Go Fish: Reacting to the Shifting Regulatory Framework Post-*Loper Bright*

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Although it's unlikely any CAAs will wade into the fishery law at the core of the recent U.S. Supreme Court case *Loper Bright Enterprises v. Raimondo*, the decision has muddied the legal waters, which has significant implications for organizational operations and programming. This case overturned a decades-long legal doctrine about deference to federal agencies and, while it's not possible to determine how this will impact CAAs in the immediate future, the decision marks a new era of uncertainty for the regulatory process.

A Primer on the Rulemaking Process

The Community Action network relies on federal agency regulation to inform their everyday decision-making. Requirements and prohibitions establishing the framework of legal compliance are contained in statutes and regulations. Statutes are created through the legislative process and are typically written without all the details necessary for an organization to know how to fully comply with them. Rather, Congress will include language in the statute that authorizes federal agency experts and specialists to flesh out the specific points that would be inefficient and cost prohibitive for legislators to add.

The "fleshing out" of statutes by federal agencies is typically achieved via regulations. To create legally binding regulations, also called "legislative rules", federal agencies must follow the Administrative Procedure Act (APA) rulemaking process. The APA requires steps such as notice, an opportunity to comment, and publication of final rules prior to codification in the Code of Federal Regulations. Once a regulation is finalized, stakeholders can challenge it in various ways including in Congress under the Congressional Review Act or in court under laws such as the APA (e.g., for failure to follow the rulemaking process or as "arbitrary and capricious"), the Constitution (e.g., for a lack of due process), or its enabling statute. A court could enjoin the rule (i.e., temporarily prevent it from taking effect) and eventually strike it down. Agencies also issue non-binding information in the form of interpretive rules, policy statements, manuals, and guidance documents to further help the public understand how to comply with a law. Agencies are not required to follow the same APA procedures when releasing non-binding information.

From *Chevron* to *Loper Bright*

The *Loper Bright* case arose from a federal agency's interpretation of a statute it administers. Congress authorized the National Marine Fisheries Service (NMFS) to regulate under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). In 2013, the NMFS issued a rule, following the APA requirements, directing fishermen to pay for onboard observers meant to prevent overfishing. A group of family fishing businesses challenged the regulation, and the lower courts upheld the rule by applying a longstanding doctrine established in the case *Chevron v. Natural Resources Defense Council*. The doctrine required the court to defer to NMFS's interpretation of the MSA. On review, the Supreme Court overturned the doctrine.

The Chevron doctrine (also known as Chevron deference or the Chevron "two-step") was a legal approach to reviewing federal agency rulemaking that stopped a court from substituting its own interpretation of a statute for a reasonable interpretation made by the responsible federal agency. The Chevron doctrine was premised on the idea that when Congress was silent on a specific issue, the federal agencies would step in to fill the gaps with their expertise and experience. For 40 years, courts reviewed regulations by deferring to agencies when Congress's intent was unclear or ambiguous in a statute. Since what "ambiguous" meant was often up for argument, many cases resulted in courts deferring to agency readings of statutes rather than the court conducting its own judicial inquiry.

In *Loper Bright*, the Supreme Court held that Chevron deference was incompatible with the APA's requirement that the "reviewing court" decide "all relevant questions of law" and "interpret constitutional and statutory provisions". The Supreme Court was concerned that the Chevron two-step had been applied inconsistently and the application of the doctrine gave power to the Executive Branch (where federal agencies sit) that was meant for the Judicial Branch. The judiciary, the Supreme Court reasoned, is not only better suited to deciding issues of statutory interpretation, but is also mandated by Congress as the final decision-maker in the APA.

The Supreme Court did not articulate a particular test to replace the Chevron doctrine, but noted that, while the judiciary may consider an agency's thoughts when interpreting an ambiguous statute, the courts should use their "independent judgment" rather than deferring to an agency.

While the *Loper Bright* decision explicitly did not overturn any old cases that relied on *Chevron*, another Supreme Court case, *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, could open the door to challenging longstanding regulations. There is typically a time frame during which someone can bring a claim in court, which is referred to as the "statute of limitations". Claims under the APA have a six-year statute of limitations pursuant to another law governing claims against the federal government. In *Corner Post*, the Supreme Court interpreted that six-year period to start when a person is "injured"—when facts supporting a claim under the APA occur—rather than when the regulation at issue is finalized. This decision potentially creates an indefinite frame within which a stakeholder may challenge agency rulemaking like the NMFS rule in *Loper Bright*.

Why Does This Matter to CAAs?

The regulatory process is in a moment of significant change and uncertainty because *Loper Bright* and *Corner Post* upend decades of precedent that guided federal rulemaking. While existing regulations remain intact for now, litigants looking to test the contours of the new legal landscape may file cases that bring current and future regulations into question. CAAs should stay attuned to the federal agencies that regulate them and factor the involvement of the court in the rulemaking process into their decision-making. The status of regulations may change on a dime while the dust settles. CAPLAW will keep the network informed of changes resulting from these decisions that could impact

CAAs.

While this terrain is completely new for everyone, the current feeling is that the following impact will (at least) initially result from *Corner Post* and *Loper Bright*:

Fewer Hurdles Could Create More Controversy. Although a court may eventually uphold an agency's actions, new regulations are more likely to go through a judicial review process. The tactic of seeking injunctions—requesting that a court stall the implementation of a regulation—as soon as new rules are finalized may become more commonplace following *Loper Bright*. Aware that the judiciary is no longer required to defer to federal agencies, savvy challengers may bring claims in courts they view as favoring a particular interpretation of the law. This could also impact older regulations, since *Corner Post* seemingly establishes an indefinite statute of limitations period. All for-profits and nonprofits, including CAAs, may fall into the gap between agency and judicial authority, making it more difficult to understand legal obligations at any given time.

For example, using the *Loper Bright* framework, a lower court in Texas recently blocked the enforcement of the U.S. Department of Labor's (DOL) new rule raising the minimum salary thresholds for exempt employees. A smattering of recent regulations potentially facing similar challenges include the independent contractor rules by the DOL and the Equal Employment Opportunity Commission's regulations implementing the Pregnant Workers Fairness Act. Forthcoming rulemaking that may encounter a similar fate includes the proposed Head Start Performance Standards and heat rule by OSHA.

An Even Slower Regulatory Process. Federal agencies may now take additional time to promulgate rules in an attempt to preempt lawsuits. If a court decides that a statute only gives an agency limited authority to issue regulations, the agency may feel unable to act when new problems, not anticipated by the courts, arise. Agencies may choose to make their authority clear to the courts by building time into the rulemaking process to request specific permission from Congress to regulate in certain areas. This involvement of Congress could result in significantly longer timelines for agency rulemaking.

Agency Deference May Still Exist at the State Level. While *Loper Bright* solely impacts federal law, the case may embolden states to take a similar path in overturning their similar laws. All states have agencies and judiciaries that often mirror the federal system. Over the decades, some states passed laws requiring state courts to defer to state-level agency interpretations. However, recently several states, such as Arizona, Tennessee, and Florida, rescinded or otherwise removed their deference doctrine.

Little Immediate Impact on Tribal Issues. Over 150 years before the Chevron doctrine was created, the Supreme Court articulated the basis for the current approach to analyzing tribal treaties, which govern the relationship between the federal government and tribes. This legal doctrine known as

the "canons of construction" dates back to the 1800s and generally requires courts to construe ambiguities in treaties in favor of tribes. Regulations promulgated by certain federal agencies whose work impacts tribal communities most often, such as the Department of the Interior's Bureau of Indian Affairs or Bureau of Land Management, could be challenged under the *Loper Bright* framework. However, the canons of construction still remain in place following the recent court cases to help protect tribal interests under treaties.

Non-Binding Federal Agency Action Seemingly Survives. The recent decisions are unlikely to impact non-binding information, like "non-legislative" rules, in the same way as legally binding regulations. Historically, agency interpretations in non-binding publications are afforded a lower level of agency deference than the Chevron doctrine because the interpretations do not carry the force of law. This lower deference doctrine, called Skidmore deference, arose from the case *Skidmore v. Swift & Co.*, which was not overturned by *Loper Bright*. Skidmore deference allows a court to defer to an agency's interpretation to an extent that correlates with the strength, consistency, and depth of the agency's reasoning—basically, how well the court is persuaded by the agency's thought process. Any challenge to non-binding agency interpretations, such as the EEOC's recent guidance on workplace harassment, should be thus evaluated based on the lower deference doctrine precedent.

The courts could also decide to apply the lower-level Skidmore deference to legally binding regulations in place of Chevron deference or use it as a loose framework underlying their review. However, the new standard governing judicial review of legally binding actions taken by federal agencies is anyone's best guess. *Loper Bright* placed all of us in unchartered waters.

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