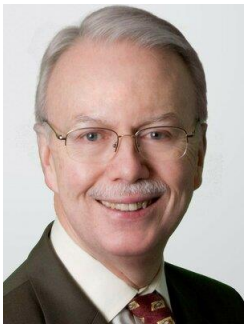
Loper Bright Limits Federal Agencies' Ability To Alter Course

By **Steven Gordon** (August 7, 2024)



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In 2017, I examined the considerable leeway enjoyed by an incoming administration to alter or reverse existing regulatory policies without enacting new legislation.

It is time to revisit this issue in light of the U.S. Supreme Court's recent decision in Loper Bright Enterprises v. Raimondo,[1] which overruled the Chevron decision requiring courts to defer to reasonable agency constructions of statutes that they administer.[2]

The demise of Chevron substantially curtails agencies' ability to change course.

The Brand X Decision

Chevron made it possible for federal agencies to change regulatory course by reinterpreting their statutory authority. The Supreme Court ruled in 2005, in National Cable & Telecommunications Association v. Brand X Internet Services, that an agency could change its interpretation of a statute and still receive deference so long as its new interpretation was within the range of reasonable interpretations.

It reasoned that, "if the agency adequately explains the reasons for a reversal of policy, change is not invalidating, since the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency."[3]

Further, the court recognized that a change in administrations may constitute a legitimate basis for an agency to change regulatory course. It observed that an "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 administrations."[4]

The Limits Imposed by the Administrative Procedure Act

At the time Brand X was decided, it was widely thought that the Administrative Procedure Act imposed constraints on an agency's ability to change regulatory course.

Federal appellate courts had ruled that the APA required agencies to provide additional factual justification or to take additional procedural steps when they reversed an established policy than when they formulated a policy in the first instance. However, the Supreme Court overruled those decisions in the years that followed.

In 2009, in Federal Communications Commission v. Fox Television Stations Inc., the court held that the APA does not impose any additional limits when an agency reverses its policy beyond those applicable when the agency created the policy in the first instance.

An agency may not depart from a prior policy without acknowledging that it is doing so. But

the agency need not demonstrate that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.[5]

The court flagged two situations in which an agency must provide a more detailed justification for changing an existing policy than would be necessary for a brand new policy.

The first is when the changed policy rests upon changed factual findings that contradict those that supported the previous policy; the second is when the previous policy is long-standing and has engendered reliance interests by the regulated community that must be taken into account.

In such cases, the agency must provide a reasoned explanation for disregarding its previous fact-finding and the reliance interests created by its previous policy.[6] But, so long as it does so, the agency is free to change course.

In 2015, in Perez v. Mortgage Bankers Association, the Supreme Court overruled cases that had required agencies to follow public notice-and-comment rulemaking procedures whenever they changed an interpretation of a federal statute or regulation.

The court held that if the agency's interpretation did not require public notice-and-comment procedures in the first instance, a change in that interpretation does not require public notice and comment either.[7]

The court reasoned that the APA requires public notice and comment for the promulgation of legislative rules that have the force and effect of law, but not for interpretative rules that advise the public of the agency's construction of the statutes and rules that it administers, but which are not legally binding.

The court held that "[b]ecause an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule."[8]

In essence, the Supreme Court ruled that the APA is neutral in terms of the limits it imposes on agencies as between new and changed policies. Since the APA is not a brake, this meant that, under Brand X, agencies had considerable latitude to change regulatory course by simply reinterpreting the statutes that they administer.

The Impact of Loper Bright

Loper Bright overrules Chevron and effectively overrules Brand X as well. Because a statute's meaning is to be decided by a court rather than an agency, the statute's meaning cannot change from one administration to the next.

Until a court authoritatively construes an ambiguous statute, different administrations may espouse different interpretations of it. But once the meaning of a statute is established, an agency cannot redefine it.

This does not mean, however, that agencies have lost all ability to change regulatory course from one administration to the next. They retain some authority to redefine the meaning of their own regulations under the Supreme Court's 2019 decision in Kisor v. Wilkie,[9] which retained the rule that courts defer to reasonable agency constructions of their own regulations. However, this form of judicial deference was narrowly construed by Kisor and

may now face its demise after the decision in Loper Bright.

An agency also retains authority, under the court's decision in Perez, to change regulatory course in its interpretative rules that advise the public of the agency's construction of the statutes and rules which it administers.

Although such interpretative rules are not legally binding, they have been enormously influential on the regulated community, especially under the Chevron regime where courts were likely to defer to the agency's construction in the event of a legal challenge.

The Loper Bright decision levels the playing field for the regulated community to challenge an agency's interpretative statutory construction with which it disagrees. Doubtless, more such litigation will now ensue.

However, the expense and uncertainty of litigation frequently cause the regulated community to adjust its conduct to an agency's changed interpretation rather than contest it. Thus, the practical impact of an agency's ability to change course via interpretative rule should not be underestimated.

Loper Bright does, however, ameliorate the practical difficulties of discerning whether a challenged regulation is a legislative rule or an interpretative rule, a determination that often "is quite difficult and confused," according to the U.S. Court of Appeals for the District of Columbia Circuit in National Mining Association v. McCarthy in 2014.[10]

Under the Chevron regime this distinction was important because a challenge to a particular regulation was unlikely to succeed unless it was a legislative rule that had been issued without the requisite notice and comment. If it was instead found to be an interpretative rule, the court would likely side with the agency and uphold it.

Under Loper Bright, however, a challenge can prevail if the regulation at issue is either (1) a legislative rule issued without notice and comment, or (2) an interpretative rule and the court disagrees with the agency's statutory construction. A challenge can assert these two contentions in the alternative.

For all of these reasons, Loper Bright will greatly diminish agencies' ability to change regulatory course from one administration to the next. While a new administration can institute changes in policy and enforcement philosophy, the legal requirements imposed by unchanged statutes or regulations should generally remain the same. This should end a regime "where legal demands can change with every election even though the laws do not," as Justice Neil Gorsuch said in Loper Bright.[11]

Correction: A previous version of this article attributed the 2014 opinion in National Mining Association v. McCarthy to the wrong court. This error has been corrected.

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[1] Loper Bright Enterprises v. Raimondo, 603 U.S. ___, 144 S.Ct. 2244 (2024).

[2] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984).

[3] National Cable & Telecomms. Ass'n v. Brand X Internet Services, 545 U.S. 967, 981 (2005). (Internal quotation and citation omitted).

[4] Id. (internal quotation and citation omitted).

[5] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

[6] Id. at 515-16.

[7] Perez v. Mortgage Bankers Association, 575 U.S. 92 (2015).

[8] Id. at 101.

[9] Kisor v. Wilkie, 588 U.S. ___, 139 S.Ct. 2400 (2019).

[10] National Mining Assn. v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014).

[11] Loper, 144 S.Ct. at 2286 (Gorsuch, J., concurring).