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A Bright Spot for Lawyers Seeking to Build on 'Loper Bright'

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Some see a shark lurking in the deep water beneath *Loper Bright Enterprises v. Raimondo*, a landmark administrative law Supreme Court case. Thanks to the herring fishermen who brought that lawsuit, it is now easier to challenge agency action. But *Loper Bright* also contained key caveats that raise new questions about how to navigate the post-*Loper Bright* seas. Administrative lawyers can now look to an important opinion from Judge John K. Bush of U.S. Court of Appeals for the Sixth Circuit to light the way and develop new arguments against agency actions.

What exactly did *Loper Bright* hold? Most people think they know: The decision overruled *Chevron v. Natural Resources Defense Council* and held that courts—not agencies—must interpret statutes. No longer may courts do a *Chevron* multi-step dance, asking whether a statute is ambiguous and whether an agency's interpretation was within the bounds of the statute. Instead, courts interpret statutes, straight up, based on traditional tools of statutory construction.

Courtesy photos

Helgi C. Walker (L) and Michael Corcoran (R) of Gibson, Dunn & Crutcher.

But within *Loper Bright* is a subtle exception to that watershed holding. Sometimes, *Loper Bright* cautioned, the meaning of a statute is that agencies are delegated discretion. And that discretion can include authority "to give meaning to a particular statutory term" or "fill up the details" of the statutory scheme. When a statute does so, courts should "fix the boundaries of the delegated authority" and "effectuate the will of Congress subject to constitutional limits."

Sound familiar? If you thought that passage sounded like *Chevron*, you're not alone. Many critics have claimed that *Loper Bright* amounts to a hollow victory, with delegated discretions poised to swallow the *Loper Bright* rule and resurrect *Chevron* deference as "*Loper Bright* delegation." Others disagree, contending the "case that overruled *Chevron* didn't quietly reinstitute it." So far, the Supreme Court has shed no light on who is right.

In early April, Judge Bush issued an important opinion that provides critical ammo to lawyers seeking to settle that debate and build on *Loper Bright*. The case itself, *Americare Healthcare Services*, was relatively uncontroversial. It concerned one of the same statutory provisions that *Loper Bright* had cited as delegating discretion to the Department of Labor over a specific Fair Labor Standards Act exemption. And it involved an agency regulation that the Supreme Court had already held to be within the scope of that delegation in a pre-*Loper Bright* case, *Long Island Care at Home v. Coke*. All three judges thus agreed that the regulation was valid under Supreme Court precedent.

But Judge Bush took the opportunity to explain how he would have approached the case if he were not bound by *Coke*. In doing so, Judge Bush charted a course for agency challengers to winnow the scope of any supposed delegation of discretionary power they face.

First, Judge Bush argued that *Loper Bright* calls for a clear statement rule: Only delegations that are clearly "connect[ed]" to a "specific term or provision" will suffice for the agency to have interpretive authority. In doing so, he focused on a provision that *Loper Bright* had not cited: the Department of Labor's generic authority to "prescribe necessary rules"—a "housekeeping" grant of authority found at the end of the FLSA. That open-ended grant of authority, he argued, did not resemble any of the examples *Loper Bright* cited, which were more discrete and tailored to specific provisions, not far-flung statutory schemes.

Second, Judge Bush took a careful look at the more specific delegation that *Loper Bright* had recognized as conferring discretion: an FLSA exemption for "*employees*" providing "companionship services," "as such terms are defined and delimited" by the agency. But as he pointed out, the agency regulation at issue turned on the *employer's* status, not the employee's. Specifically, the regulation provided that third-party employers cannot invoke the FLSA's exemption; only the person using the services or their families may do so. And because none of the "terms" within the FLSA exemption turned on the employer's status, Judge Bush concluded that the agency's regulation was defining a "term" it had no authority to construe (despite *Coke*'s contrary holding years beforehand).

That should be the basic one-two strategy for any lawyer seeking to challenge agency actions involving supposed delegations of discretionary power: (1) Knock out generic grants of authority as conferring no interpretive discretion. And then, (2) ensure that the agency's regulations are directly linked to terms it has authority to interpret.

Judge Bush concluded by suggesting additional limits on the agency's generic authority to make "necessary" rules. As he argued, the agency's generic authority is a mere "housekeeping" provision that confers *no* substantive rulemaking authority. In fact, such "housekeeping" provisions were once widely understood to confer only authority to promulgate "interpretive rules and policy statements" and "procedural rules." And although that distinction fell out of favor with agencies in the 1970s and '80s, a federal district court last year breathed new life into the principle when vacating the Federal Trade Commission's ban on non-compete agreements. Under *Loper* Bright, as Judge Bush understood it, courts have a renewed mandate to police that line—an argument now ripe for development in future agency challenges.

In making these arguments, litigants should also pull from their established administrative-law toolkits to build on *Loper Bright*. For example, they can point out that general housekeeping delegations to make "necessary" rules may appear unbounded, raising nondelegation concerns that courts should avoid under constitutional avoidance principles. So too, litigants could argue that the major questions doctrine counsels against reading generic delegations to confer interpretive authority, lest agencies wind up with power to answer more questions than Congress itself addressed. Particularly if statutes confer any more specific and targeted delegations, litigants should argue that basic principles like expressio unius require keeping the agency to the limits of those narrower delegations, lest the agency exceed the bounds Congress imposed.

So as it turns out, *Loper Bright*'s language about delegated discretions is no shark, but a herring. Armed with these arguments, agency challengers should be well-equipped to sail across these new seas in the post-*Loper Bright* world—building on *Loper Bright* and opening new fronts in challenges to agency actions.

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