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BLOG

Expert Panel Discusses How *Loper Bright* Will Impact Courts, Congress, and Agencies

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Key Takeaways

- A panel of administrative law experts, including Richard A. Epstein, Robert Percival, Andrew Mergen, and Winston & Strawn partner Jonathan Brightbill, met to discuss the impacts that the overruling of *Chevron* deference is having.
- *Loper Bright*'s impact is already being felt in appellate and district courts, which regularly cited *Chevron* deference when reviewing agency actions but are now citing *Loper Bright* as a reason not to defer to agencies.

On October 29, 2024, a panel of administrative law experts convened to discuss the impact of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*. This overruled *Chevron U.S.A. Inc. v. NRDC*. In a webinar hosted by the Federalist Society, Jonathan Brightbill, a partner at Winston & Strawn LLP and a former Acting Assistant Attorney General, moderated the program. It featured academic experts Richard A. Epstein, Robert Percival, and Andrew Mergen. These experts in administrative and environmental law discussed what can be expected in a post-*Chevron* world. The panel discussed the impact *Loper Bright* is already having on the courts, as well as the decision's potential impact on administrative agencies and Congress.

Professor **Robert Percival**, the Robert F. Stanton Professor of Law at the University of Maryland Carey School of Law, began the discussion. Percival described his research into the Justices' internal deliberations leading to the *Chevron* decision. According to Percival, Justice Marshall's and Justice Blackmun's papers suggest that the Justices did not appreciate "what a momentous step the Supreme Court was taking" prior to issuing *Chevron*. Percival noted that, in Justice Blackmun's conference notes, he placed question marks next to several of the Justices' names because their votes were evidently not firm. Percival also explained that Justice Stevens reportedly stated at conference that he was confused about the language in the Clean Air Act, and that it was because of this confusion that he would defer to the agency. In sum, Percival's research indicates that the Justices did not contemplate the *Chevron* decision's potentially transformative effect on administrative law prior to issuing the opinion.

Percival then explained why *Loper Bright*'s impact might be overstated. He noted that *Chevron* had already fallen out of favor with most of the Justices of the Supreme Court. It had not been cited approvingly by the Supreme Court

in the prior six years. Percival opined, however, that *Loper Bright* might have more of an impact on lower courts, which had more regularly relied on *Chevron* deference.

Professor **Richard Epstein**, the Laurence A. Tisch Professor of Law at the New York University School of Law, explained his belief that *Loper Bright* came to the correct conclusion based on the Administrative Procedure Act's text. This provides that courts decide "all relevant questions of law." Epstein emphasized that debates would persist over the proper interpretation of ambiguous text, even though *Loper Bright*'s holding means that the debate will no longer be focused on how ambiguous a statute must be to trigger deference to an agency's interpretation.

The panel discussion addressed the impact of *Loper Bright* on administrative agencies' decision-making processes. President-elect Trump has emphasized deregulation and his administration will likely adopt regulations based on new interpretations of statutes. According to Percival, *Loper Bright* could make it more difficult for the Trump administration to adopt regulations in certain areas, such as immigration law, where courts were more likely to defer to an agency's interpretation under *Chevron*.

Although statutory interpretations adopted by the Trump administration will not be entitled to *Chevron* deference, Professor **Andrew Mergen**, the Emmett Visiting Assistant Clinical Professor of Law in Environmental Law at the Harvard Law School, pointed to three situations that the Court identified in *Loper Bright* in which an agency still has discretion to interpret a statute. Those include: (1) when Congress expressly delegates authority to the agency to define a term; (2) when Congress provides broad delegations of power to the agency; and (3) when Congress delegates authority to the agency to make "reasonable" decisions.

Adopted regulations could also be afforded *Skidmore* deference, under which an agency interpretation may be accepted based on its persuasiveness and the agency's body of expertise. The Court in *Loper Bright* appeared to cite *Skidmore* approvingly. Professor Epstein noted, however, that it remains an open question about how much respect should be given to an agency interpretation under *Skidmore* following *Loper Bright*.

The panelists also addressed whether *Loper Bright* might help incentivize members of Congress to compromise and work together. Professor Epstein cited the Court's recent *Garland v. Cargill* case, which concerned whether a bump stock qualified as a "machinegun." He noted that the actions of Congress and the agencies may have been different had *Chevron* already been overruled. Even though both political parties agreed that the bump stocks at issue should be prohibited, Congress apparently decided not to act, consciously believing that the agency would act and that the agency's interpretation would be deferred to. Had *Chevron* already been overruled, it is possible that Congress would have passed legislation to resolve the issue with the bipartisan support that then apparently existed. Instead, the Supreme Court vacated the regulation promulgated by the Department of Justice.

You can enjoy the complete discussion by visiting the website of the Federalist Society, at: https://fedsoc.org/events/what-does-new-mean-agency-action-post-chevron.
4 Min Read

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