Chevron Deference is on Thin Ice

January 18, 2024

On Wednesday, January 17, 2024, the Supreme Court heard oral arguments in *Loper Bright Enterprises, Inc. v. Raimondo* and *Relentless, Inc. v. Dep't of Commerce*, a pair of cases where a majority of the Justices made clear that *Chevron* deference is on borrowed time. A decision overruling *Chevron* would have major implications for businesses and entities subject to administrative agency oversight and could potentially call into question hundreds of decisions decided on the basis of *Chevron* deference in the past.

How We Got Here

Nearly forty years ago, the Supreme Court decided the case of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the seminal opinion on the level of deference federal courts afford to interpretations of statutes by administrative agencies. *Chevron* deference involves a two-part test. First, courts consider whether Congress has directly spoken to the issue before the court. If the intent of Congress is clear, that is the end of the matter, and courts must give effect to the clear intent of Congress. Second, and more controversially, if Congress has not directly addressed the question at issue, courts will consider whether the relevant agency's interpretation is reasonable, and if so, the court will defer to that interpretation.

Chevron was controversial from the start. Supporters of *Chevron* deference claim it reflects Congress' intent to delegate interpretive authority to agencies with expertise over complicated administrative issues. Opponents have sharply criticized the level of deference it affords administrative agencies, arguing it is an unconstitutional limit on judicial oversight. For nearly forty years, *Chevron* deference opponents have searched for a case and a receptive court to overrule *Chevron*.

Raimondo, Relentless, Inc. and the Current Status of *Chevron* Deference

Enter *Raimondo* and *Relentless, Inc*. Both of these cases began as a discrete dispute over who pays for at-sea fishing monitors under the Magnuson-Stevens Act. Utilizing *Chevron* deference, the lower courts in each case ultimately deferred to the agency's interpretation of the statute and found that the commercial fishing companies were responsible for the costs associated with at-sea fishing monitors.

The fishing companies then asked the Supreme Court to consider the cases. In *Raimondo*, the petitioners presented the Court with two questions for review. The first question was narrowly tailored to the facts of the particular case and whether the lower courts' *Chevron* deference analysis was incorrect. The second question, however, sought to end *Chevron* deference once and for all:

> *Whether the Court should overrule Chevron or at least clarify that silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.*

Relentless, Inc. also included the same question seeking to overturn *Chevron*. Most Supreme Court scholars have considered *Chevron* to be a dead letter even before the Court accepted *Raimondo* and *Relentless, Inc*. Not only does the current Court have numerous vocal critics of *Chevron* deference, but the Court has stopped citing *Chevron* favorably in recent years and has continued to chip away at its underlying holding[1]. In fact, it has been more than eight years since the Court deferred to an agency's interpretation under step two of the *Chevron* deference test. Little wonder then that the Court jumped at the chance to accept the significantly broader questions presented for review, a telling sign that *Chevron* is on the chopping block.

Oral Argument Confirms the Obvious: *Chevron* Deference is on Borrowed Time

The Justices' questions at oral argument in the cases only reaffirmed the widespread belief that *Chevron* is on borrowed time and will almost assuredly be overruled to some degree. The conservative justices, led by Justice Gorsuch, an outspoken *Chevron* critic, focused on the belief that *Chevron* impermissibly delegates Article III judicial duties to an agency. The conservative justices also disagreed with their liberal counterparts on the impact overruling *Chevron* would have on prior decisions decided by *Chevron* deference as well as concerns over justices making policy considerations. In fact, to a number of the conservative justices, overruling *Chevron* would not have much of a negative impact at all. Chief Justice Roberts noted that *Chevron* deference has not been relied upon by the Court itself in many years, and Justices Gorsuch, Kavanaugh, and Barrett noted their belief that *Chevron* deference actually causes uncertainty and does not resolve it.

Lacking the votes to affirm *Chevron*, the Court's three liberal justices focused on what might happen in a post-*Chevron* world. In one telling exchange, Justice Sotomayor discussed the impact overruling *Chevron* would have on the 77 cases decided by the Court on *Chevron* grounds (not to mention the thousands of lower court cases decided on *Chevron* grounds). Counsel for the fishing companies argued, somewhat unpersuasively, that stare decisis would protect those decisions and that overruling *Chevron* would only apply prospectively. Conversely, Solicitor General Prelogar echoed the liberal justices' concerns, noting that thousands of decisions "would be open to challenge." "Litigants," she said, "will come out of the woodwork." Justice Kagan focused on the fact that agency experts are more suited to decide tough, complicated statutory questions than unelected judges. While the government agreed, that argument did not find much support from the majority of the Court. The Solicitor General also attempted to persuade the Court to take a middle-of-the-road approach and simply clarify *Chevron* without overruling it entirely. It is unclear whether that approach would garner a majority of the votes on the Court.

Ultimately, at the end of the three-and-a-half-hour oral argument, it was readily apparent that *Chevron* would not survive, at least in its current form.

So, What Comes Next?

What does the potential end of *Chevron* deference mean? First, it depends on what the Court replaces *Chevron* deference with. If the Court replaces *Chevron* with a *de novo* standard of review (i.e., no deference given), then it's a safe bet that agency interpretation will be rejected at least as often as it is accepted. Conversely, if the Court were to replace *Chevron* deference with a lesser form of deference, like *Skidmore* deference (which several justices signaled might be appropriate),[2] it is possible lower courts would still defer to agency

interpretation more often than not. The degree of deference afforded agencies in a post-*Chevron* world matters, especially when certain agencies, like the FTC and CFPB, are not shy about flexing their interpretive muscles in deciding what a statute means.

Second, expect even more forum shopping from litigants looking to challenge or uphold agency interpretations in a post-*Chevron* world. The current federal judiciary has over 850 judges, and in a scenario where no deference is given to an agency interpretation, it's a safe bet that those judges will have vastly different interpretations of what a vague or ambiguous statute means. That will certainly lead litigants to shop for the most favorable forum to support their interpretation of a statute.

Third, and despite the confidence expressed by a handful of the justices and petitioners' counsel that overruling *Chevron* would have a negligible impact on prior decisions, it is almost certain that litigants will look to utilize the death of *Chevron* as an attempt to re-litigate one or more of the thousands of cases decided on *Chevron* deference grounds. And, while it is true that the statute of limitations might ultimately protect some of those cases, the statute of limitations is an affirmative defense that must be proven and litigated. It is no sure bet that a court would not find some exception to toll the applicable statute of limitation in a particular case.

Fourth, despite the politically ideological split on *Chevron* deference, the end of *Chevron* could significantly impact future administrations of both parties. Indeed, both political parties have utilized *Chevron* deference to enact certain administrative goals. For instance, administrations looking to relax or cut regulations could face skepticism from judges who see things in a different light. Conversely, administrations who utilize *Chevron* deference to expand certain regulations and statutes would undoubtedly face a more skeptical bench, especially if a litigant challenging such regulations brought suit in a receptive forum to such challenges.

Decisions on *Raimondo* and *Relentless, Inc*. are not expected until the end of the current term in 2024.

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[1] *See, e.g. U.S. v. Mead*, 533 U.S. 218 (2001) (agency interpretation must have force of law).

[2] In *Skidmore v. Swift & Co*., 323 U.S. 134 (1944), the Supreme Court held that the degree of deference to an administrative agency "depend[s] upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."

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