

How the Regulatory State May Change in the Aftermath of the SCOTUS Chevron Ruling

Sam Gandhi, Kwaku Akowuah, and David Carpenter
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Sam Gandhi:

The Supreme Court has discarded the Chevron doctrine. In a decision overturning a four-decade long precedent, the high court now says courts will no longer so easily defer to federal agency interpretations of the statutes they implement. The demise of so-called Chevron deference could upend the regulation in nearly all aspects of American commerce, opening the floodgates for litigation with existing laws and future rulemaking up for grabs. And it will task agencies, corporations, environmental groups, and Congress with defining a new normal for administrative law.

Now that Chevron has been overturned, what happens to all those Chevron-based decisions for the last 40 years? Are they just all going to get reopened?

Kwaku Akowuah:

It's a great question, Sam. Cases decided by the Supreme Court under Chevron are only a tiny slice of the cases overall that have been resolved under Chevron. Many of them have been resolved at the courts of appeals, at the district courts. For those cases, there is no one ruling that binds all courts, binds all litigants, and they're open to challenge.

Sam Gandhi:

That's Kwaku Akowuah, co-leader of Sidley's Supreme Court and Appellate practice.

David Carpenter:

I think there is going to be a significant amount of instability in the law. I think you're going to see litigants taking a sort of raptors testing the fence approach, seeing where they can exploit weaknesses, generally in particular jurisdictions.

Sam Gandhi:

And that's David Carpenter, head of Sidley's West Coast Appellate practice and co-leader of the firm's Regulatory Litigation group. How will this affect regulated industries and how should corporations respond? We'll find out in today's podcast.

From the international law firm Sidley Austin, this is *The Sidley Podcast* where we tackle cutting-edge issues in the law and put them in perspective for businesspeople today. I'm Sam Gandhi. Hello, and welcome to this edition of *The Sidley Podcast*, episode number 42. Kwaku and David it's great to have you on the podcast.

Kwaku Akowuah:

Thanks, Sam, nice to be back.

David Carpenter:

Thank you, Sam, good to be here.

Sam Gandhi:

On Friday, June 28, the Supreme Court of the United States essentially upended the regulatory landscape, as we know it. Their ruling on two cases, *Relentless v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo*, overrules what's known as the Chevron doctrine. Federal courts have used that doctrine for nearly 40 years to defer to an agency's reasonable interpretation of an ambiguous statute. David, I'm going to start with you, break this down for us. What's this case about and what does the ruling say?

David Carpenter:

Sure. So, let's start with a brief, very brief, background on the Chevron. It arises from a 1984 case and has come to be known as a two-step framework. At step one, the court will ask has Congress directly spoken to the precise question at issue or is the statute silent or ambiguous? And if it's silent and ambiguous, you proceed to step two where courts must defer to the agency's construction, so long as it's permissible, even when the court thinks that's not actually the best interpretation of the statute.

And the doctrine's core assumption, it's underpinning, is that agencies rather than courts should be making policy judgments necessary to fill in the statutory gaps, or adapt or apply the statute to new facts and

circumstances. It's, in effect, a rule of implied delegation of interpretative authority to the agency. Now, criticisms of the doctrine, and you see those reflected particularly in the concurring opinions by Justices Thomas and Gorsuch, are that it arrogates too much power to agencies at the expense of Congress and the Court. That tilts the scale, it puts a finger on the scales, of justice in favor of the government, the most powerful litigant, and that it's an anti-reliance doctrine. It allows agencies to change the meaning of a statute from one administration to another.

Now, the specific cases in *Loper Bright* or *Relentless* have to do with a rule issued by the National Marine Fisheries Service, but the decision has almost nothing to do with that specific rule or those particular facts. These cases came up as a pure challenge to the Chevron doctrine itself and they were resolved that way. And in essence, the majority opinion basically says that both historically and specifically under the Administrative Procedure Act, the APA, it's the role of the judiciary to say what the law is. So, courts must exercise their independent judgment when interpreting statutes, even if the statute implicates a technical subject matter.

Sam Gandhi:

David, before I ask you a follow-up on the APA, you talked about the fact that the Court said that an agency's role is to make policy, but where is the line between policy and the law here in the view of the Court?

David Carpenter:

It is often very, very hard one to distinguish. And that's where the majority, even under a new regime where we're not talking about Chevron deference, recognizes the role of the agencies impossibly informing statutory interpretation. So, *Loper Bright* calls back to a 1944 case, *Skidmore v. Swift & Co.*, which recognizes that agency interpretations may constitute a body of experience and foreign judgment to which courts and litigants may properly resort for guidance.

So, in those cases under *Skidmore*, now *Loper Bright* regime, courts may give agency interpretations weight or respect depending on factors like the thoroughness and validity of its reasoning, consistency and other factors giving, the agency's view, "the power to persuade." But how much weight to give, where an issue implicates, you know, a pure question of law versus a matter of policy, that's a very fuzzy line.

Kwaku Akowuah:

I think maybe one way that a majority, say, would respond to your question, Sam, is to say, well, there's law everywhere, and there's policy everywhere. And what we are doing by ensuring the courts interpret the law as far as it goes is to make sure that the agencies are faithfully applying the policy choices made by Congress when it drew up the statute. So, we the courts police the policymaking done by Congress when Congress has been told the agency to make further make further policy, we'll enforce that too, but when the courts step out before all of Congress's policy choices have been enforced that distorts the law.

Sam Gandhi:

David, let me follow-up one other thing on the APA. So, the majority opinion frequently sites the view that under the APA it remains the responsibility of the courts to decide whether the law means what the agency says it means. But if Congress specifically delegates that authority to the agency, again, what's the Court's view on the primacy of interpretation in that case?

David Carpenter:

Under the APA policymaking and fact-finding within the agency's delegated authority is subject to arbitrary and capricious review, generally speaking. So, what the majority are saying is that where there is an expressed delegation or where the best reading of the statute is that Congress intended to confer a degree of delegated or discretionary authority on the agency. Then in those cases the Court's role will be fixing the bounds of that discretion and ensuring that the agency has engaged in reasoned decision-making within the permitted range.

But again, even within that, whether an expressed delegation has occurred and whether it applies to the facts can be subject to dispute. And we actually see that in the Marine Fisheries case where the challengers are complaining about the cost of onboard monitoring of these fishing vessels being passed onto the vessel owners; where the statute does expressly delegate discretion to the agency to require these onboard monitors, and also expressly gives the agency's power to adopt necessary and appropriate conditions.

Yet, nonetheless, we have a dispute over whether that expressed delegation is sufficient to confer the authority for the agency's particular rule here. And it's not clear that Chevron, or a lack of Chevron, actually is going to be a driver or resolve the question presented.

Sam Gandhi:

Kwaku, for 40 years, courts — as the majority opinion have said — have routinely deferred to agencies under the Chevron doctrine. Now that Chevron has been overturned, what happens to all those Chevron-based decisions for the last 40 years? Are they just all going to get reopened?

Kwaku Akowuah:

It's a great question, Sam. You know, one of the responses that the majority has to that concern is to say, well, the decisions made under Chevron still have *stare decisis* effect. They're still decisions, and I think here they're thinking about Chevron decisions that the Supreme Court has made itself, they're still binding. They remain good law even if the basis for the decision has now been called into question. They're not overturned by our decision today.

I think that's a pretty limited view of the landscape. I mean, just from scratch cases decided by the Supreme Court under Chevron are only a tiny slice of the cases overall that have been resolved under Chevron. So, many of them have been resolved at the courts of appeals, at the district courts, or maybe never even made it out of the agency forum into a challenge. For those cases, there is no one ruling that binds all courts, binds all litigants. They're open to challenge and it will be very powerful for litigants to say it's true that judge so and so, in a decision that doesn't bind you, said, well, that agency interpretation is permissible.

But that's not the law anymore and a permissible interpretation doesn't resolve the question you have to ask, which is what's the best interpretation of the law? And we're starting over. So, from that perspective, setting aside those few cases, I think there's 70 or so that Elizabeth Prelogar, the Solicitor General, identified in her brief to the Court. Apart from those 70, the huge range of cases resolved under Chevron in other settings I think are open to challenge and I think many of them will be challenged in different times and places.

Sam Gandhi:

David, what are your thoughts on that? It just seems like the Court has just opened up every potential agency decision to second-guessing in terms of whether the agency was right in interpreting policy or interpreting the law.

David Carpenter:

I agree with what Kwaku said, and at least in the short-term, I think there is going to be a significant amount of instability in the law. I think you're going to see litigants taking a sort of raptors testing the fence approach, seeing where they can exploit weaknesses, generally in particular jurisdictions, and as applied to different agencies that may be more susceptible to these kinds of challenges based on how much they have relied on Chevron in the past. And one of the points that Justice Kagan made in her dissent was that while the majority was criticizing Chevron for being unworkable, or not producing consistent results, she said, well, if you think that's going to change, I fear the majority will be gravely disappointed.

You know questions that came up under Chevron were hard and contentious and there were disputes over whether the statute was actually ambiguous, those will continue to be debated under *Loper Bright* and *Skidmore*, including questions about whether the authority was actually delegated to the agency, questions about the scope of that delegation, and whether the particular issue is truly one of law or policy.

Sam Gandhi:

If you're interested in more information about how overturning Chevron will impact the energy industry specifically, you can tune into the next episode of Sidley's *Accelerating Energy* podcast hosted by our partner Ken Irvin. You can subscribe to Sidley's *Accelerating Energy* podcast wherever you get your podcasts.

You're listening to *The Sidley Podcast* and we're speaking with Sidley partners Kwaku Akowuah and David Carpenter about the Supreme Court's ruling on two cases involving the Chevron doctrine, who benefits from the ruling, and what companies should know. Kwaku, now that Chevron has been overruled the media was focused on the fact that conservatives were applauding this, liberals were lamenting this, but is that a simple explanation of who really benefits here?

Kwaku Akowuah:

I don't think so, Sam. I mean, one of the interesting pieces of the backdrop is that when *Chevron* was first decided it was the conservatives who were cheering, not only the specific ruling, which upheld, interestingly enough, a decision made by the Environmental Protection Agency (EPA) under Justice Gorsuch's mother when she was the EPA administrator, but it was thought to be basically a message to the D.C. Circuit, to say, look, the Reagan Administration won. They won the election, they get to make policy choices. They get to make policy choices even if they are a significant departure from what the Carter Administration did, and the Johnson Administration did, and the Nixon Administration did. Policymaking really is for the President.

And so, I think that, at a structural level, what *Loper Bright* represents, at least for me, is a swing of authority away from the President, away from the presidency; and not just the President alone, but all the political appointees that occupy the agencies that are supposed to be directing the agencies to implement the President's policy priorities and towards the courts. Now, in this moment Republican appointees dominate the Supreme Court, and so I think, perhaps, there's some tendency to think about this as a victory for conservatives.

Clearly, the conservative legal movement pivoted away from a pro-*Chevron* stance — Justice Scalia was one of the early champions — and towards a broader skepticism of *Chevron* and whether it's right. But I think the way to think about it is the people who benefit, at large, are the people who lost the debate at the agency. They now have more green space to get that loss overturned in the courts. And then you have the flipside, those who won in the agency now have more work to do in the courts to ensure that the courts uphold that interagency victory.

Sam Gandhi:

And David let me give you the example, I'm the CEO or a general counsel of a highly regulated company that's subject to federal regulation and what do I do now? I'm sure there's at least a few regulations in which I would prefer not to be subject to, or I don't like the way it's been interpreted. Do I just go to court and ask to be overturned because there's no *Chevron* deference any longer?

David Carpenter:

Broadly speaking, courts may be less likely to defer to agencies like the Federal Energy Regulatory Commission (FERC), like the EPA, as they set their nationwide policy and take other action. So, I think there is more of an opening to bring those challenges or to arrange coalitions to bring those challenges. The Court's recent *Corner Post* decision, which came down just earlier this week, provides sort of a one-two punch. That's the decision saying that for purposes of the statute of limitations for an APA challenge, the statute of limitations runs from when a particular plaintiff experiences the injury, not from when the statute became final.

So, that means that statutes that were final over six years ago may now be subject to a new challenge, at least so far as a new player or a relatively newer player has entered the market. So, that definitely creates that opportunity for more aggressive litigation. But as Kwaku said that there's also the flipside of that, which is the risk. There are Chevron cases that are brought by environmental groups against overly lax regulation where now the courts may, you know, the Fifth Circuit might take a different view than the Ninth Circuit in terms of whether the agency is being too permissive in its approach.

You have a lot of prior Chevron cases that were business versus business, as Kwaku pointed out, and so now if you were the winner in the agency in its interpretation, you might now be lamenting the loss of Chevron. But overall, I think the impacts of this will be felt across areas of law, they're going to be felt across industries. I mean, the degree will depend and vary based on the statutes and the regulatory regime and the issues. A lot of agencies were already moving away from reliance on Chevron, they sort of saw the writing on the wall, so they had begun trying to insulate themselves from these kinds of decisions and to bolster the basis for their rulemaking.

I think there are other agencies and regimes where the day-to-day regulatory operations fall more squarely or more naturally within a policymaking, fact-finding rubric. Where I think agencies are going to struggle more is where they're trying to adapt statutes to new technologies or new problems and new circumstances. One of the things where the majority says you're really going to get weight, as an agency, if you have a regulation that is contemporaneous with the statute and has been consistent over time.

Well, that's fine and good, and probably not controversial at all, but it doesn't help when the world has changed and you as an agency think that you now need to address a new problem that wasn't contemplated by the original statute. And that's where you often see like the Securities and Exchange Commission (SEC) climate rule where agencies are trying to move the statutory language or to grab new problems that don't necessarily fit within the old statutory terms. Adding in the past, agencies probably had more leeway to use Chevron deference to expand the statute to allow them to address those problems.

But now you have the major questions doctrine on one hand, plus *Loper Bright*, and it's going to really tie agent's hands in being able to expand the scope of their power and their jurisdiction. But ultimately, as you as CEO or a general counsel in getting legal advice, you want the combination of an overall perspective on this shifting legal landscape, combined with the specific subject matter expertise for that industry and that agency.

Kwaku Akowuah:

So, David, I totally agree with that. I think that, you know, Sam in terms of your question, what should I do today as the CEO or general counsel, it really depends on what you need. You may not need, for your particular issue, a new rule. You may want the agency to back down off of an enforcement position. You may want the agency to shift 10 percent in terms of an approval or permitting decision. You may want them to exercise regulatory authority or not assert regulatory authority over the space in which you operate or competitor operates.

There are so many different varieties of questions and interactions that companies can have with agencies that you're really going to have to be thinking about that on a much more granular level to decide what to do, what to do next. But there's opportunity, I think, here for really creative decision-making and in some ways more aggressive postures.

Sam Gandhi:

We talked a lot about the difference policy and law. I think it's clear to say that while we think we know what it means, we don't really know what it means in terms of the distinction. And is there a risk in the future that courts

start actually starting to make policy in an effort to interpret what they think is the law?

Kwaku Akowuah:

I think that risk does exist, Sam. That, as we've been saying, there is this indistinct line of demarcation between where the law ends and policymaking begins and I think there's a risk that courts will step over that line. I think that risk exists. I also think it existed, to some degree, in the prior Chevron regime. Recall that at step one, as David described, a court could always say this is the only thing that the statute can mean as applied to this particular problem. That construct at least lent itself to the possibility that a court would get it wrong or go too far.

There are also areas like major question where a court could say, well, we're basically flipping the rubric and it's not a question of ambiguity. It's whether the Congress has spoken so clearly, and so clearly given the power of the agency to make this monumental decision, that we, the Court, will accept that it has been given to the agency. And so, that also was an area where you could see policymaking bleeding in to the legal decision-making depending on your perspective.

So, I think that risk is kind of there, no matter how you describe the exact intersection between what the courts do and what the agencies do, but I think that this opens up that risk more broadly.

Sam Gandhi:

What do you think about what agencies can do to respond to the Court's view? How do they get their views out in terms of what they think the policy really means without the risk of being overturned? Is it more likely that they're going to issue nonbinding advisory opinions? Are federal agencies going to go to court to try to clarify what this means? Do they go back to Congress?

David Carpenter:

I think agencies will try to use as many tools as they can in the toolbox. So, one will be when they're issuing new rules to round them very specifically in their delegated authority, make it clear that they are exercising policy judgments. I think they will try to make the new rule sound consistent with policies that have existed in the past, since that's one of the main features

that seems to be bugging the majority is the idea of flip-flopping, so even if it's something new try to connect it to historical regulation that has gone on.

Putting aside the rulemaking, we might see them do things like informal guidances, which we're always under *Skidmore* regardless, negotiating with the market participants. You could see agencies try to do more interpretations through the lens of enforcement proceedings where there's more of a mix of the fact-finding in the adjudication. Now, clearly if the adjudication itself is going to turn on a statutory interpretation question that's still going to be a question for the Court to ultimately decide, but that means you need a litigant who is willing to go through the entire adjudicatory process, risk the enforcement, and then appeal from that rather than settle or basically accede to the interpretation.

It'll depend on what problem they're trying to solve whether that kind of ad hoc piecemeal approach will work. Certainly, we see that in state regulations where you don't have a Chevron doctrine in California, for example, but administrative agencies carry out a lot of tacit, let's say, policymaking or rulemaking through the threat of enforcement on an ad hoc basis.

Sam Gandhi:

That's a great answer, David, thank you. As we wrap up the podcast, Kwaku, what do you anticipate hearing from clients?

Kwaku Akowuah:

We're hearing from clients quite a bit already. Broadly speaking, we're hearing three baskets of questions. So, one, some clients are just trying to get a grounding in what this decision does mechanically, how does it change the landscape in general? Hopefully, this podcast and other advice that we've been giving will help people understand just what the decision means, what does it do. Second, they're looking to see what does it mean for my particular industry. I do think that's going to be a statute-by-statute, industry-by-industry, provision-by-provision, kind of analysis.

Don't worry if you're in one of the regulated industries, help is on the way. We can tell you that our Sidley colleagues are working right now to try and develop more industry-specific guidance. In particular, I know our colleagues in the Food, Drug, and Medical Device Regulatory group have

already put out some guidance that talks about areas where the Food and Drug Administration (FDA) has relied on Chevron or Chevron adjacent ideas and there may be vulnerability and opportunity. So, I would refer people who are interested in the food and drug area to that guidance, and there will be more to come.

And then I think the other question clients have been asking me, at least, is well what's next? We are seeing a lot of movement at the Supreme Court, not only in this area, but in when it comes to administrative law and the law that governs how agencies act. What's coming around the bend? One thing that clients have pointed out — and I think they're right to point this out — is we've talked about the parts of the opinion that suggest that, well, when Congress expressly delegates to an agency we're going to recognize and respect that, that is a delegation that's in the agency's hands to work with. But they've pointed out that there's this qualifying language that what the Court says is when a particular statute delegates to an agency consistent with constitutional limits, courts must respect the delegation.

Okay, so consistent with constitutional limits. What does that mean? There's a traditional answer to that, which is that the limits are not very important. Congress has to delegate with an intelligible principle in mind, which means something like the Court has to say there's some basic loose guidance in there that tells the agency something about what it should do with the authority it's been given. Well, that's been an area of focus for academics. There have been separate writings at the Supreme Court should the Court reinvigorate what's been known as the non-delegation doctrine and put new parameters around Congress's ability to delegate?

I would keep an eye on that issue. I wouldn't be surprised, in the least, if the Supreme Court returns to that question and starts to put new rules around Congress's ability to delegate to agencies and if it does that, that too would be a very big deal.

Sam Gandhi:

We've been speaking with Sidley thought leaders Kwaku Akowuah and David Carpenter about the intricacies of the Supreme Court's new ruling involving the Chevron doctrine, and what businesses should know about the regulatory environment going forward. Kwaku and David, great informative look at the landscape regarding this new Supreme Court

decision in what was a fairly consequential week for the country. Thanks for sharing your insights on the podcast.

Kwaku Akowuah:

My pleasure, Sam.

David Carpenter:

Thank you, Sam. It was a pleasure to be here.

Sam Gandhi:

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