

ENERGY NEWS

A L E R T

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Agency Deference - Post-Chevron Doctrine

The U.S. Supreme Court formally ended the administrative law doctrine known as “*Chevron* deference” this summer in [Loper Bright Enterprises, Inc v. Raimondo](#). This decision is celebrated as a significant victory for reigning in federal agency regulatory over-reach and the power of the administrative state. Appropriately so. But, with the revelry dust now settled, there is still confusion as to what the *Loper* decision means, particularly in the context of the level of deference courts still afford to federal agencies.

Under the *Chevron* doctrine federal courts deferred to a federal agency’s reasonable interpretation if two things were true. First, the agency must have been interpreting a statute that Congress charged the agency to administer. Second, the court had to find the statutory provision at issue to be ambiguous.

As an initial matter, the use of *Chevron* deference had already been declining prior to the Court’s decision in *Loper*. In its wake, reviewing federal courts cannot defer to the agency’s interpretation of an ambiguous statutory provision. Instead, the court must exercise its independent judgment to determine whether or not the agency’s interpretation is consistent with the legislative language enacted by Congress. The judicial branch is the ultimate arbiter of the issue, not the executive branch. *Loper* reflects the current Supreme Court’s continued emphasis on the restoration of constitutional separation of powers between the three branches of government.

From a practical standpoint, what does *Loper* really mean for regulated industries?

The bottom line:

1. The *Loper* decision most significantly impacts agency rulemakings where federal agencies are seeking to promulgate regulations to implement an arguably ambiguous statutory provision.
2. When developing rules to implement ambiguous statutory provisions, agencies must narrowly construe those regulations. Even so, *Loper* opens the door to an increase in legal challenges to new agency rules, as creative attorneys will develop novel theories to allege the existence of an ambiguous statutory provision.
3. Courts can still consider and give weight to a federal agency’s interpretation of its own statute, even if ambiguous, to inform the court’s ultimate decision. Under *Loper*, courts simply will not automatically defer to the agency’s interpretation.
4. When agency actions do not involve interpretation of an ambiguous statutory provision, then courts still afford deference to the agency under the standard of review stemming from Administrative Procedure Act legal precedent. Under this legal standard, courts afford deference to agency actions squarely within that agency’s legal and regulatory authority, particularly in matters that are highly technical and within the realm of the agency’s expertise.
5. *Loper* applies when there is an ambiguous statute, but not an ambiguous regulation. Courts still afford deference to an agency’s interpretation of its own ambiguous regulations under what is called the *Auer* doctrine.

In sum, *Loper* is not an all encompassing panacea to federal agency overreach. *Loper* provides an important backstop to the administrative state and a tool for challenging agency regulations that exceed the regulatory authority granted to the agency by Congress. But, a wide-array of judicial deference to federal agencies still exists.

For more insight into this Supreme Court ruling and other important issues impacting the industry, please contact [Bret Sumner](#).