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Locke Lord QuickStudy: Get Into the Ring: The Supreme Court's *Loper Bright* and *Corner Post* Rulings Set up Round Upon Round of New Regulatory Challenges

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The one-two punch of the U.S. Supreme Court's rulings in *Loper Bright Enterprises v. Raimondo* ("*Loper Bright*") and *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* ("*Corner Post*") this past week spun administrative law around and could put a wide range of current and anticipated federal regulations—particularly in the environmental arena—on the ropes.

As we noted in a QuickStudy last week, *Loper Bright* reverses the longstanding *Chevron* doctrine of judicial deference to federal agencies' interpretations of their own statutory authority, inviting judges to more readily substitute their own judgment for that of the agencies. At the same time, *Corner Post*, a less-widely publicized but nonetheless significant decision, effectively nullified the six-year statute of limitations for challenges to regulations under the Administrative Procedure Act ("APA") by holding that such causes of action arise when a specific party becomes subject to the regulation—and *not* when the regulation takes effect.

While the precise impact of these watershed cases will crystalize in the coming years, they overturn decades of settled law and could bring, as one dissenting justice cautioned, a "tsunami" of regulatory challenges.^[1] For better or worse, companies in virtually every sector subject to federal regulation—energy, manufacturing, construction, financial services, health care, and insurance, to name but a few—should begin to prepare for the end of the era of regulatory certainty.

1. *Loper Bright*: Deference is Dead

In a 6-3 decision, the Court overturned *Chevron v. Nat. Res. Def. Council*, which required courts to defer to an administrative agency's reasonable interpretation of an ambiguous statute.^[2] The longstanding "*Chevron* doctrine" was previously a bedrock of administrative law practice, requiring that courts give agencies deference where they have adopted a reasonable interpretation of an ambiguous statute.^[3] While several of the current Justices have been critical of *Chevron* and the decision to overturn it was widely expected, it had been a guiding principle for lower courts for decades.

a. Facts

The cases revolve around fishing groups' challenges to a National Marine Fisheries Service ("NMFS") final rule that required fishermen to pay part of the cost of having federal compliance monitors aboard their ships.^[4]

The Magnuson-Stevens Fishery Conservation and Management Act empowers NMFS to regulate overfishing in marine waters.^[5] Among the regulations NMFS has adopted is the requirement to include observers on board to ensure that overfishing does not occur.^[6] The regulation does not specifically address whether Atlantic herring fishermen may be required to bear costs associated with these observers.^[7] At one point, the NMFS fully funded the program, but, in 2013, it proposed amending its regulations to require the fishermen to pay for observers if federal funding became unavailable.

The NMFS formally adopted this amendment in 2020.^[8] Under the new rule, if the NMFS determines that an observer is required but declines to assign a government-funded one, the vessel must contract with and pay for a certified third-party observer.^[9] The petitioners challenged the new rule under the APA. Both the D.C. and First Circuits applied the *Chevron* doctrine in finding the NMFS's regulations were permissible.^[10] The Court granted certiorari on the issue of whether *Chevron* should be overruled or clarified.^[11]

b. Holding

The Court ultimately held that courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and they may not discharge this duty of interpretation to an agency just because the statute is ambiguous or silent.^[12]

Chief Justice Roberts, writing for the majority, characterized the *Chevron* doctrine as "fundamentally misguided" and "unworkable" within the APA's regulations.^[13] The Court held that "Chevron defies the command of the APA that 'the reviewing court'—not the agency whose action it reviews—is to 'decide all relevant questions of law' and 'interpret . . . statutory provisions.'"^[14] Thus, while a court may rely on the interpretation of a statute by the agency, it is not required to defer to it as it was under *Chevron*.^[15]

c. Future Impacts

The ripple effects of *Loper Bright* will be far-reaching in a multitude of areas of federal regulation, but particularly environmental regulation. For example, the Environmental Protection Agency's efforts to regulate greenhouse gas emissions under the Clean Air Act are now ripe for additional challenge. The removal of deference makes what was once a high hurdle to challenge agency interpretations of statutes much easier to clear. As such, this will increase the impact that certain judges' and courts' interpretations of law and science have on these ambiguous statutes—which will in time likely lead to circuit splits to be resolved by the Court. This issue may be exacerbated by the Court's holding that lower courts must still defer to agencies if the statute has a "clear" congressional delegation of authority—while not defining "clear" in its opinion.^[16] However, even that limitation may soon go away as several of the Justices have already indicated their support for the non-delegation doctrine, which would limit Congress' ability to delegate rulemaking authority to the executive branch.

This ruling will likely impact the behavior of the legislative and executive branches. Congress will have to draft

statutes in a manner that avoids ambiguity, clearly stating its intent and expressly delegating authority to the agency to adopt regulations consistent with that intent. Congress may even need to engage in a “look-back” of previous legislation to ensure that the statutes are sufficiently specific to properly empower the desired agency actions, although the Court does create a carve-out of protection for cases previously decided on *Chevron’s* basis.^[17] Of course, it is fair to question whether a Congress that is increasingly divided on so many issues will be able to legislate with the level of specificity needed to avoid ambiguity, particularly in statutes that deal with increasingly large and complex issues.

For their part, federal agencies charged with implementing and enforcing laws must now provide persuasive reasoning for any rules or other binding interpretations of a statute. Though they are no longer entitled to deference as a matter of law, a court may still adopt their interpretation if it finds it to be the correct one.

2. *Corner Post*: No Time Limits on Challenging Regulations

The effects of *Loper Bright* will be magnified by the Court’s contemporaneous ruling in *Corner Post*, which indefinitely extends the time period in which a regulation is subject to challenge under the APA. In another 6-3 decision along ideological lines, the Court held that an APA claim does not accrue under the six-year statute of limitations in 28 U.S.C. § 2401(a) until the plaintiff is actually injured by a final agency action.^[18] Justice Barrett, explaining the Court’s reasoning in the majority opinion, noted that previously, “only those fortunate enough to suffer an injury within six years of a rule’s promulgation may bring an APA suit. Everyone else – no matter how serious the injury or how illegal the rule – has no recourse.”^[19]

a. Facts

Corner Post involved the regulation of “interchange fees” incurred by businesses when their customers use debit cards to complete a purchase.^[20] The amount of the fee is set by the payment networks that process the transaction between the banks of merchants and cardholders.^[21] These fees have ballooned over time, but businesses were forced to pay them as refusing to take debit cards would result in lost business.^[22] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 tasked the Federal Reserve Board with setting standards for these fees and ensuring they were reasonable and proportional to the transaction.^[23] In 2011, the Board promulgated “Regulation II” which imposed maximum limits on these fees.^[24] Four months later, a group of businesses sued the Board, arguing Regulation II allows higher costs that the empowering statute does not. The plaintiffs lost on appeal in the D.C. Circuit.^{[25] [26]}

The plaintiff in this case, *Corner Post*, was incorporated in 2017 and opened for business in 2018, and thus did not exist when the Board adopted Regulation II or during the D.C. Circuit litigation. In 2021, it joined new litigation challenging the same Regulation II on the same basis.^[27] The district court dismissed the case as being time barred under the six-year statute of limitations and the Eighth Circuit affirmed this ruling.^{[28] [29]} The Eighth Circuit distinguished between “facial” challenges (like *Corner Post’s*) and “as applied” challenges (to a particular party) restating that the statute of limitations begins to run at the time of final publication of a rule and expires six years from that date—not when the injury occurs as argued by *Corner Post*.^[30] The Court granted certiorari to resolve a growing circuit split on this issue.^[31]

b. Holding

The Court found that a right of action does not occur until a plaintiff has a “complete and present cause of action,” and “an APA plaintiff does not have a complete and present cause of action until she suffers an injury from the final agency action, so the statute of limitations does not begin to run until she is injured.”^[32] Because Corner Post filed suit within six years of suffering its injury, the Court held that its suit was not barred by the APA’s statute of limitations.^[33]

c. Future Impacts

The Court’s holding in *Corner Post* significantly alters the calculus of agencies, potential litigants, and regulated entities regarding the staying power of “established” agency rules and regulations. For example, if an agency rule finalized in 1950 were to harm a newly formed entity in 2024, the entity would have until 2030 to file a suit challenging the rule.^[34] Thus, while individual litigants remain subject to a six-year statute of limitations from the date of their injury, there is no longer any point at which a federal regulation is no longer subject to challenge under the APA. Every rule will always remain open to suit from any newly created entity, or any entity newly subject to that rule.

The most immediate impact of the *Corner Post* ruling is that long-standing agency rules and regulations will likely face new waves of scrutiny and challenges. This could be a destabilizing force, not only for federal agencies but also for the businesses that they regulate. The increased burden will be borne by an already strained judicial system which will now have to wade into areas of administrative law that were previously thought to be settled. This will inevitably lead to conflicting decisions and new circuit splits based on differing interpretations of the law.

3. Conclusion

These twin rulings are the continuation of the trend of increased judicial oversight of the federal administrative state, and together they will empower a new class of litigants seeking to reach back and challenge regulations that were previously considered unassailable due to *Chevron* deference and/or time-barred under the APA. These challenges will cover the full spectrum of regulatory actions and agencies. While this may lead to new opportunities to reduce the regulatory burden on industry, it is also bound to lead to a less certain and predictable regulatory environment. It will take time for this process to play out and the true effect of these rulings to become clear as new challenges are brought and existing challenges play out in the lower courts, then the circuits, and ultimately the Supreme Court. In the meantime, Locke Lord attorneys in key industry sectors can help you navigate this rapidly changing landscape.

The opinions of *Corner Post* and *Loper Bright* are linked here.

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[1] *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, p. 23, No. 22-1008 (2024) (hereinafter “CP Op”).

[2] *Loper Bright Enterprises et al. v. Raimondo*, No. 22-451 (2024) (hereinafter “LB Op.”).

[3] See *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984).

[4] *LB Op.*, p. 3.

[5] *LB Op.*, pp. 2-3.

[6] *LB Op.*, pp. 2-3.

[7] *LB Op.*, p. 3.

[8] *LB Op.*, p. 3.

[9] *LB Op.*, p. 3.

[10] See 45 F. 4th 359 (2022) and 62 F. 4th 621 (2023) respectively.

[11] *LB Op.*, 3.

[12] *LB Op.*, p. 1.

[13] *LB Op.*, pp. 23 and 30.

[14] *LB Op.*, p. 21.

[15] The Court does leave the door open for *Skidmore* deference in which a judge may consider a federal agency's interpretation but is not required to defer to it automatically. (See *Skidmore et al v. Swift*, 323 U.S. 134 (1944)).

[16] *LB Op.*, p. 19.

[17] *LB Op.*, p. 34.

[18] *CP Op.*, p. 23.

[19] *CP Op.*, p. 22.

[20] *CP Op.*, pp. 1-2.

[21] *CP Op.*, pp. 1-2.

[22] *CP Op.*, p. 2.

[23] *CP Op.*, p. 2.

[24] *CP Op.*, p. 2.

[25] *CP Op.*, p. 2.

[26] *NACS v. Board of Governors of FRS*, 746 F.3d 474 (2014).

[27] *CP Op.*, p. 3.

[28] *CP Op.*, p. 3.

[29] *North Dakota Retail Assn. v. Board of Governors of FRS*, 55 F.4th 634 (2022).

[30] *CP Op.*, p. 3.

[31] *CP Op.*, p. 4.

[32] *CP Op.*, p. 6.

[33] *CP Op.*, p. 23.

[34] *CP Op.*, p. 3 (To note, the court distinguishes this ruling to “facial challenges” to rule and not “as applied” challenges).

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