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How Decline Of Deference Will Affect Trump Policymaking

By **Kevin King and Brad Grisenti** (January 13, 2025, 2:44 PM EST)


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The incoming Trump administration has announced plans to dramatically reshape the administrative state. In the past, presidents could rely on Chevron deference and related doctrines to clear the way for such policy changes. But that era has ended.

Due to recent U.S. Supreme Court rulings — including last summer's blockbuster Loper Bright Enterprises v. Raimondo decision — the Trump administration faces a new administrative law regime that constrains the executive branch's ability to implement new policies.[1]

Although that regime limits the Trump administration's options in the short term, it will likely boost the administration's ability to achieve its longer-term goals of reducing the number of regulations and the overall power of federal agencies.

The need to grapple with the decline of deference is not limited to the Trump administration: All parties with an interest in Trump administration policy changes — supporters and opponents alike — must take a fresh approach to these issues.

This article summarizes how recent court rulings will affect policymaking during the second Trump administration, and how regulated parties can manage the risks and opportunities presented by the new legal framework.

Chevron's Demise

The Supreme Court's Loper Bright decision brought an end to the Chevron doctrine, which had, for nearly 40 years, instructed courts to defer to an agency's reasonable interpretation of an ambiguous statute.[2]

Under the court's 1984 Chevron USA Inc. v. Natural Resources Defense Council Inc. decision, a new presidential administration could often change or repeal the previous administration's policy with relative ease — a dynamic that facilitated significant flip-flopping in agency policy each time a new party won the presidency.

For example, the Supreme Court's 2005 National Cable & Telecommunications Assocation v. Brand X Internet Services decision[3] upheld the Federal Communications Commission's interpretation of the term "telecommunications service" in the Communications Act to exclude cable broadband providers —

an interpretation that broke with previous agency policy.[4]

The court rejected the argument that the commission's inconsistency rendered the interpretation unlawful, stating that "inconsistency is not a basis for declining to analyze the agency's interpretation under the Chevron framework."[5]

As the court explained, Chevron dictated that "'[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency ... must consider varying interpretations and the wisdom of its policy on a continuing basis,' ... for example, in response to changed factual circumstances, or a change in administration."[6]

And in Chevron itself, the court upheld the U.S. Environmental Protection Agency's interpretation of a term in the Clean Air Act, even though that interpretation departed from previous agency policy.[7]

For decades, agency flip-flopping has been the norm. At a November 2024 convention, former Solicitor General Paul Clement remarked that, "[o]n important issues, instead of coming to an enduring compromise that doesn't change with each administration," Chevron caused agencies to "start ping-ponging from one policy to the other, essentially every four years."[8]

But in overruling Chevron, the court made clear that times are changing. Indeed, the court criticized Chevron's requirement "that courts mechanically afford binding deference to agency interpretations, including those that have been inconsistent over time."[9]

Under Loper Bright, courts must now "exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[10]

Gone are the days when agencies could reverse policy by simply offering a reasonable statutory interpretation; they must now apply the correct statutory interpretation, even when it does not fully align with their policy agenda.

This doctrinal shift will play a significant role in shaping policymaking and regulatory litigation during the second Trump administration.

Challenges for the Administration, Opportunities for the Opposition

We have already seen some of the practical effects of Loper Bright, as the Supreme Court and several courts of appeals swiftly remanded pending cases for further consideration under the new standard.[11] That said, the Trump administration will be the first to start with Loper Bright as the baseline for cases involving agency interpretations.

Given the court's increasingly skeptical view of agency deference, Loper Bright will likely make it more difficult for the new administration to change or repeal Biden-era policies.

To prevail in court, agencies and their supporters will need to show that the new policies are based on the best reading of the statute. Successful arguments will rely on the traditional tools of statutory interpretation — e.g., ordinary meaning, dictionary definitions, substantive canons, etc. — to show that their interpretation is correct.

In addition, these parties will need to navigate sometimes-conflicting priorities between (1)

interpretations that maximize agency discretion and power, which would produce near-term wins for the Trump administration; and (2) interpretations that incorporate meaningful limits on agency authority — which, in the short term, would limit the Trump administration's options, but over the long term would advance the administration's broader goal of reducing the power and scope of the administrative state.

On the latter point, some may think that Loper Bright supports the Trump administration's goals because deregulation, in many cases, is the administration's goal.[12] This may be true to some extent, but it is also true that the narrow boundaries established in Loper Bright may hinder the administration's ability to fully realize its agenda.

For example, President-elect Donald Trump's immigration and border security goals may require new interpretations of the Immigration and Nationality Act. Loper Bright could wind up being an obstacle for some of those changes.

On the other side, Loper Bright provides new and powerful tools for parties opposed to the Trump administration's actions. Under Chevron, parties challenging agency interpretations were at a disadvantage because the agency's interpretation prevailed so long as it was reasonable. Under that test, the agency interpretation prevailed in more than 77% of cases, nearly 25% more often than in cases where Chevron did not apply.[13]

Now, both sides are on a level playing field where the most persuasive statutory argument will prevail.

Express Delegations

Although Loper Bright closed the door on one of Chevron's key presumptions — that statutory ambiguity reflects a delegation of power to the executive branch — Loper Bright left the door cracked open for deference where a statute expressly delegates interpretive discretion to an agency.

In addressing this issue, the court stated that "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it."[14]

Then, in a pair of key footnotes, the court provided examples of these delegations, such as Title 42 of the U.S. Code, Section 7412(n)(1)(A), which directs the "EPA to regulate power plants 'if the Administrator finds such regulation is appropriate and necessary,'" and Title 29 of the U.S. Code, Section 214(a)(15), which authorizes the U.S. Department of Labor to define and delimit certain statutory terms in the Fair Labor Standards Act.[15]

Under the Biden administration, agencies have seized on these examples to argue that other statutes similarly delegate broad policymaking flexibility.[16] Though the success of these arguments has varied,[17] the Trump administration may still follow suit, choosing to adopt similar arguments.

To be sure, the first Trump administration rarely invoked Chevron deference. This suggests that the second administration might not rely heavily on the express delegation concept. Nonetheless, taking a page from the Biden playbook could help the Trump administration achieve its near-term policy goals.

Despite these examples, the line between permissible and impermissible delegations remains unclear. For example, under the nondelegation doctrine, courts may be reluctant to interpret a statute as

delegating Congress' core legislative powers to the executive branch. And under the "major questions" doctrine, agency policymaking on important issues — such as forgiveness of federal student loans — must be supported by a clear congressional delegation of authority.[18]

Parties opposed to Trump administration policy changes may be able to wield these doctrines in court, particularly where agencies rely on general language in older statutes to tackle new problems.

On the other hand, the Trump administration and its allies may find ways to deploy these doctrines in an affirmative manner — for example, by citing them as the basis to repeal or narrow regulations adopted by prior administrations.

Indeed, in cases where an existing regulation arguably conflicts with Loper Bright, the nondelegation doctrine or the major questions doctrine, the Trump administration could repeal the regulation on that basis alone — thus bypassing the more time- and resource-intensive process of developing a factual record sufficient to support repeal under the Administrative Procedure Act's "arbitrary and capricious" standard.[19]

The Supreme Court's July 2024 decision in Corner Post Inc. v. Board of Governors of the Federal Reserve System,[20] which interpreted the statute of limitations for Administrative Procedure Act claims in a way that allows businesses and trade associations to challenge many long-standing regulations,[21] provides yet another avenue for the Trump administration's deregulatory agenda.

Erosion of Other Deference Doctrines

Although Chevron deference has been the most scrutinized deference doctrine, there are related doctrines that will likely see further erosion over the next four years.

For example, the Kisor, or Auer, doctrine, often requires courts to defer to an agency's reasonable interpretation of its own regulations.

Although the Supreme Court upheld this doctrine almost six years ago in 2019's Kisor v. Wilkie[22] — albeit on narrow grounds — Loper Bright's declaration that "courts, not agencies, will decide 'all relevant questions of law' on review of agency action" casts further doubt on Kisor's survival.[23]

If the Trump administration relies on Kisor deference, we expect that parties will seek to overturn the doctrine in the Supreme Court, replicating the Loper Bright playbook and relying on the rationales in Justice Neil Gorsuch's Kisor concurrence.[24]

While Kisor is likely to experience further erosion, Loper Bright may have preserved some form of Skidmore deference. Under the Skidmore doctrine, named for the Supreme Court's 1944 decision in Skidmore v. Swift & Co., courts may give respectful consideration to an agency's construction of a statute, with the amount of weight given to the interpretation depending on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[25]

The consistency element will likely disable Skidmore deference in cases where the Trump administration modifies or overturns preexisting regulations. For example, in In re: MCP No. 185, the U.S. Court of Appeals for the Sixth Circuit in August 2024 stayed an FCC rule that would have interpreted the term "common carrier" under the Telecommunications Act to include broadband internet providers.[26]

In his concurring opinion, U.S. Chief Circuit Judge Jeffrey Sutton rejected the commission's argument that its interpretation was entitled to Skidmore deference, noting that the commission had modified its position several times in the past: "The Commission's 'intention to reverse course for yet a fourth time' suggests that its reasoning has more to do with changing presidential administrations than with arriving at the true and durable 'meaning of the law.'"[27]

Although Skidmore's consistency element will sometimes prevent the Trump administration from successfully invoking the doctrine, that element may also present an opportunity for the administration on a longer-term basis. By breaking with past practice and adopting its own interpretations, the Trump administration can ensure that an agency's position is not consistent over time, thus effectively disabling Skidmore deference for future presidential administrations that seek to return to Biden- or Obama-era policies.

In other words, the mere act of adopting new positions can in itself reduce an agency's authority in a durable manner.

Conclusion

The incoming Trump administration appears poised to break considerable new ground in administrative law, and the Supreme Court's recent decisions will play a significant role in shaping those developments.

Loper Bright leaves the Trump administration with less flexibility to adopt policy changes than past administrations, and it will hinder the Trump administration's near-term efforts to overturn some Biden-era policies.

Nevertheless, Loper Bright may prove to be an asset for the Trump administration in other respects, including the administration's longer-term effort to reduce the number of regulations and the overall reach of the administrative state.

In addition, these doctrines provide parties with an interest in Trump administration policy changes — whether as supporters or opponents — with tools to advance their interests in court.

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Disclosure: King was on the legal team that filed a merits-stage amicus brief on behalf of the U.S. Chamber of Commerce in Kisor v. Wilkie.

[1] https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf.

[2] Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2256 (2024); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council Inc., 467 U.S. 837, 844 (1984).

[3] https://tile.loc.gov/storage-services/service/ll/usrep/usrep545/usrep545967/usrep545967.pdf.

[4] See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

[5] Id. at 981.

[6] Id. at 981 (cleaned up).

[7] See Chevron, 467 U.S. at 857–58.

[8] Paul D. Clement, "Administrative Law and Regulation: What Is the Future of Administrative Law?," 2024 Federalist Society National Lawyers Convention, Nov. 14, 2024, Washington, D.C. Available at https://youtu.be/9kkJ8xnOTSc.

[9] Loper Bright, 144 S. Ct. at 2265.

[10] Id. at 2273.

[11] See Solar Energy Indus. Ass'n v. FERC, 59 F.4th 1287 (D.C. Cir. 2023), cert. granted, judgment vacated sub nom. Edison Elec. Inst. v. FERC, 144 S. Ct. 2705 (2024); Solis-Flores v. Garland, 82 F.4th 264 (4th Cir. 2023), cert. granted, judgment vacated, 144 S. Ct. 2709 (2024); Utah v. Su, 109 F.4th 313 (5th Cir. 2024) (remanding to district court for review under Loper Bright).

[12] See Jack Salmon, Trump Can Start Deregulation Right Away With Executive Orders, Nat. Rev. (Nov. 21, 2024), https://www.nationalreview.com/2024/11/how-trump-can-release-bidens-regulatory-brake/ (noting that President-elect Trump "has vowed to implement the 'most aggressive regulatory reduction' effort in the country's history"); see also Robin Bravender, Trump Vows Anti-reg Blitz, E&E News (Nov. 4, 2024) https://www.eenews.net/articles/trump-vows-anti-reg-blitz/ (quoting Trump: "On Day One, I will sign an executive order directing every federal agency to immediately remove every single burdensome regulation driving up the cost of goods.").

[13] Brief for Law Professors Kent Barnett and Christopher J. Walker as Amicus Curiae Supporting Neither Party at 28, Loper Bright Enterprises v. Raimondo, No. 22-451 (U.S. filed July 24, 2023).

[14] Loper Bright, 144 S. Ct. at 2273.

[15] See Loper Bright, 144 S. Ct. at 2263, n.5–6.

[16] See, e.g., In re MCP No. 185, No. 24-7000, 2024 WL 3650468, at *4 (6th Cir. Aug. 1, 2024) (Rejecting the FCC's claim that it had a "clear congressional delegation of authority to classify broadband as a common carrier").

[17] Compare id., with Mayfield v. United States Dep't of Lab., 117 F.4th 611 (5th Cir. 2024) (Upholding Department of Labor Minimum Salary rule "because there is an uncontroverted, explicit delegation of authority" and the Department's rule is "within the outer boundaries of that delegation.").

[18] See Biden v. Nebraska, 143 S. Ct. 2355 (2023) (The term "waive or modify" in the HEROES Act does not permit Secretary of Education to cancel $430 billion in student loans).

[19] See 5 U.S.C. § 706(2)(A). The APA provides a separate avenue to set aside regulations that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." Id. §706(2)(C).

[20] https://www.supremecourt.gov/opinions/23pdf/22-1008_1b82.pdf.

[21] See Corner Post Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 144 S. Ct. 2440 (2024).

[22] See Kisor v. Wilkie, 588 U.S. 558 (2019).

[23] Loper Bright, 144 S. Ct. at 2261.

[24] See Kisor, 588 U.S. at 592 (Gorsuch, J., concurring in judgment) (reasoning that Kisor was "more a stay of execution than a pardon" for Auer deference).

[25] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[26] See In re MCP No. 185, 2024 WL 3650468.

[27] Id. at *6 (Sutton, J., concurring).