

Supreme Court to Reconsider the Chevron Doctrine: Does the Bell Toll for Judicial Deference to Administrative Agencies?

by Steven A. Weiler

Early next year, the Supreme Court will hear oral arguments in a pair of cases, which could overrule the *Chevron* doctrine and thereby end nearly forty years of judicial deference to federal administrative agencies' interpretations of statutes they administer. While the cases involve regulatory compliance costs imposed on Atlantic herring fishermen, the Court's decision will have broad and significant consequences, including the outcome of a pending appeal involving the extent to which an electric utility is obligated to purchase all the output from a renewable energy generator.

Without Specific Statutory Authorization, Agency Tells Fishermen to Pay for Monitors

Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act to conserve coastal fishery resources, but also to promote commercial and recreational fishing.^[1] The Secretary of Commerce, in particular her designee the National Marine Fisheries Service, promulgates regulations that implement the Act. The Service issued a rule outlining how and when New England herring fishing vessels must carry and pay for an on-board monitor, a cost which the Service recognizes will reduce fishing vessel profits by approximately 20%.^[2] Several fishermen objected and sought judicial review: one group filed suit in Washington, DC, the other in Rhode Island.

In each case, the fishermen argued that the Service exceeded its authority, because the Act contains no language authorizing the Service to force fishermen to pay for the salaries of monitors. Neither case made it to trial: each court granted the Service's motion for summary judgment, after invoking the *Chevron* doctrine and determining that the Act's authorization of the Service to act as "necessary and appropriate" was sufficient to withstand the fishermen's claims.^[3] The fishermen appealed to the DC Circuit and First Circuit, where they lost again.

Citing *Chevron*, a split DC Circuit panel explained: "When Congress has not 'directly spoken to the precise question at issue,' the agency may fill this gap with a reasonable

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interpretation of the statutory text.”^[4] The DC Circuit also noted: “When an agency establishes regulatory requirements, regulated parties generally bear the costs of complying with them.”^[5] The First Circuit echoed the DC Circuit’s analysis, then concluded: “we have no trouble finding that the Agency’s interpretation of its authority to require at-sea monitors who are paid for by owners of regulated vessels does not ‘exceed[] the bounds of the permissible.’”^[6]

Each group of fishermen filed a petition for a writ of certiorari, presenting multiple issues on appeal. The Supreme Court granted each petition, but only to address one issue: “Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial power expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.”^[7] Oral arguments on the cases – *Loper Bright Enterprises v. Raimondo* (Secretary of Commerce) and *Relentless, Inc. v. Department of Commerce* – will be held in tandem in the January 2024 argument session.

Chevron Doctrine

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,^[8] the Supreme Court established a two-step process to determine if a court should defer to a federal agency decision:

1. If the statute is clear (on its face or by using interpretive tools, e.g., rules of statutory construction), the court must give effect to the unambiguous, stated intent of Congress.
2. If the statute is silent or ambiguous, an agency’s reasonable interpretation of the statute is entitled to deference.

The doctrine is limited. Although deference can be afforded to a federal agency’s formal “notice and comment” rulemaking proceeding under the Administrative Procedures Act, non-binding agency guidance, such as policy statements, are not entitled to deference.^[9] Likewise, the Supreme Court has never “deferred to an agency’s *conclusion* that state law is preempted.”^[10]

Significantly, last year the Supreme Court in *West Virginia v. EPA* did not defer to the Environmental Protection Agency’s reading of the Clean Air Act, but rather struck down EPA’s Clean Power Plan by invoking the major questions doctrine.^[11] The antithesis of deference, the major questions doctrine requires a federal agency to show “clear congressional authorization”^[12] when claiming the power to make decisions of vast “economic and political significance.”^[13] Notwithstanding the above, application of the *Chevron* doctrine often results in a court’s upholding a federal agency’s action, which in turn deters legal challenges to administrative orders.

Pros and Cons

Supreme Court Justice John Paul Stevens, who wrote the *Chevron* opinion, gave three reasons for establishing the doctrine. One, by not specifically addressing an issue,

Congress implicitly vests an agency with a limited delegation to act (reasonably). Two, agencies (rather than courts) have greater institutional competence and expertise in an esoteric subject matter. Three, the executive branch of government, not the judicial branch, should make policy choices.^[14]

Justice Elena Kagan has expressed her support for the doctrine this way: “Members of Congress often don’t know enough— and know they don’t know enough—to regulate sensibly on an issue. Of course, Members can and do provide overall direction. But then they rely . . . on people with greater expertise and experience. Those people are found in agencies.”^[15]

However, Justice Neil Gorsuch contends that the doctrine is unfair: “[O]ur courts have long and often understood that, ‘as between the government and the individual, the benefit of the doubt’ about the meaning of an ambiguous law must be ‘given to the individual, not to authority....’” ^[16] Yet, he claims that the *Chevron* doctrine has the opposite effect: “We place a finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else.”^[17] He therefore concludes: “At this late hour, the whole project deserves a tombstone no one can miss.”^[18]

Justice Clarence Thomas also opposes the doctrine: it forces judges “to abandon what they believe is ‘the best reading of an ambiguous statute’ in favor of an agency’s construction. It thus wrests from Courts the ultimate interpretative authority to ‘say what the law is,’ and hands it over to the Executive.”^[19]

Context

The 1984 *Chevron* opinion was unanimous, but with only six justices participating: Justices Marshall, Rehnquist, and O’Connor did not participate. Before October 13, only eight justices were scheduled to participate in the *Loper Bright* decision: Justice Ketanji Brown Jackson was recused, because she was on the DC Circuit panel that heard arguments in *Loper Bright*. However, granting certiorari to *Relentless* allows all nine justices (including Justice Brown Jackson) to help decide the fate of *Chevron*.

The *Chevron* doctrine was established in a case upholding a regulation promulgated by the Reagan administration’s EPA. The EPA administrator during the rulemaking was Ann Gorsuch. Her son, Supreme Court Justice Neil Gorsuch, is ardently opposed to the doctrine.

The herring fishermen have already beaten the odds by the Supreme Court’s deciding to hear their cases. Absent a few instances where parties have a right to appeal to the Supreme Court (not applicable here), an aggrieved party seeking the Supreme Court to review a lower court decision must file a petition for a writ of certiorari. “Writ” means a written command, while “certiorari” is Latin for “to be more fully informed.” By filing a request for a writ of certiorari, a petitioner asks the Court to order a lower court to send up the record of the case for review. The Supreme Court is not obligated to grant the requested review, but rather carefully chooses cases that might have national

significance or harmonize conflicting circuit court decisions. If four of the nine Justices agree, the Court grants the request. Each year, the Supreme Court reportedly receives about 7,000 petitions for a writ of certiorari, but only hears oral argument for 100.

Implications

As noted above, the Supreme Court granted the fishermen's writs of certiorari to determine whether to overrule or curtail *Chevron*. More and more the Court has been using the doctrine less and less, but trial and appellate courts still regularly apply the doctrine. Overruling *Chevron* would lift "the finger on the scales of justice ... in favor... of the federal government" and, thereby, arguably reduce the number of federal agency victories involving legal challenges to agency regulations and spur litigation objecting to the terms of administrative oversight. This could have a deleterious effect on aspects of the Biden administration's "whole-of-government" approach to combatting climate change, such as the Securities and Exchange Commission's proposal to require registered companies to include climate-related information in registration statements and periodic reports. On the other hand, the practical effect of the Court's simply pruning the *Chevron* doctrine is unclear.

Utilities' Obligation to Purchase Green Energy from Small Generators

This summer, the Edison Electric Institute (an electric utility trade association) and NorthWestern Energy (an electric utility in Montana) filed a petition for writ of certiorari regarding the Federal Energy Regulatory Commission's interpretation of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). PURPA requires electric utilities to purchase all the output of small power production "qualifying facilities" or QFs, which are defined by statute and regulation as renewable fuel generators with a "power production capacity" not greater than 80 MW. At issue is whether an integrated 160 MW solar project and 50 MW battery storage system qualifies as a QF, requiring NorthWestern to purchase all the QF's energy output. FERC initially found that the solar project was not a QF because it could produce more than 80 MW.^[20] On rehearing, FERC reversed course, explaining that the 80 MW limit does not apply to the amount of power a generator could produce, but rather how much could be delivered.^[21] FERC reasoned that the solar developer was a QF because it intends to limit energy delivery to 80 MW: the solar array would generate direct current power, but inverters (which change the DC power from the array and the battery into alternating current power before delivery) would be designed to limit the amount of power that can be delivered to 80 MW. On appeal, the DC Circuit applied *Chevron* and by a two-to-one vote deferred to FERC.^[22]

EEL and NorthWestern argue that the DC Circuit majority opinion misapplied *Chevron*, by finding that PURPA is ambiguous (because the statute does not define "power production capacity") without performing the full *Chevron* "step one" analysis. The petitioners ask the Supreme Court to grant certiorari or, alternatively, delay deciding until the fate of *Chevron* is determined. FERC agrees. Ultimately, if *Chevron* is upheld, so too will FERC's QF order. But, if the doctrine is overruled, the Supreme Court would likely remand the proceeding to the DC Circuit to determine (without agency deference) whether FERC reasonably interpreted PURPA.

[1] 16 U.S.C. § 1801(b)(1) & (3). Congress also found and declared: “Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation.” *Id.* § 1801(a)(3).

[2] *Loper Bright Enterprises, Inc. v. Raimondo*, 544 F. Supp.3d 82, 97 (D. DC 2021).

[3] *Id.* at 104; *Relentless, Inc., v. U.S. Dep’t of Commerce*, 561 F.Supp.3d 226, 244 (D. R.I. 2021).

[4] *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 365 (D.C. Cir. 2022), *citing* *Chevron*, 467 U.S. at 842; *but see* 45 F.4th at 373 (J. Walker dissenting) (“I would reverse the judgment of the district court because the Magnuson-Stevens Act unambiguously does not authorize the Fisheries Service to force the fishermen to pay the wages of federally mandated monitors”); *id.* (“Agencies are creatures of Congress, so they have no authority apart from what Congress bestows.”) (footnote omitted).

[5] *Loper Bright*, 45 F.4th at 366.

[6] *Relentless, Inc. v. U.S. Dep’t of Commerce*, 62 F.4th 621, 633-34 (1st Cir. March 16, 2023).

[7] *Loper Bright’s* Petition for Writ of Certiorari, No. 22-451 (filed Nov. 10, 2022); Supreme Court’s Order (May 1, 2023); *see* *Relentless’* Petition for Writ of Certiorari, No. 22-1219 (filed June 4, 2023); Supreme Court’s Order (October 13, 2023).

[8] 476 U.S. 355 (1984).

[9] *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

[10] *Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (emphasis in original).

[11] 142 S. Ct. 2587 (2022).

[12] *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014).

[13] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

[14] *Chevron*, 476 U.S. at 864-65.

[15] *West Virginia v. EPA*, 142 S. Ct. at 2642 (J. Kagan dissenting).

[16] *Buffington v. McDonough*, No. 21-972, slip op. at 10 (Nov. 7, 2022) (J. Gorsuch dissenting to denial of writ of certiorari) (citation omitted).

[17] *Id.* at 9.

[18] *Id.* at 16.

[19] *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (J. Thomas concurring) (citations omitted).

[20] *Broadview Solar, LLC*, 172 FERC ¶ 61,194, P 25 (2020).

[21] *Broadview Solar, LLC*, 174 FERC ¶ 61,199, P 40 (2021); *but see id.* Commissioner Danly dissent at P 4 (The Broadview facility “is 75.5 MW above the statutory maximum allowable power production capacity for a QF. The Facility does not meet the statutory requirement to be a QF.”).

[22] *Solar Energy Industries Association v. FERC*, 59. F. 4th 1287, 1291-94 (D. C. Cir. 2023); *but see id.* at 1299 (J. Walker dissenting) (“Applying the normal tools of statutory interpretation, Broadview is not a “small facility” under the Public Utility Act because its “power production capacity” is greater than 80 megawatts.”).