

The Supreme Court Takes on the Administrative State

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In a highly controversial decision, the Supreme Court on June 28 reversed a 40-year old ruling, reclaiming the Court's role as interpreter of statutory law as it applies to a massive body of regulations imposed by federal agencies in such areas as the environment, workplace safety, public health and more.

The Court's 6-3 conservative majority overturned a 1984 ruling, also issued by that Court's conservative majority, that granted authority to a federal agency if a Congressional statute involving that agency was ambiguous or incomplete. It left the interpretation of the law to the agency rather than the courts.

This principle blocked individuals and businesses from suing agencies in court for damages incurred when the agencies exceeded their Congressional mandates.

"*Chevron* deference," the name given the 1984 decision due to the litigation involving that company, has been grounds for upholding thousands of regulations by a host of federal agencies over the last four decades. Opinions by commentators on its reversal range from "[an epic disaster](#), ... one of the worst Supreme Court rulings ... another huge gift to special interests and corporations," to "[a victory for the common man](#)" and "[an important win for accountability and predictability](#) at a time when agencies are unleashing a tsunami of regulation — in many cases clearly exceeding their statutory authority"

On July 10, [Reuters reported](#) that House Republicans had asked all federal agencies to begin reviews of regulations that could be affected by the recent ruling, noting:

Three House committees — Agriculture, Oversight, and Education and Workforce — targeted agencies including the Environmental Protection Agency, the Securities and Exchange Commission and Department of Labor in what the chamber's No. 2

Republican, Steve Scalise, called a “fight to free the American people from the power-hungry administrative state.”

The “administrative state” had modest beginnings during George Washington’s presidency, with the formation of the Defense, State, Treasury and Justice Departments. Today it has mushroomed into [more than 400 agencies](#). For the 178 laws passed by Congress in 2020 alone, [federal agencies issued](#) an average of 19 rules and regulations for each law passed, for a total of 3,382 such rules. The Federal Register, a common measure of regulatory action, hit an all-time high [95,894 pages in 2016](#). That’s 75 times [The Complete Works of William Shakespeare](#), which contains 1280 pages.

The issues raised by the *Chevron* doctrine go back to the founding of the country and make for an interesting lesson in civics. But first a look at the fishing case that reversed it.

The Fishermen Who Challenged a Bureaucracy

On Jan. 17, 2024, the U.S. Supreme Court heard oral arguments in two combined cases, [Loper Bright Enterprises v Raimondo](#) and [Relentless, Inc v Department of Commerce](#), which would determine the fate of *Chevron*. On June 28, the Court ruled in favor of the fishermen plaintiffs in the *Loper Bright* case, rejecting the deference that courts have given federal agencies in cases where the law is unclear. The Court did not rule on the merits — the question whether the agency had exceeded its statutory authority. It just ruled on the judicial question whether *Chevron* blocked the case from proceeding. **Chief Justice John Roberts**, who wrote the [Opinion of the Court, stated](#):

Chevron’s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. ...

Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA [Administrative Procedures Act] requires.

The case was therefore allowed to go forward in the lower D.C. District Court where it originated. Those proceedings are expected to begin this fall.

The plaintiffs are [three New Jersey herring fishermen who challenge](#) what they say is an unlawful requirement that forces them to surrender 20% of their earnings to pay at-sea monitors – individuals who gather information used to regulate their industry. The cost works out to as much as \$700 a day, which can be more pay than the crews themselves take home.

The requirement was imposed on them by the U.S. Department of Commerce, which oversees the National Oceanic and Atmospheric Administration, which regulates the nation’s fisheries. The fishermen don’t contest that federal law allows the government to require at-sea monitors on their boats, but they argue that Congress never gave the executive branch authority to pass monitoring costs onto the fishermen. They contend that the NOAA abused its power, but they were handicapped by *Chevron* in fighting the rule.

“We are grateful the Court has overruled *Chevron*,” said Bill Bright, one of the fishermen plaintiffs. “Restoration of the separation of powers is a victory for small, family-run businesses like ours, whether they’re involved in fishing, farming or retail.”

Paul Clement, former U.S. Solicitor General and attorney for the fishermen, echoed that sentiment, stating, “We are gratified that the Court restored the constitutionally mandated separation of powers.” And that Constitutional mandate is what makes for an interesting civics lesson on the issues.

Designing a Republic with a Balanced Separation of Powers

The Founding Fathers were famously afraid of centralized power, and they designed the Constitution and Bill of Rights to avoid it. Power was balanced among separate branches of the government — watchers watching the watchdogs, with no one imperial controller.

In colonial America, judges were appointed and paid by the monarchy, receiving salaries that were raised from duties paid by the colonists. King George exercised sole authority to appoint colonial governors to represent the Crown’s interests. For legislative control, the monarchy possessed the powers of the purse and the sword, stationing soldiers in the colonies while requiring that colonists house, feed, and pay taxes for the soldiers’ imported supplies.

Today, many regulatory agencies have their own in-house court systems, which similarly serve as judge and jury. [As Stone Washington with the Competitive Economic Institute](#), a nonprofit [libertarian think tank](#), wrote:

The judicial branch is presumably an independent branch of government, alongside the legislative and executive branches. But many regulatory agencies have their own in-house court systems, called administrative law courts (ALCs). In ALCs, agencies choose their own judges, pay their salaries, and set the rules of procedure. Agencies rarely lose in their own courts. And their abuses to established constitutional norms have garnered the attention of federal courts in recent years especially in antitrust and securities law matters.

In administrative law courts, private litigants are [deprived of basic constitutional privileges](#), including the right to trial by jury, freedom to petition a case before a Constitutional (Art. III) court, and equal application of justice under the law. Litigants who lose may or may not be granted the right to appeal to a federal court; but even if they succeed in getting on the appellate court docket, the process is lengthy and expensive, undemocratically excluding those who cannot afford the cost or the time to wait for a decision.

The New Jersey fishermen in the two herring boat cases were not required to go through the administrative law court system, but the result was the same: the agency made the rules and enforced them; and under “*Chevron* deference,” the plaintiffs were powerless to contest the outcome.

[Alexander Hamilton wrote](#) in *The Federalist* that any irreconcilable differences between the Constitution and the laws passed by Congress were to be decided in favor of protecting the Constitution as the supreme law of the land. The power of judicial review was first asserted in the Supreme Court’s 1803 decision in *Marbury v. Madison*, recognizing the Constitution as the highest law in the land. Through judicial review, the Court reinforced that constitutional system by checking the power of other branches. Not just the administrative arm of the executive branch but the legislature itself could be restrained from passing legislation that violated the Constitution.

In 1946, Congress passed the Administrative Procedure Act (APA) to codify the procedure for executing administrative law. The APA provides that the “reviewing court shall decide all relevant questions of law, [and] interpret... statutory provisions.”

It is that deviation from the constitutional system as codified in the APA that the Supreme Court intended to rectify. Justice Elena Kagan, who wrote the dissenting opinion, stated that “the majority’s decision today will cause a massive shock to the legal system, ‘cast[ing] doubt on many settled constructions’ of statutes and threatening the interests of many parties who have relied on them for years.” But Justice Roberts made clear that prior decisions relying on *Chevron* were not automatically nullified but stood under *stare decisis* (to “stand by things decided”). The issues could be challenged in new cases, but the challenged rules had to be shown to exceed the mandate of Congress.

The Question of Corporate Capture

No doubt the floodgates to new cases will be opened, as other critics have stated; and it will be a major burden for the court system, which is already backlogged. But it is actually a democratic development. As Robert F. Kennedy Jr. [explains on X](#):

The Chevron decision cuts both ways.
The original ruling allowed agencies to function effectively, which they cannot if every interpretative gray area in the law requires a court decision.

If the agency is working in the public interest, we definitely want it to exercise broad...

— Robert F. Kennedy Jr (@RobertKennedyJr) [July 2, 2024](#)

The Chevron decision cuts both ways. The original ruling allowed agencies to function effectively, which they cannot if every interpretative gray area in the law requires a court decision. If the agency is working in the public interest, we definitely want it to exercise broad interpretive leeway. For instance, almost every important environmental decision in federal court over the past 40 years is based upon Chevron. Without it, the EPA (not an entirely captured agency) is virtually powerless. But when corporate interests have captured a federal agency, then the same interpretive leeway gives the agency even more power to serve their corporate masters at the expense of the public interest. Thus we have the FDA sending armed police to [shut down Amish farmers](#) and grocery stores for selling raw milk, [while they allow](#) into our food supply hundreds of harmful but profitable chemical additives that are banned in other countries. The Chevron controversy is therefore a false dilemma with no solution. The real issue is corporate capture. If federal agencies served the public interest, then no one would want to hamstring them.

Although critics say the ruling is a boon to corporations, it is the agencies themselves that are notoriously susceptible to “corporate capture.” As [explained in Investopedia](#):

Regulatory capture is a process by which regulatory agencies may come to be dominated by the industries or interests they are charged with regulating. The result is that an agency, charged with acting in the public interest, instead acts in ways that benefit incumbent firms in the industry it is supposed to be scrutinizing.

It is that sort of corporate capture that *Chevron* deference protected from the reach of the courts, and that the Supreme Court's latest ruling has opened to private challenge. The APA tells agencies they cannot act illegally, arbitrarily, or without letting the public meaningfully participate in the creation of new rules. Many agency rules are now vulnerable to judicial review for violating those standards.

Agency Overreach: Some Areas of Vulnerability

Technically, the Federal Reserve, the FDIC, the Treasury, the State Department, the IRS and even the Defense Department are agencies falling under the Administrative Procedure Act and its rules. Even those secretive, non-transparent, unaccountable intelligence agencies sometimes called the "deep state" could be subject to APA review. But as detailed in a Vanderbilt Law School article titled "[The Politics of Deference](#)," "national security" has its own special deference under separate case law, so it probably cannot be reached.

The more likely initial targets will be agencies such as the Environmental Protection Agency (EPA), the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA) and the Securities and Exchange Commission (SEC).

[MSNBC experts expect](#) electric vehicles to be most at risk. A Reuters article titled "[Biden Tailpipe Emission Rules on Shakier Ground after Supreme Court Ruling](#)" explains, "That's because the rules target mobile sources of greenhouse gas rather than stationary ones like power plants, even though environmental laws are ambiguous on whether regulators have the mandate to do that." Another expert says the controversial tailpipe regulations "[will eliminate most new gas cars](#) and traditional hybrids from the U.S. market in less than a decade."

[Steve Forbes argues](#) that Congress would not have passed such a prohibition because of intense public opposition, so it got kicked over to the EPA, which was thought to be untouchable under *Chevron*. But *Chevron* deference is no more. On July 3, [26 states filed suit](#) against the Administration over EV mandates. [The Petition for Review states](#), "the final rule exceeds the agency's statutory authority and otherwise is arbitrary, capricious, an abuse of discretion, and not in accordance with law."

Other agency regulations expected to be the subject of lawsuits include the SEC's imposition of civil penalties without the benefit of a jury trial, and [FDA and CDC regulations](#) involving vaccines, pharmaceuticals and dietary supplements.

The administrative law system does not follow constitutional principles, which it must if it is ruling on regulations having the force of law. Removing some of the arbitrary red tape hampering small business, local politicians, schools and families by holding administrative regulations up to Constitutional standards can not only stimulate economic productivity and lower inflation and taxes but can help restore the system of checks and balances so important to our country's founders.

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