In Memoriam: The Modern Administrative State (1984-2024)

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(by **Joseph Schaeffer** and **Jessica Deyoe**)

On June 28, 2024, the modern administrative state died with the United States Supreme Court's overruling of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Born in obscurity as a six-justice plurality opinion on the meaning of "stationary source" under the Clean Air Act, its two-step framework for resolving ambiguities in agency-administered statutes soon catapulted *Chevron* into the most-cited opinion in the Supreme Court's canon. That framework required courts reviewing agency's statutory interpretations to ask, first, whether Congress had clearly spoken to the precise question at issue. If so, the Congressional intent controlled over any contrary agency interpretation. But, if not, the Court was to defer to the agency as long as it offered a permissible construction of the statute, even if that construction was not the one the Court would have reached on its own.

Chevron and its two-step framework enjoyed a charmed childhood as a perceived means to achieving uniformity in interpretation of agency-administered statutes. But as *Chevron* entered its teenage years, and particularly once it entered adulthood, its original luster began to tarnish. Members of the bench and bar began to question how the deference owed to agency interpretations under *Chevron* could be squared with Congress's directive in the Administrative Procedure Act that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." [1] And some members of Congress and the broader public bemoaned *Chevron* as transferring power away from the legislative to the executive branch, enabling each new administration to offer a new gloss on statutory enactments that the prior administration had thought settled.

By the time the most recent question of *Chevron*'s continued vitality reached the Supreme Court in the consolidated cases of *Loper Bright Enterprises and Relentless, Inc.*,[2] the decision was a zombie. Not having been applied at the Supreme Court since 2016 and questioned by several of the justices in separate opinions, its death was virtually assured. But lower courts, bound by precedent, for the most part continued to apply it. Justice Roberts' opinion formally overruling *Chevron* was thus a formality, but a necessary one nonetheless to inform and direct lower court review of federal administrative agency actions.

Writing for the majority, Justice Roberts adopted the central legal criticism of *Chevron* as the foundation of the Court's holding: by requiring courts to defer agency interpretation of ambiguous statutory enactments, *Chevron* ran counter to the Congressional commandment in the Administrative Procedure Act for courts to "decide *all* relevant questions of law"[3] and to Constitutional separation-of-powers principles, as well. And because *Chevron* had started on a shaky legal footing, proved unworkable in practice, and experienced a lengthy period of desuetude at the Supreme Court, not even *stare decisis* could save it from death.

Chevron, however, did not "go gentle into that good night." Its two-step framework continued to be applied by lower courts up to the moment of its death. And Justice Kagan, writing for the three Justices in dissent, denied any contradiction with the Administrative Procedure Act, arguing that that statute does not compel the *de novo* statutory review required by Justice Robert's majority opinion, while bemoaning the Supreme Court's lack of respect for *stare decisis* and the practical consequences of having judges interpret ambiguous provisions in complex technical statutes. Justice Kagan also expressed concern for the application of the many post-*Chevron* statutory enactments that assumed application of an interpretative framework that is no longer. She further predicted uncertainty as agency interpretations, once thought settled, will be subject to challenge. In that sense, Justice Kagan authored an obituary preceding ours.

Chevron was preceded in death by *Securities and Exchange Commission v. Jarkesy*.[4] Another Justice Roberts opinion from just a day earlier, *Jarkesy* applied the Seventh Amendment to invalidate the SEC's use of in-house administrative law judges to seek civil penalties under antifraud provisions in agency-administered statutes. Those

claims must henceforth be prosecuted in federal court where defendants may be tried by a jury of their peers. Similar provisions in approximately 200 other federal statutes are likely to soon face similar challenges, if not to fall soon. *Chevron* and *Jarkesy* thus mark the end of the modern administrative state, where agencies could offer their own interpretations of ambiguous statutory provisions and then enforce their interpretations in in-house administrative forums with less formal procedural rules.

Though its modern iteration died with *Loper Bright* and *Jarkesy*, the administrative state lives on. *Chevron* is survived by the cases decided under its two-part framework, with the majority noting that "mere reliance" on *Chevron* is not enough by itself to qualify as a "special justification" for overruling a decision. *Chevron* also is survived by *Skidmore*, [5] under which agency interpretations and opinions, even on legal questions, are entitled to respect consistent with "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." And *Chevron* further is survived by *Auer*,[6] under which judicial deference is required of agencies' interpretations of their own regulations. Neither decision, however, is a substitute for the scope and significance of deference that agencies were previously afforded under *Chevron*.

Though much about the post-*Chevron* landscape remains to be determined, the courts now have a much larger role in saying *what* the law is—not only at the interpretative stage under *Loper Bright* but also at the enforcement stage under *Jarkesy*.

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[1] 5 U.S.C. § 706.

[2] Loper Bright Enterprises Inc. v. Raimondo, No. 22-451, 603 U.S. — (2024).

[3] 5 U.S.C. § 706.

[4] U.S. Securities and Exchange Commission v. Jarkesy, No. 22-859, 603 U.S. — (2024).

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

[6] Auer v. Robbins, 519 U.S. 452 (1997).