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IRS ISSUES

No More "Chevron Deference": A Primer for Nonprofits

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In the final week of June 2024, the Supreme Court released the last batch of major rulings for the term.

One of these cases involved the fate of a nerdy 40-year-old doctrine in administrative law known as "Chevron Deference." Few Supreme Court observers expected this precedent to survive intact. The only suspense was whether the justices would leave it partially in place instead of overruling it entirely.

Chief Justice Roberts, about one-third of the way through his majority opinion in *Loper Bright Enterprises v. Raimondo* (June 28, 2024) No. 22–451, laid bare the carnage: "At this point, all that remains of Chevron is a decaying husk with bold pretensions." *[603 U.S. at pp.32-33]*

What Is This All About?

In the four decades that the rule from *Chevron USA v. NRDC* (1984) 467 U.S. 837 has been in effect, most Americans have been blissfully unaware of it. They know, generally, that Congress passes statutes. The president then signs some of them into law. While many federal laws are long and complex, others are almost shockingly concise. (Our very own section 501(c)(3) of the Internal Revenue Code is just a bit over 130 words long!)

Even the most comprehensive statutes rarely include each and every detail needed for implementation and enforcement. It would be impossible for lawmakers to draft an air-tight and fully complete law. It's also unnecessary and undesirable.

There is a procedure that begins once the lawmakers and the chief executive have done their jobs. The federal agency responsible for implementing and enforcing the new statute is authorized to

develop and draft regulations. But final regulations don't just pop up in the Federal Register overnight. There is a formal, open, and transparent process that includes public notice and opportunity for comment and input at several stages. See *A Guide to the Rulemaking Process Prepared by the Office of the Federal Register*. This process often takes months, if not years.

Is the final regulation, crafted by an administrative agency – (staffed, except for the top officials, by career civil servants who are experts in that field) – considered the final word when a statute is challenged in court? Is there any presumption or deference accorded the agency's interpretation?

The Effect of Chevron

In 1984, what had previously been a custom and practice of courts to respect the expertise of the administrative agency, was formalized into what has since been called the "Chevron Doctrine" or "Chevron Deference." From then on, "courts deferred to an agency's interpretation of ambiguous statutory authority if the agency's definition was judged reasonable."

Otherwise stated: "'Chevron deference' is the latitude federal judges give agencies over how to interpret the statutes they administer when a dispute arises. Some 40 years ago, the Supreme Court articulated a relatively simple two-part test. First, the judges examine the wording and the context of the statute in question to see if Congress's intent is clear. If it is, then the matter is settled: The agency is obliged to follow the letter of the law." If not, in settling the ambiguity or uncertainty, the courts then evaluate the reasonableness of the process and result leading to the final regulation.

Under *Chevron*, "[a] government agency must conform to any clear legislative statements when interpreting and applying a law, but courts will give the agency deference in ambiguous situations as long as its interpretation is reasonable."

(Note that the *Chevron* lawsuit involved a 501(c)(3) organization – the Natural Resources Defense Council – challenging a regulation of the Environmental Protection Agency under the Clean Air Act Amendments of 1977. The NRDC did not win the case; the Supreme Court upheld the EPA's regulatory interpretation of the Clean Air amendments.)

The Loper Bright Ruling

What six of the nine high-court justices did on June 28, 2024, before they adjourned for their summer vacations, was toss out "a long-standing doctrine on regulators' ability to interpret ambiguous laws."

With "that two-part test gone, the focus now shifts to lower courts, which will have to vet regulations without the precedent."

The case in question – *Loper Bright Enterprises v. Raimondo* (2024) – was about the Atlantic-herring fishing industry off the coast of the U.S. and regulation of over fishing through the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and amendments.

But the justices made a preliminary decision to limit the scope of the matter before it. "The Court granted certiorari in these cases limited to the question whether Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, should be overruled or clarified."

The result: "Held: The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; Chevron is overruled."

From pages 8 through 80 of the majority and concurring opinions, six justices pummeled the *Chevron* decision into oblivion. One particularly curious criticism was that *Chevron*, which "triggered a marked departure from the traditional approach," had been "decided in 1984 by a bare quorum of six Justices,…" (at p. 18).

In 2024, irony is alive and well in America's highest court.

What is the result of ditching Chevron?

In *The Supreme Court Ends Chevron Deference—What Now?* (June 28, 2024) *nrdc.org,* contributor Jeff Turrentine explains the history of the *Chevron* doctrine and offers his analysis of the consequences of its ending. This article, published the day the *Loper Bright* decision was released, is on the website of the National Resources Defense Council, the *Chevron* plaintiff in the 1984 landmark case.

Mr. Turrentine first quotes the dissenting opinion of Justice Elena Kagan: "In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law. As if it did not have enough on its plate, the majority turns itself into the country's administrative czar."

Continuing with his analysis, Jeff Turrentine adds: "The decision has profound consequences, not only for the country's rule of law but also for how agencies—such as those protecting the public against everything from pollution and contaminated food to workplace hazards and rising drug prices—are able to function…."

"The U.S. Supreme Court's ruling today in *Loper Bright Enterprises v. Raimondo* dealt a severe blow to the ability of federal agencies to do their jobs …. Instead of deferring to the expertise of agencies on how to interpret ambiguous language in laws pertaining to their work, federal judges now have the power to decide what a law means for themselves. As a result, despite not being accountable to the people, judges will now be able to expand their role into the realm of policymaking."

See also: *Chevron Death Puts Agencies on Notice for Tougher Legal Brawls* (June 28, 2024) Jennifer Hijazi and Robert Iafolla, *newsbloomberglaw.com*. ["The US Supreme Court's decision to overturn a decades-old judicial test on the scope of agency authority gives opponents a clearer legal path to challenge rules—and a fresh headache to regulators trying to defend them."]

For the Nonprofit Sector, A Double-Barreled Effect

In *What Does the End of the "Chevron Doctrine" Mean to Charitable Nonprofits?* (July 15, 2024) Steven M. Woolf, writing for the National Council of Nonprofits, explains: "…[T]he Supreme Court rejected a 40-year rule that required judicial deference to the subject matter expertise of federal departments and agencies when interpreting statutory requirements in regulations…."

There are two effects on the charitable community:

First, "[t]he ruling in *Loper Bright Enters v. Raimondo* could upend administrative law on federal regulations on everything from food and drug safety, clean air and water, to health care, civil rights, worker rights and safety, education, transportation safety, and more." The missions of many charitable nonprofits may be directly impacted by this decision.

Second, "[w]hile it is unclear the extent to which *Loper Bright* will impact nonprofit organizations in the immediate future, the decision will likely result in more challenges to federal rulemaking which will in turn delay or alter reforms and relief for people charitable organizations serve. It is also expected that Treasury Department and Internal Revenue Service interpretations of the tax law will come under increased scrutiny by the courts as well."

Mr. Woolf elaborates: "Challenges to tax regulations issued by the Treasury Department and the Internal Revenue Service are already among the most litigated federal agency rulings – perhaps because such interpretations frequently involve the definition of and the interrelationship between complex statutory language."

Bloomberg Law's Erin Schilling adds: "The newfound power of the courts to disregard … agency rules could upend an untold number of IRS regulations. Nonprofits already rely on scant IRS rules around tax exemptions, in part because Congress restricts its ability to write new regulations on the subject." See *IRS Nonprofit Rule's Durability Is in Doubt After Chevron's End* (November 29, 2024).

Ms. Schilling quotes Eric Gorovitz, Esq. of San Francisco's Adler & Colvin: "It creates a great deal of uncertainty" and "calls into question lots of longstanding assumptions about what's permissible and what's not in exempt organizations."

The effect on various Treasury regulations governing the exempt-organizations sector has already begun.

We'll pick that up in the next post.

Conclusion

When the Supreme Court handed down the *Loper Bright* ruling on June 28, 2024, the only certainty was that a single obscure federal district judge from Anywhere, USA may henceforth be the "expert" deciding which safety measures are necessary to make sure that an airplane doesn't fall out of the sky. In her dissent, Justice Elena Kagan expresses horror and alarm at this result: "Today, the Court flips the script: It is now 'the courts (rather than the agency)' that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris …. "

Now toss in another surreal point to consider since November 5, 2024: The next Administration has made clear its plans to take a machete to many federal agencies. So – will there be any remaining regulatory capability in the executive branch in the next months and years? In that scenario, will *Loper Bright* make any difference at all?

"Other than that, Mrs. Lincoln, how was the play?"

– Linda J. Rosenthal, J.D., FPLG Information & Research Director