DEEP DIVE

Appeals Courts Wrestling With Agency Leeway After Chevron's End

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- **Courts differ on factoring agencies' reads of laws**
- **1944 decision can give agencies boost in litigation**

Federal appeals courts are still figuring out how much weight to give to agencies' views of their legal authority, a year after the US Supreme Court said judges must interpret relevant laws.

The justices in *Loper Bright Enterprises v. Raimondo* swept away the longstanding *Chevron* doctrine, under which courts had deferred to agency interpretations of ambiguous statutes. But the high court left in place an even older precedent calling on courts to give weight to an agency's position to the extent that it's persuasive.

In the year since the Supreme Court ruled, circuit courts have started going in different directions on the level of deference judges should grant agencies under the older case, 1944's *Skidmore v. Swift & Co.* At stake is how much clout agencies will have in the post-*Chevron* era to defend their actions against legal challenges.

It will still take several more years—and likely another Supreme Court decision or two—to get a clear picture of how courts will handle challenges to agencies' legal interpretations, including how they apply the amorphous *Skidmore* standard, said Michael Kagan, an administrative law professor at the University of Nevada-Las Vegas.

"But the early direction does matter," Kagan said. "Sometimes these things grow like plants, so you want to make sure you plant the right seeds."

The US Court of Appeals for the Ninth Circuit applied *Skidmore* in a way that some legal observers called a revival of the *Chevron* doctrine, while other appeals courts have taken narrower approaches. The Fifth Circuit went as far as to question whether *Skidmore* has any value at all in a *Loper Bright* world.

"The lower courts aren't certain what to do with *Skidmore* after *Loper Bright*," said Kristin Hickman, an administrative law professor at the University of Minnesota. "What we're seeing reflected in the Ninth Circuit and Fifth Circuit is emblematic of that uncertainty."

Courts' uncertainty provides an opportunity for litigators to urge judges to apply a version of *Skidmore* that best suits their clients' needs, depending on the context of the particular case and whether the agency's view helps or hurts their cause, Hickman said.

The justices in *Loper Bright* cited *Skidmore* to say an agency's stance merits weight depending on the thoroughness of its consideration, the validity of its reasoning, and its consistency with its pronouncements. While courts should seek agencies' views, they are merely informative to the extent they stem from facts within their expertise, and are never binding, the high court said.

Deference Entitlement

UNLV's Kagan said a Ninth Circuit panel's 2024 ruling in *Lopez v. Garland* relied on an overly expansive application of *Skidmore*, essentially using it to replace the *Chevron* doctrine.

The panel decided that the Bureau of Immigration Appeals was "entitled to *Skidmore* deference" for its rule for determining when a theft offense qualifies as a crime of moral turpitude, which can trigger deportation, in an opinion by Judge Sidney Thomas, a Clinton appointee.

The panel adopted the BIA's reading of the statute without providing its own analysis of what it understood to be the best interpretation, a requirement for reviewing agency action under *Loper Bright*, Kagan said.

The full Ninth Circuit should rehear the case and jettison the panel's approach to *Skidmore*, Kagan and University of Michigan administrative law professor Christopher Walker argued in an amicus brief. A petition for en banc reconsideration is pending.

The Fourth Circuit cited *Lopez* in an April ruling in its own case involving the BIA's rule for theft offenses, saying that it agreed with the Ninth Circuit and granted "*Skidmore* respect" to the agency.

Value Questioned

The Fifth Circuit, on the other hand, cast doubt on *Skidmore*'s impact in a 2024 decision rejecting a challenge to a Labor Department rule on overtime eligibility.

A court panel wondered "what work *Skidmore* deference can do" in light of two guideposts the justices left in *Loper Bright*: a statute's best reading is the reading a court would reach if no agency were involved; and only the best interpretation of a law is permissible.

"Taking these statements together, it seems that either the agency's interpretation is the best interpretation (in which case no deference is needed) or the agency's interpretation is not best (in which case it lacks persuasive force and is not owed deference)," wrote Judge Jennifer Walker Elrod, a George W. Bush appointee.

Still, the Fifth Circuit panel said that the Labor Department met the criteria for *Skidmore* deference, to the extent it had any impact on the outcome. The department has consistently issued minimum salary rules for decades, and it has always taken the position that it has the authority to promulgate such a rule.

Even as the Fifth Circuit questioned whether *Skidmore* had any value, the Fourth Circuit in January treated it as mandatory by vacating a lower court's decision for failing to examine the persuasiveness of the Bureau of Prison's interpretation of a sentencing reform law to determine whether it merited deference.

Canon of Construction

Other circuit courts have applied *Skidmore* factors without explicitly citing it, apparently viewing it less as a coherent deference doctrine and more a tool to help them interpret laws, said Hickman, the University of Minnesota professor.

Loper Bright instructed courts to treat *Skidmore* as an optional canon of construction, said Eric Bolinder, an administrative law professor at Liberty University. That's how the justices themselves used *Skidmore*—without citing it—in a March decision upholding regulations on ghost guns, he said.

Skidmore only applies when a court is reviewing an interpretation that an agency adopted when the law was passed and has stayed consistent through time, said Bolinder, who argued against the government in *Loper Bright* when the case was at the D.C. Circuit.

"If courts had to invoke it every time, it would feel more like a deference doctrine," he said. "The Supreme Court is quite clear that it's not a deference doctrine."

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