Federal Agencies Stripped of Power by Supreme Court

by Kate Lynnes
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Kate Lynnes is a Muskegon native. She has a B.S. in civil engineering from Michigan Technological University and a law degree from the University of Oregon. She decided not to practice law and focused her four decade career on environmental permitting and the cleanup of hazardous waste, Superfund and Brownfield sites. For the three years before she retired in the spring of 2024, Kate served as the technical lead for the office of the Assistant Secretary of the Air Force's cleanup program with a focus on emerging contaminants, such as PFAS.

In 2020, New Jersey fishing company Loper Bright Enterprises filed a lawsuit which argued the National Marine Fisheries Service could not force it to pay for monitors to accompany crews on trips to watch for overfishing.

Lower courts sided with the agency based on the "Chevron deference doctrine", named for a 1984 case that directed courts to defer to a federal regulating agency's interpretation when the law is ambiguous.

The U.S. Supreme Court's June 28, 2024 *Loper Bright Enterprises v. Raimondo* (Loper Bright) decision overturned the 40-year legal precedent and gave individual judges the sole responsibility to decide Congressional intent when regulated parties and agencies disagree and the law isn't clear.

Chief Justice Roberts explained it this way:

"*Chevron's presumption is misguided because agencies have no special competence in resolving statutory ambiguities, Courts do*".

You may have missed this ruling in the fire hose of news that overwhelms us every day. Maybe you listened to Nina Totenburg's summary of the ruling while making dinner and thought, "it's about herring fishing. I don't need to worry about that".

FAR REACHING IMPLICATIONS

If only that was true! The implications of the Loper Bright ruling extend far beyond commercial fishing, and will affect how all federal regulatory agencies develop the rules including, but not limited to, the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), the Occupational Health and Safety Administration (OSHA) and the Federal Trade Commission (FTC).

The line between what is an exclusively scientific determination and a legal interpretation is not always clear. I agree with Justice Elena Kagan who wrote in her dissent that the court had given itself "*exclusive power over every open issue – no matter how expertise-driven or policy-laden – involving the meaning of regulatory law*."

SOUNDING THE ALARM

Ironically, Justice Gorsuch in another environmental ruling this term, *Ohio v. EPA,* repeatedly mixed up nitrous oxide (laughing gas administered by dentists) with nitrogen oxide (a greenhouse gas and ozone precursor), illustrating Justice Kagan's point. He or any one of his clerks could have Googled this and easily caught the mistake.

I admit that as an environmental engineer, this mistake made me laugh. Unfortunately. there is nothing funny about Loper Bright. Agencies do have the technically qualified staff to draft and enforce rules.

Judges, on the other hand, may have expert consultants but will never have the breadth and depth of expertise that an agency has. Furthermore, judges typically rely on their clerks, who are recent law school graduates with fairly general undergraduate degrees and no specialized work experience.

The activist federal judges appointed by Trump for life from lists developed by the Federalist Society and other right wing "think tanks" clearly relish legislating from the bench and throwing out established precedent.

On the other hand, agency employees, with the exception of high level administrators appointed by the President, are career civil servants who aren't beholden to a particular administration.

Agencies aren't always right, but at least the federal rule-making process is very transparent;

- The administrative record, which contains all of the background studies and public comments, is available online.
- The proposed rule includes a detailed preamble, which describes the agency's rationale for its proposal.
- There is a public comment period.
- The final rule includes another detailed preamble, which includes the significant public comments received on the proposed rule, the agency's response, and the rationale for the final rule.

At the end of all of this, there is still an opportunity for parties to file suit.

This level of transparency and accountability does not apply to judges making decisions about Congressional language.

Loper Bright and other recent Supreme Court decisions targeting the authority of administrative agencies are part of the game plan developed by the Federalist Society and others.

While it is true that Chevron has fallen out of favor in the higher courts, the Loper Bright decision stands out to me as just one more piece of evidence of the hostility of the court's conservative majority to the regulations we all rely on in our daily lives.

The Chief Justice tried to allay fears about all older decisions based on Chevron will now be open for challenge with this statement:

"*…we do not call into question prior cases that relied on the Chevron framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of Chevron itself—are still subject to statutory stare decisis despite our change in interpretive methodology.*"

I really don't believe it. Justice Thomas, in his concurring opinion, made it clear he wants to go farther:

"*…Chevron deference also violates our Constitution's separation of powers…Chevron was thus a fundamental disruption of our separation of powers. It improperly strips courts of judicial power by simultaneously increasing the power of executive agencies. By overruling Chevron, we re-store this aspect of our separation of powers. To safeguard individual liberty, "[s]tructure is everything.*"

BOLSTERS TRUMP'S PLAN

Trump is already on the record planning to gut civil service protections and replace dedicated career civil servants with unique expertise, with political appointees.

Vice Presidential candidate J.D. Vance enthusiastically shares Trump's negative opinion of federal agencies.

In a 2021 interview on Jack Murphy's podcast, Vance stated: "*I think that what Trump should do, if I was giving him one piece of advice, fire every single midlevel bureaucrat, every civil servant in the administrative state, replace them with our people and when the courts stop you stand before the country, and say the chief justice has made his ruling. Now let him enforce it*."

Bright will cause agencies like EPA to be more cautious regarding rule-making, for fear of well-financed challenges from industry, and knowing they will be second-guessed by conservative judges. The public will lose when agencies do not have the resources to respond to legal challenges, or worse, are prohibited from responding by political appointees.

What does this ruling mean to Michiganders? Since I just retired after four decades of working in environmental permitting and cleanup, I will use the example of emerging contaminants.

I know many of us in Muskegon County are concerned about PFAS in groundwater, Muskegon Lake, Lake Michigan and in the soil and fill materials contaminated by decades of industrial use.

Michigan, like most states, has been delegated authority by EPA to implement the Clean Water Act and Safe Drinking Water Act. The potential slow down of federal rule making and subsequent litigation because of Loper Bright and other recent Supreme Court decisions will ripple through the states like a pebble tossed in Muskegon Lake.

Fortunately, Michigan recently overturned its "no stricter than federal law" requirement, giving our legislators the power to make rules that are more protective than federal ones, and our State a pathway to address regulatory gaps created by Loper Bright.

Unfortunately, because the Great Lakes border Wisconsin, Illinois, Minnesota, Indiana, Ohio, Pennsylvania, and New York, Michigan can't single-handedly protect them.

The first test will be the lawsuits filed recently against EPA on the two new PFAS regulations, which listed two PFAS compounds as hazardous substances under Superfund and established nationwide drinking water standards for six PFAS compounds under the Safe Drinking Water Act.

Loper Bright has given lower judges the green light to arbitrarily discard EPA's technical expertise and the 120,000 public comments on the proposed rule.

Robert Sussman, principal at Sussman and Associates, who served as senior policy counsel to the EPA under the Barack Obama administration said it well:

COURTS HAVE GREEN LIGHT TO 'RUN ROUGHSHOD'

"*For courts that don't have any respect for agencies and are inclined to run roughshod over them, this decision by the Supreme Court is going to give them a green light*."

There is no quick fix to the damage these decisions will do to many of the issues Democrats, Independents and many Republicans hold dear, including

- having safe drinking water, food and medications;
- fighting climate change;
- protecting online privacy; and
- protecting workers.

Just like we did in Michigan in 2022, we need to embarrass the pundits and polling experts by turning out in record numbers to take back the House, expand the Democratic majority in the Senate, and keep the Presidency.

To quote President Obama, we need to "shellack" the Republicans so we can start the hard work of updating these older laws to codify the proper role of the federal agencies and continue President Biden's legacy of appointing qualified, objective federal judges.