for the implementing agencies. For example, where statutory text cannot anticipate certain market developments the delegation by Congress must not rise to the level of actually empowering the agency to issue regulations that have the effect of amending a statute. Rather, the delegation must authorize interpretations of specific provisions in the statutory text itself.

Lesson Two: The Courts Employ Established Tools of Statutory Construction

Even under *Chevron,* courts applied a two-part test to apply the doctrine. First, to determine whether Congress had directly spoken to a precise question at issue, and if the intent of Congress is clear then that is the end of the matter and the court could reject an agency's interpretation that was contrary. Second, if the statute is silent or ambiguous on a specific issue, a court would defer to the agency if it offered a permissible construction of the statute thus presuming that ambiguity would be resolved by the implementing agency.

Step one of *Chevron* is retained under *Loper* and courts will use every tool of statutory construction at their disposal to determine the best reading of the statute to resolve any ambiguity. The *Loper* Court notes that the resolution of statutory ambiguities involves "legal" interpretation based on the traditional tools of statutory construction. This is distinguished from the discretionary policymaking left to the political

branches, the *Loper* opinion states, and that the APA requires courts to independently identify and police the outer statutory boundaries.

Government affairs operations must, at the very least, analyze and prepare comments on proposed agency regulations that employ the tools of statutory construction utilized by the courts in anticipation of a challenge and possible judicial review.

Lesson Three: Agency Guidance is Not a Last Resort and is Unenforceable

Some might be tempted to resort to agency guidance and FAQs. However, guidance and FAQs are not regulations issued pursuant to the federal APA. As such, agency guidance documents "do not have the force and effect of law." *See* U.S. Department of Justice Manual (April 2022), at section 1-19.000 ("Justice Manual"). The Justice Manual also cites as authority on the non-enforceability of guidance two U.S. Supreme Court opinions: *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015); and *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995).

The *Loper* decision removes *Chevron's* deference but retains the ability of agencies to offer persuasive arguments that their interpretation is the right reading of the statute. In the end, however, it is the court that will decide the best reading of an ambiguous or silent statute. In his concurring opinion, Justice Gorsuch noted the importance of aligning statutory interpretation with expressed congressional intent, providing an analysis focused on the statutory text, its linguistic context, and the traditional rules of statutory construction.

Government affairs operations, at the very least, when working with agencies to implement statutory provisions must provide an analysis that considers the demands set forth in *Loper*. Under *Chevron*, agencies were inclined to adopt more aggressive interpretations of their authority where a statute was ambiguous or silent on an issue in question.

Lesson Four: A Current Example of Agency Rules in Excess of Statutory Authority

On July 3, 2024, the U.S. District Court for the Southern District of Mississippi in *State of Tennessee v. Becerra* issued a nationwide injunction to stay the effective date of the specific ACA Section 1557 regulations challenged by the State of Tennessee, et al (included Mississippi). The complaint only challenged, and the injunction only stays, the enforcement of ACA Section 1557's final rule relating to the redefinition of "sex" discrimination.

In the Mississippi District Court's "independent" analysis, the opinion notes that the text of Section 1557 prohibits discrimination "on the ground prohibited by Title IX…under any health program or activity, any part of which is receiving Federal

financial assistance…or any program or activity that is administered by an Executive Agency." The Plaintiff States argued that the statutory text does not define the term "sex" and does not employ the term "gender identity" as a protected category.

HHS countered that the Supreme Court's prior decision in *Bostock v. Clayton Cnty, Ga.* (2020) permits this interpretation. However, the District Court observed that the *Bostock* decision was based on the non-discrimination provisions of a different statute, Title VII, and not Title IX which is the provision incorporated into ACA Section 1557, and, that the statutory text is very different. The District Court then reviewed the provisions of Title IX instead and considered the meaning of "sex" employed at the time of its enactment in 1972. The court found that "gender identity" was not specified as a "cause" of discrimination in the statute.

Citing *Loper*, the District Court noted that agencies are no longer entitled to deference pursuant to *Chevron*. As a result, the District Court noted that courts must interpret words included in a statute consistent with their ordinary meaning. The District Court also cited the Supreme Court's prior decision in *Wisc. Cent. Ltd v. United States* (2018) which stated that statutes, no matter how impenetrable, must have a single, best meaning and that every statute's meaning is fixed at the time of enactment.

Lesson Five: Prior Chevron Decisions Not Overturned But Rules Vulnerable

In the 40 years since the doctrine was established by the Supreme Court, the lower federal courts cited *Chevron* tens of thousands of times. The *Loper* majority opinion states that these earlier lower court decisions are not overturned; however, the underlying agency deferral could be subject to challenge going forward in new litigation. *See* Lubbers, Jeffery S. *A Guide to Federal Agency Rulemaking* (ABA, Section of Administrative Law and Regulatory Practice, Sixth Edition) (2018).

That new litigation would have to be based on more than the mere fact that *Chevron* was overturned and would need to assert a challenge based on the provisions set forth in the APA. Section 706 of APA provides that reviewing courts "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." The APA empowers the reviewing court to hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accord with the law, excess of statutory authority, and other grounds specified in Section 706.

Already, since the *Loper* decision, the Supreme Court has vacated and remanded for further consideration in light of *Loper*, several appellate court decisions that upheld agency actions under *Chevron*, and had petitions pending for Supreme Court

review. These appeals court decisions involve questions of law relating to criminal law and procedure, energy and environmental law regulation, immigration law, unfair labor practice complaints, and IRS regulations involving whistleblower provisions. *See* CRS, "Congressional Court Watcher: Federal Appellate Decisions in Recent Years Applying Chevron Defense" (July 26, 2024).

Other recent appellate court decisions upholding agency action employing the *Chevron* doctrine, but not yet being appealed to the Supreme Court, involve a similar wide range of subject matter controversies. In the health care area, these decisions include CMS's methodology for calculating Medicare reimbursements to providers; Medicare and Medicaid requirements relating to provider participation in arbitration agreements; whether audiologists are "physicians" under a workmen's compensation law; and the adjudication of Social Security disability claims. *See* CRS, "Congressional Court Watcher: Federal Appellate Decisions in Recent Years Applying Chevron Defense" (July 26, 2024).

Conclusion: Statutory Words Matter Even More Now That Chevron is 'Let Go'

Federal agencies issue thousands of regulations interpreting hundreds of statutory provisions that touch multiple industries. The APA authorizes federal courts to review these regulations, hold them unlawful, and set aside agency actions when found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accord with the law, or in excess of statutory authority.

For the immediate time, some potential rules that may be litigated for a *Loper* review include FTC's noncompete clause rule; HHS regulations for Medicare hospital payments and reimbursement; HHS drug pricing rules for Medicare and Medicaid; ACA rules for patient cost-sharing and the counting of cost-sharing assistance towards deductibles; and the Medicare Antikickback safe harbors. *See* Sidley-Austin, "Potential Implications of *Loper Bright* for the Healthcare Industry" (July 2, 2024).

For government affairs operations the lesson here again is that "words matter" under *Loper* and in any subsequent judicial review of agency regulations. Those regulations depend upon the words of the statutory text enacted by Congress. There is no longer an implied delegation of interpretative authority to agencies by Congress in the case of ambiguity or silence in statutory text. Even where the delegation is explicit *Loper* demands that it must be specific and within the boundaries of separation of powers.

Government affairs operations must become subject-matter experts to Congress and federal agencies to draft clear and concise statutes and rules. Wishing does not make it law.