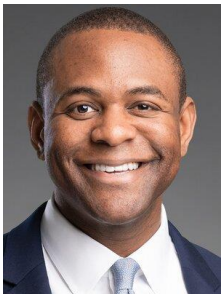
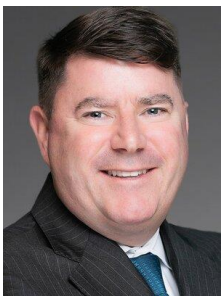
3 Ways Agencies Will Keep Making Law After Chevron

By **Varu Chilakamarri, Tre Holloway and Michael Scanlon** (July 2, 2024)

Varu Chilakamarri



Tre Holloway



Michael Scanlon

The administrative state suffered a significant blow last week when the U.S. Supreme Court overturned the 40-year-old Chevron precedent that had given agencies more power to construe statutes.

The consolidated cases of Loper Bright Enterprises v. Raimondo and Relentless Inc. v. U.S. Department of Commerce eliminated the long-standing Chevron rule that the judiciary defer to federal agencies' reasonable interpretations of ambiguous statutes that they administer.[1]

Loper, in Justice Neil Gorsuch's words, put "a tombstone on Chevron no one can miss."[2]

The 1984 decision in Chevron USA Inc. v. Natural Resources Defense Council Inc. had long empowered agencies to interpret ambiguities in the law — allowing them to definitively fill the gaps that Congress leaves in statutes and that need to be filled by someone if the law is to be carried out.[3]

Now, that someone is the federal judiciary. Chief Justice John Roberts was cuttingly clear when he told the agencies that they have "no special competence" in resolving statutory ambiguities, but that the "[c]ourts do."[4] Going forward, courts can listen to the advice of agencies as to what a statute means but will exercise their independent judgment to conclusively determine the meaning of statutes, ambiguous or otherwise.

The full outlines of the post-Chevron world remain to be drawn, though it is clear the court thinks it has done something big. But this is a moment to consider the other ways in which the executive branch will retain a legitimate role in the lawmaking process.

Though relegated from gap-fillers to advisers, agencies will continue to shape what the law says and means by: (1) using the executive's influence to inform the legislative agenda, (2) drafting legislation behind the scenes, and (3) maintaining a technocratic advantage that withstands judicial scrutiny.

Regulated parties will have to consider agencies' ability to make a difference in all three lanes moving forward, even if Chevron has minimized their power.

1. Legislative Agenda

First, as to the legislative agenda, the executive branch has a uniquely powerful advocate in the president — an actor who can use the bully pulpit to move issues onto lawmakers' agendas and create focus and attention where none previously existed.[5] President Barack Obama's involvement in the passage of the Affordable Care Act is perhaps one of the most notable examples in recent decades,[6] but presidents routinely place direct and indirect

pressure on Congress to consider issues important to the White House.

And the power to influence runs further down. Cabinet members and other high-ranking agency officials use various opportunities — from speeches to virtual town halls, and even bus tours — to take the president's legislative agenda directly to the people.[7]

Agency heads also frequently communicate with oversight committees in public hearings and behind closed doors to advocate for legislation that enables the agency to pursue administration priorities. Even more prevalent is the regular "annual call" practice in which each agency seeks ideas for legislation from its programmatic and legal offices, which are then sent to Congress through the Office of Management and Budget.[8]

In the post-Chevron world, regulated entities must redouble their efforts to track and engage the legislative process. Advocating for legislative priorities will always be key, but it could now be just as important what items stay off the agenda and how the legislative debate unfolds around controversial issues.

In the post-Chevron era, close interpretative calls will be resolved by scrutinizing legislative intent, with particular emphasis on what Congress has chosen not to do, as exemplified by the Supreme Court's recent rejection of the Bureau of Alcohol, Tobacco, Firearms and Explosives' bump stock ban in Garland v. Cargill, due in part to a lack of explicit congressional action on the matter.[9]

2. Drafting Legislation

Second, agencies will continue to play a significant role moonlighting as quasi-legislative aides to Congress, where they have an opportunity to nip ambiguities in the bud, aiming to win at what was once called Chevron Step 1.

In Washington, it is common for career agency staff and political appointees to directly provide members of Congress and congressional committees technical assistance on draft legislation.[10] Agency TA, as this technical assistance is sometimes called, can range from reviewing draft legislation, to redlining text, to even ghostwriting bill provisions.[11]

The potential for agencies to offer their expertise — and influence — is meaningful. After interviewing 54 agency staff members, professor Jarrod Shobe reported that nearly two-thirds said their agency plays a role in drafting 100% of the legislation in their area.[12]

With Chevron overruled, agencies will have greater incentive to weigh in as bills are drafted. So too will companies subject to agency regulation. The demise of Chevron amplifies the importance of strategic foresight for the regulated community: Businesses must now assess whether targeted delegations of authority or explicit limits on agency discretion align with their long-term interests.

As always, regulated entities that participate in the policymaking process will need to do so strategically, to ensure they maintain good relations with administrative agencies, which will continue to wield significant power over routine regulatory affairs.

3. Technocratic Advantage

Finally, perhaps the most important way that agencies will continue to shape — and even make — the law is by doing the core technical work that is the hallmark of the administrative state.

While Justice Roberts has previously bemoaned the fact that there are "hundreds of federal agencies poking into every nook and cranny of daily life,"[13] that fact will remain true in the post-Chevron world. And the sheer magnitude of what those agencies do every day means that they will necessarily still write the book on many issues.

For starters, regardless of whose interpretation of any given law is upheld by a court, someone must still carry out that law in the first instance, and that someone is the agency. While agency interpretations no longer enjoy Chevron deference, they remain the operative rules that regulated entities must follow unless and until a court overturns them. Challenges will abound, but there is only so much room on the judicial docket.

Moreover, administering the law offers agencies subtle yet potent avenues to shape its understood meaning. For example, federal agencies define terms of art in various fields.[14] There are government guidebooks on everything from wood as an engineering material to what behaviors constitute domestic violence.[15]

Even setting aside Chevron deference, regulated parties and the courts routinely look to such definitions to augment general dictionaries — all in the course of applying the traditional tools of statutory construction.[16] Loper Bright did not dispatch with this practice or other canons of construction that rely on agency expertise. Practitioners and the courts may thus see a rise in reliance on such canons, including looking to prior construction of statutes by agencies and other features of the regulatory backdrop that Congress is charged with actual or constructive awareness.[17]

And while Loper Bright rejected Chevron's notion of mandatory deference, it observed that federal courts may still "seek aid" from the executive branch, giving careful attention to what the agencies have to say on interpretive matters, particularly where the agency's construction rests on "factual premises" within its expertise.[18]

Agencies will carry on interpreting the law through rulemaking and adjudications. As they do, it will be even more important for regulated entities and other interested parties to engage federal lawmaking processes — both to shape the direction of policy but also to preserve their right to challenge agency actions in the post-Chevron world, where at least in the foreseeable future, agencies may be less emboldened.

Varu Chilakamarri is a partner at K&L Gates LLP. She previously worked at the U.S. Department of Justice, most recently as deputy assistant attorney general in the DOJ's Civil Division.

Tre A. Holloway is an associate at the firm.

Michael Scanlon is a partner and leader of the policy and regulatory practice group at the firm.

K&L Gates partner John Longstreth contributed to this article.

[1] Loper Bright Enterprises, et al. v. Raimondo, 603 U.S. ___, No. 22-451 (June 28, 2024), slip op. at 1-2, 35.

[2] Id., Gorsuch, J., concurring op. at 1.

[3] Id., Kagan, J., dissenting op. at 31.

[4] Loper Bright, slip op. at 23.

[5] Edwards, G. C. III & Wood, B.D., Who Influences Whom? The President and the Public Agenda, POL. SCI. REV. 327, 342 (1999).

[6] Sallie Thieme Sanford, Nobody Knew How Complicated: Constraining the President's Power to (Re)shape Health Reform, 45 Am. J.L. & Med. 106, 109 (2019).

[7] Jarrod Shobe, Agencies As Legislators: An Empirical Study of the Role of Agencies in the Legislative Process, 85 GEO. WASH. L. REV. 451, 471 & n.64 (2017).

[8] See https://ogc.osd.mil/Portals/99/DetailedGuidelinesforPreparingProposals-FY19-UPDATED.pdf; Shobe, supra note 8 at 470.

[9] Garland v. Cargill, 602 U.S. __, No. 22-966 (June 14, 2024), slip op. at 4, 14.

[10] See https://www.acus.gov/document/technical-assistance-federal-agencies-legislative-process.

[11] Id.; Shobe, supra note 8, at 473.

[12] Shobe, supra note 8, at 481.

[13] See City of Arlington v. FCC, 569 U.S. 290, 323-27 (2013) (Roberts, C.J., dissenting).

[14] See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 73 (2012).

[15] See, e.g., Wood Handbook: Wood as an Engineering Material, U.S. Dep't of Agric., Forest Serv., Forest Products Laboratory, Mar. 2021, at 501-519; United States v. Castleman, 572 U.S. 157 (2014) (citing specialized definitions from DOJ's Office on Violence Against Women).

[16] See, e.g., S.D. Warren Co. v. Maine Bd. of Env't Prot., 547 U.S. 370, 377-78 (2006) (approving interpretation of the term "discharge" after consulting EPA's Water Quality Standards Handbook, and without affording either Chevron or Skidmore deference); Castleman, 572 U.S. at 157 (citing DOJ's specialized definitions to aid in the Court's construction of a statute).

[17] Scalia & Garner, supra note 15, at 322-24; Bragdon v. Abbott, 524 U.S. 624, 645 (1998).

[18] Loper Bright, slip op. at 16, 25.