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ALERT

Loper Bright's Potential Effects on "*Chevron*-Like" Deference Doctrines

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On June 28, 2024, the U.S. Supreme Court sent shockwaves across the administrative law landscape when it handed down *Loper Bright Enterprises v. Raimondo*, overruling the 40-year-old *Chevron* doctrine and its two-step framework that required courts to defer to agency interpretations of ambiguous statutes.[1] *Loper Bright*'s shockwaves are bound to be felt for years to come, and the lower federal courts are already beginning to develop the contours of a post-*Loper-Bright* world. Of course, the effects of *Loper Bright* are being felt most immediately in cases involving agency interpretations of ambiguous statutes, where *Chevron* once squarely governed. Beyond that, however, courts also have begun grappling with *Loper Bright*'s effects on deference doctrines similar to *Chevron*. A set of recent opinions involving one such "*Chevron*-like" doctrine concerning agency interpretations of contracts – including the D.C. Circuit's October 4 decision in *NextEra Energy Resources, LLC v. FERC* – illustrates the point. Parties in cases implicating this doctrine or similar ones should be mindful of *Loper Bright*'s potential effects on the legal framework governing such disputes.

To review briefly, under *Chevron*, a two-step framework applied in cases involving the interpretation of statutes administered by federal agencies.[2] First, the reviewing court had to decide whether the statute in question was ambiguous.[3] Second, if it was, the reviewing court had to "defer to the agency's interpretation" of the statute so long as that interpretation was "based on a permissible construction of the statute."[4] In other words, when faced with ambiguous statutes administered by federal agencies, the reviewing court applying *Chevron* did not decide for itself what the best reading of the statute was; the court instead decided simply whether the agency's

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interpretation was reasonable – if so, it controlled.[5]

In *Loper Bright*, the Supreme Court jettisoned *Chevron*, deciding that courts "may not defer to an agency interpretation of the law simply because a statute is ambiguous."[6] Instead, the *Loper Bright* Court held that courts must "exercise independent judgment" to adopt a statute's "best reading," even when ambiguous.[7] As the Court explained, Article III of the Constitution vests the federal judiciary with responsibility and final authority to decide "questions of law" such that it cannot "surrender" that interpretive responsibility to others.[8] And this "traditional understanding" of the judicial role was codified in the provisions of the Administrative Procedure Act (APA) generally governing judicial review of agency action.[9] But *Chevron* could not "be squared" with this principle, leading the *Loper Bright* Court to overrule it.[10]

Following *Loper Bright*, federal courts have begun grappling with its effects not only on cases involving agency interpretations of ambiguous statutes but also in cases implicating other doctrines similar to *Chevron* that are vulnerable to the same critique *Loper Bright* had of *Chevron*. Two recent decisions in the D.C. Circuit illustrate the point.

For years, several courts of appeals have followed a *Chevron*-like rule of giving deference to agency interpretations of ambiguous federal contracts.[11] The D.C. Circuit "paved the way"[12] for this doctrine in 1987 in *National Fuel Gas Supply Corp. v. FERC*, in which it announced that a court generally must "give deference" to an agency's reasonable interpretation of an ambiguous contract (in that case, a settlement agreement between a natural-gas supplier and its customers that was approved by FERC order), "even where the issue" involves a "pure question[] of law" about the "proper construction" of contract language.[13] As the *National Fuel Gas Supply* court explained, the then-recent *Chevron* decision "compel[led] this conclusion," which the court read as having "implicitly modified" earlier cases that adhered to the "traditional rule" of reviewing questions of law *de novo*.[14] Since *National Fuel Gas Supply*, the D.C. Circuit and several other circuits have generally "appl[ied] a *Chevron* analysis when reviewing an agency's interpretation of a contract."[15]

Given its *Chevron*-inspired departure from the "traditional" conception of the judicial role, this rule had its skeptics even before *Loper Bright*. For instance, in a 2017 statement respecting the denial of certiorari, Justice Gorsuch, joined by Chief Justice Roberts and Justice Alito, questioned this doctrine and observed that it was "open to dispute" whether "*Chevron*-type deference warrants a place in the canons of contract interpretation."[16]

After *Loper Bright*, such skepticism is growing. In August, the U.S. District Court for the District of Columbia "assume[d] without deciding" that this "*Chevron*-type" deferential standard applied to a dispute over the interpretation of a contract administered by the Office of Personnel Management.[17] In doing so, it reasoned that it was bound by circuit precedent, *Loper Bright* notwithstanding, because the "now-defunct" *Chevron* doctrine and the rule of *National Fuel Gas Supply* were "distinct."[18] But in reaching this conclusion, the court recognized that the principle of judicial deference to agency interpretations of ambiguous contracts was "based on *Chevron*," and it hinted strongly that *Loper Bright* created "'tension'" with this rule.[19]

More recently, in October, the majority in a split-panel D.C. Circuit decision posed, but ultimately sidestepped, the question whether this "'*Chevron*-like'" rule "survive[d] the overruling of *Chevron*" in *Loper Bright*.[20] The dissent reached the issue, however, concluding that "[b]ecause contract interpretation is a question of law, we do not defer to agencies" on such questions and that the "*Chevron*-like" practice of deferring to agency interpretations of ambiguous contracts was "incompatible" with *Loper Bright*.[21]

As these opinions suggest, the "*Chevron*-like" principle of judicial deference to agency interpretations of ambiguous federal contracts may soon follow *Chevron* into the dustbin of discarded precedent. Parties in cases implicating this or similar "*Chevron*-like" doctrines should be mindful of *Loper Bright*'s potential effects on the legal framework governing those disputes.

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Wiley Rein LLP has a deep bench of attorneys across its practice groups monitoring developments in the new administrative landscape following a series of historic decisions from the Supreme Court in 2024 that have reshaped regulatory litigation. For more information about this dynamic area of the law, please contact one of the authors.

[1] *See* 144 S. Ct. 2244 (2024) (overruling *Chevron U.S.A. Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984)).

[2] *See id.* at 2254.

[3] *See id.*

[4] *Id.*

[5] *See id.* at 2264.

[6] *Id.* at 2273.

[7] *Id.* at 2269.

[8] *Id.* at 2257–58.

[9] *Id.* at 2260–61.

[10] *Id.* at 2263, 2273.

[11] *See, e.g.*, *Muratore v. U.S. Office of Pers. Mgmt.*, 222 F.3d 918, 920–23 (11th Cir. 2000) (identifying a lopsided circuit split in favor of the rule).

[12] *Id.* at 921.

[13] 811 F.2d 1563, 1569–72 (D.C. Cir. 1987).

[14] *Id.* at 1568–70 (emphasis added) (citing *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 268–70 (1960)).

[15] *Reed v. R.R. Ret. Bd.*, 145 F.3d 373, 375 (D.C. Cir. 1998) (citing *Nat'l Fuel Gas Supply*, 811 F.2d at 1569); *Muratore*, 222 F.3d at 920–23 (collecting authorities).

[16] *Scenic Am., Inc. v. Dep't of Transp.*, 583 U.S. 936, 138 S.Ct. 2, at *2–3 (2017).

[17] *Rai Care Ctrs. of Md. I, LLC v. U.S. Off. of Pers. Mgmt.*, CV 18-3151, 2024 WL 3694433, at *1, *12 (D.D.C. Aug. 7, 2024).

[18] *Id.* at *13.

[19] *Id.* (quoting *Mallory v. Norfolk S. Rwy. Co.*, 600 U.S. 122, 136 (2023)).

[20] *See NextEra Energy Res., LLC v. FERC*, — F.4th —, 2024 WL 4394994, at *3 (D.C. Cir. Oct. 4, 2024).

[21] *Id.* at *9 & n.1 (Rao, J., dissenting).