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Commercial Fishermen Urge Supreme Court to Reel In Agency Authority

Minding Your Business on **June 8, 2023**

The U.S. Supreme Court has agreed to hear a case challenging its landmark 1984 decision in *Chevron v. Natural Resources Defense Council.* The high court's ruling could have important implications on federal officials' discretion to regulate in many facets of American life.

Background and Chevron

When Congress delegates regulatory functions to administrative agencies, the delegating statute governs the agency's ability to act. That is, the statute itself sets the agency's boundaries and an agency may not regulate or take actions outside the scope of its delegated authority. But what happens when an agency takes actions that exceed the scope of its delegated authority? Or what happens when it is unclear from the statute whether an agency even has authority? For more than 200 years, the federal judiciary has served as a critical "check" on the powers and actions of the executive and legislative branches of government.

"*Chevron* deference" has become one of the most well-known precedents in administrative law. Arising from the Supreme Court's landmark 1984 decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, it is based on the principle that an agency, with its expertise, is better positioned than a judge to know a statute's meaning and, thus, it requires judges to defer to "reasonable" interpretations of ambiguous statutes.

Chevron deference involves a two-step process. First, a judge must decide whether Congress has directly addressed the precise issue before the court. If the statute is clear on its face, the court must effectuate Congress's stated intent. But if the court concludes that a statute is silent or ambiguous, it proceeds to step two, which requires it to defer to the agency's interpretation as long as that interpretation is "reasonable." This is a deferential standard, prompting courts to assess only whether the agency's interpretation is "based on a permissible construction of the statute."

Loper Bright Enterprises, Inc. v. Raimondo

Loper involved a challenge to agency authority under the Magnuson-Stevens Act—a federal statute enacted to "conserve and manage the fishery resources found off the coasts of the United States." Pursuant to its purported authority, the National Marine Fisheries' Service ("NMFS") sought to establish an "industry funded" monitoring program under which herring vessels would be required to carry – and pay for – federal observers onboard their vessels at sea.

A group of commercial fishermen objected, arguing that while the Act permitted the NMFS to require them to carry federal monitors, it did not allow the NMFS to force the fishermen to shoulder that cost. According to the fishermen, the expected economic impact of doing so would be "possibly disastrous for the herring fleet."

The lower court rejected the fishermens' challenge, holding that the NMFS acted within its delegated authority in implementing the industry-funded monitoring program. Under *Chevron* step one, it determined that the statute's provisions, "taken together," vested the NMFS with "broad authority" that included the authority to implement an "industry-funded" monitoring program. But the court went further, observing that even if the fishermen could raise an ambiguity in the statute, the NMFS's interpretation was a reasonable one under *Chevron* step two.

The Ninth Circuit arrived at the same conclusion, albeit through different means. Under *Chevron* step one, it held that the statute was silent on the question of whether the NMFS may require the industry to bear the costs of at-sea monitoring. But despite that acknowledgement, the Ninth Circuit nevertheless deferred to the NMFS's interpretation under *Chevron* step two, holding, in relevant part, that the NMFS's explanation "reasonably tied" the industry-funded monitoring program to the Act's purposes and was therefore "owed deference at *Chevron* Step Two."

In a brief order, the Supreme Court granted certiorari to the fishermen on one question:

"Whether the court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."

The Future of Chevron

Since the Supreme Court's 1984 decision, "*Chevron* deference" has become central to administrative law. It has allowed agencies to make "technical" decisions in areas where technical knowledge is arguably key to reasoned regulation (think: environmental law, employment law, and tax law). But critics have raised concern about the Court's holding and its tendency to not only expand the reach of agency authority, but to also interfere with objective and neutral judicial review. While one can only speculate about the Supreme Court's motivations for granting certiorari, it is nevertheless clear that, 40 years later, the Supreme Court's *Chevron* ruling is under the microscope.

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