Notice & Comment

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Did *Loper Bright* Also Overturn Notice-and-Comment Rulemaking Procedure?, by Cary Coglianese & Daniel E. Walters

Cary Coglianese & Daniel E. Walters – April 11, 2025

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It is hard to believe it was less than a year ago that the Supreme Court decided what then seemed like the biggest news for administrative law in living memory: the overruling of *Chevron*. In ditching this forty-year-old precedent, the Court fundamentally unsettled what we have called the "administrative governance game"—that is, the complex, interdependent system that emerges from competition of multiple institutional and individual players over the administration of the federal government.

With the ink barely dry in *Loper Bright*, we are beginning to see just how unsettled, and how unpredictable, the administrative governance game can be in a post-*Loper Bright* world. With a new memorandum, "Directing the Repeal of Unlawful Regulations," President Donald Trump has made a bold new move, invoking *Loper Bright* (as well as other recent administrative law innovations like *West Virginia v. EPA*'s "major questions doctrine") to claim authority to rescind scores of existing legislative rules without even following standard administrative procedures. Under the recent presidential memorandum, once an agency determines that a legislative rule is on its face unlawful "under" *Loper Bright* and other recent general administrative law cases, it must "finalize rules" rescinding those regulations "without notice and comment." Depending on how readily and extensively agencies arrive at a conclusion that existing rules are no longer legally justified, this "review-and-repeal effort" could amount to a presidential power to force the repeal of large numbers of unwanted regulations that, up to this point, would presumptively have been required to be rescinded only with deliberate care that took into account public input.

We do not know for certain, of course, that a second Trump Administration would not still have sought to jettison the notice-and-comment process even if *Chevron* had remained intact. Nevertheless, it is telling that *Loper Bright* stood at the very top of the list of Supreme Court decisions in the President's recent "Directing the Repeal" memo. *Loper Bright* also featured prominently in a November 2024 op-ed in the *Wall Street Journal* by Elon Musk and Vivek Ramaswamy, in which they claimed that the Court's decision in that case, along with the decision in *West Virginia v. EPA*, gave DOGE a mandate to prod agencies to cut their regulations.

It is striking how *Loper Bright* and the major questions doctrine are being used this way when they were ostensibly premised on the Court's conservative justices' sense that agencies had too much power and were playing too great of a role in the interpretation of statutes. And now comes along a presidential memo that compels agencies to start repealing rules based on their own, presumably changed, interpretations of statutes—and without following normal procedures to boot. All this in the name of *Loper Bright*.

Loper Bright ostensibly said that statutory interpretation was to be left up to the courts. The majority offered strong rhetoric imploring judges to exercise stringent review of agency decisions so as to constrain the steady accumulation of executive power and to put a stop to agencies' ability to keep changing how they interpret the statutes they administer.

The *Loper Bright* Court recounted with some disdain, for example, the history of flip flops on regulation of broadband internet services across each of the last four presidential administrations, concluding that *Chevron* had "engender[ed] constant uncertainty and convulsive change even when the statute at issue itself remain[ed] unchanged."

Likewise, even though the major questions doctrine is often viewed as an offshoot of the moribund (for now) nondelegation doctrine, some observers have pointed out that the better way to understand its requirement of a clear congressional delegation of authority on major issues is "not so much . . . a way of preventing Congress from giving away too much power as a way to prevent Presidents from snatching powers they were not given."

But as the new Trump Administration memorandum reveals—and as we suggested recently in an article in the *Administrative Law Review* on *Loper Bright*'s "great unsettling"—whatever the intent the justices might have had in overturning *Chevron* in an effort to constrain agencies' interpretive power, the real implications might turn out to be the opposite. One is tempted to say, be careful what one wishes for. If *Loper Bright*'s majority thought it was moving to limit agencies from going their own way in interpreting their statutes, it is remarkable to see the Court's decision now invoked as a justification for a bold assertion of executive power to effectuate sweeping regulatory change based on agencies' own statutory interpretations—and without even going through the notice-and-comment process.

The ultimate impact and implications of this latest move by the Trump Administration remain to be seen. It could very well be that Trump's first-mover advantage to weaponize *Loper Bright* and the major questions doctrine in pursuit of a deregulatory agenda will work in the short run to the advantage of the ideological preferences of conservative politicians and judges. But if *Loper Bright* has encouraged *this* Administration to abandon basic administrative procedures, the Court's decision may well prove in the future to be a boon to agency power more broadly as procedural constraints on agency rulemaking atrophy.

We hasten to add, of course, that it's also possible that President Trump's aggressive move to call for agencies to abandon notice-and-comment rulemaking will set off countermoves by any number of other players in the administrative governance game, and that these countermoves might ultimately rein in Trump or future presidents and their administrations. As we discuss in our recent article, it is difficult to know how the dust will settle now that *Loper Bright* has shaken up a once-stable governing equilibrium. But President Trump's recent memorandum is a clear indication that we are in fact in the midst of a significant and contentious recalibration of how governmental power is exercised. And at the center of this recalibration—either as motivation or as justificatory cover—sits the Supreme Court's decision in *Loper Bright*. The symbolic resonance of this decision is hard to overstate when it is being cited in an effort by the current administration to effectuate dramatic policy changes without following regular order—changes that might have seemed unfathomable a year ago. We may all do well to pause and ponder what further changes *Loper Bright*'s "great unsettling" of the nation's governing equilibrium might bring about over the next year—and beyond.

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