CHEVRON IS DEAD … NOW WHAT?

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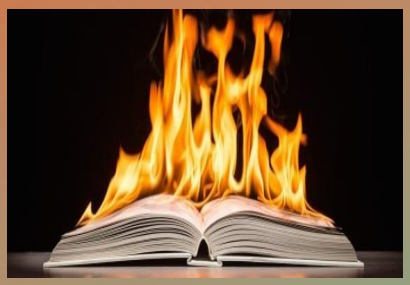


DEMISE OF *CHEVRON* DEFERENCE

- **SCOTUS 6/28/24 decision in *Loper Bright Enterprises v. Raimondo* overturned its 40-year precedential test – "*Chevron* deference" when evaluating whether courts should defer to an agency's "reasonable" interpretation of "ambiguous" statutory language**
- ***Chevron* is a foundational test in administrative law, and was long used in OSHA/MSHA/EPA cases to help agencies preserve new rules or enforcement actions against claims that the agency went beyond its authorizing statute**
- **Concerns arising that judges can now substitute their views on a topic for those of the agency SME who drafted it, including disregard of comments and hearings in the development of the rule**
- **This is major incentive for "forum shopping" to find federal courts in districts/circuits most likely to kill federal rules as they will no longer have to "defer" to the agency's expertise, experience & judgment**

SIGNIFICANCE OF *CHEVRON*

- *Chevron v. Natural Resources Defense Council* (SCOTUS 1984) looked at agency authority limits and the role that Congress and courts played in determining the constitutionality of standards
- *Chevron* held: where specific language in the original legislation (e.g., OSH Act) is ambiguous or silent, a court reviewing agency action should defer to the gency if its action is "reasonable" based on the organic statute
- Idea was that agencies had subject matter experts on the areas they regulate – workplace safety, food, aviation, rail, product safety – and are best positioned to determine everything from restrictions on child labor to agricultural and environmental practices
- Absent such deference, courts will now have to decide whether a rule is legal based on their own expertise, their analysis of decades-old statutes, or else Congress will have to specifically authorize a specific regulation if it was not mentioned in the original legislation
- In reversing *Chevron*, Justice Roberts wrote: "[A]gencies have no special competence in resolving statutory ambiguities … courts do. It remains the responsibility of the court to decide whether the law means what the agency says. Congress expects courts to handle technical statutory questions and courts also have the benefit of briefing from the parties and 'friends of the court'."

PRACTICAL IMPACT: *LOPER BRIGHT*

Using the pending OSHA heat standard as an example, based on *Loper Bright*, courts can now:

1. Accept OSHA's reasoning as acceptable under the law
2. Reject the standard outright because the statutory source (OSH Act) is silent on the subject of heat and OSHA would need specific congressional authoritizatio to promulgate a heat rule
3. Individual judges could decide "based on their personal knowledge" that the rule is not acceptable, or that different choices should have been made

***Real Question*: what expertise do judges have in the OHS area? Can they pick an OEL for a chemical, a heat level for safety, underground mine roof bolting and ventilation plan design, or guarding specifications for machinery?**

***Real World Impact*: Decision is likely to support challenges to OSHA walkaround rule, HazCom revisions, heat standard in development, MSHA respirable crystalline silica standard (under contest) and surface haulage rule**

OSHA IN THE CROSSHAIRS

- *Allstates Refractory Contractors LLC v. Su* (6th Cir. 2023) – Challenged constitutionality of Occupational Safety & Health Act of 1970 (OSH Act) – Former Trump White House counsel Don McGahn represents Allstates in this case!
- Coalition of industry and conservative groups sued to determine whether the congressional delegation to OSHA to set workplace safety standards violated the "Nondelegation Doctrine"
- The Petitioners want Congress, not OSHA, to "set whatever specific safety standards lawmakers think are necessary"
- Challenges to the OSH Act in the past were struck down (in 1978 and 2011) by 7th Cir. and DC Cir.
- 6th Cir "joined their sister circuits" in holding OSHA"s delegation to be constitutional (by a 2-1 vote)
- Appeal to SCOTUS failed to obtain certiorari … but Justices Thomas and Gorsuch voted to grant review (4 votes are needed) and this is poised for another attempt

NONDELEGATION DOCTRINE

- *Allstates* claimed that OSHA did not have authority to set standards under Sec 655(b) and therefore employers do not have a duty to comply with them under Sec 654(a)
- It noted that some regs would not be affected because they had other sources of rulemaking authority, and health standards would be unaffected because there are more limits on their promulgation
- "Nondelegation doctrine" holds that under separation of powers and tripartitite government, Congress generally cannot delegate its legislative power to another Branch … but this does not prevent Congress from seeking assistance of its "coordinate branches"
- "The extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination."
- Court concluded that the "reasonably necessary or appropriate" standard in the OSH Act for rulemaking provided an "intelligible principle" to satisfy the nondelegation doctrine and this type of delegation was upheld by SCOTUS in other circumstances – tariffs, railroads, coal etc.)
- NOTE: 6th Cir dissent claimed OSH Act gave DOL "nearly unfettered discretion"

PURPOSE OF OSH ACT

- 6th Cir considered the context of the OSH Act – Congress found that "personal injuries and illnesses arising out of work situation imposed a substantial burden on the economy" and goal of OSH Act was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources"
- OSHA has several purposes under the OSH Act: reduce workplace safety hazards, increase research into better safety standards, encourage states to improve their own standards, and provide appropriate reporting procedures
- OSH Act authorized OSHA to set safety and health standards (permanent standards and consensus standards) to "serve the objectives" of the statute, and to grant specific variances – and included a rigorous rulemaking process (notice, comment and public hearings)
- Employers must comply with the standards and the general duty to provide a workplace free from recognized hazards – serious infringements can lead to imprisonment (but Congress set the civil penalties, not OSHA)

LIMITATIONS ON OSHA'S POWER

- Congress limited OSHA's rulemaking power to workplace safety hazards (not public health or safety) and the risk must "require" action for a safe workplace – a threshold finding that a workplace is unsafe in the sense that significant risks are present and can be eliminated or lessened by a change in practices
- The agency has NO DISCRETION in determining whether to set such permanent safety standards – it must do so!
- But OSHA can only adopt such standards as are "reasonably necessary or appropriate" to improve workplace safety … and the rule need not completely resolve the issue
- 6th Cir stated "safe is not the equivalent of 'risk free'"

THEN CAME THOMAS …

- Writ of Certiorari was denied, but Justices Thomas & Gorsuch voted to review *Allstates*
- Thomas wrote a rare DISSENT on the denial, signaling an intent to review a similar future case and calling the OSH Act "the broadest delegation of power to an administrative agency found in the US Code" and that it violates Article I of the Constitution
- Thomas urged SCOTUS to review *Allstates* as a "vehicle" to revise the nondelegation doctrine and set new limits on legislative delegation to ALL executive agencies – beyond the current "intelligible principle" limit
- Thomas wrote: "Congress purported to empower an administrative agency to impose whatever workplace-safety standards it deems 'appropriate' … that power extends to virtually every business in the US … OSHA "claims authority to regulate everything from a power lawnmower's design to the level of contact between trainers and whales at Sea World"
- Contrast the arguments!
  - *"The authority to decide the major policy question regarding the appropriate safety standards for all employers nationwide abides in Congress alone" (Allstates argument)*
  - *Doctrine of stare decisis counsels against revising the approach the Court has applied for nearly a century [and] Allstates did not identify any specific permanent safety standard that involves a "major question" … an "extraordinary issue of staggering economic and political significance"(OSHA's argument)*

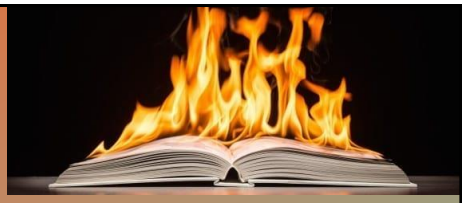
BUT WAIT … THERE'S MORE!

- Other decisions in this SCOTUS term also impact administrative law (including OSHA/MSHA/EPA) now and in the future!
- Administrative Law Judges (ALJs): OSHA and MSHA both use them to adjudicate cases via OSHRC and FMSHRC (independent agencies)
- SCOTUS 6/27/24 ruling in *Jarskey v. SEC* holds that SEC violated 7th amendment right to jury trial for "suits at common law" when an enforcement case concerning securities fraud was directed to ALJ
- In 6-3 decision, Justice Roberts held that 7th A. covers litigation "akin to common law claims" and that the SEC regulatory violation was close enough to "common law fraud" to invalidate use of ALJs
- "What determines whether a monetary remedy is legal is it it is designed to punish or deter the wrongdoer, or soley to restore the status quo" – and because SEC penalties were to punish & deter, not compensate, they were a type of "common law" remedy only enforceable in courts of law
- Roberts used OSHA's safety standards and ALJ system as example of policy that "passes the test" (*Atlas Roofing v. OSHRC*) and said OSHRC regime was to deal with OSH problems, not bring claims traced to common law (but noted that a subsequent case – *Granfinanciera* – could be seen as limiting *Atlas* if there were a direct challenge

… AND MORE

- SCOTUS Administrative Law decision, *Corner Post v. Board of Gov of Federal Reserve System* (6-3 decision) held that lawsuits over OSHA rules and other agencies "final agency action" do not have to begin within 6 years of the promulgation of the rule, but instead must be brought within 6 years of when the party was first injured by a particular policy (overturns 75 years of precedent)
- This opens floodgates for lawsuits against long-standing OSHA/MSHA/EPA agency rules and policies
- Decision (Justice Barrett) was under Administrative Procedure Act (APA) and held that the claim accrues "when plaintiff is injured by final agency action"
- Dissent (Justice Brown Jackson) warned that "The tsunami of lawsuits against agencies … has the potential to devastate the functioning of the Federal Government" … there are "no longer any limitations period for lawsuits that challenge agency regulations on their face" which is "destabilizing for both government and businesses"
- WV AG commented "Federal agencies should be held to account for their actions, even when years have passed from the time the rule was first issued"

CONCLUSION



- *Chevron* was settled law, which held that deference be given to a agency's reasonable interpretations concerning its statutory authority to set rules … NO MORE
- ✓ Will old rules be open to new challenges?
- There was a fixed 6-year statute of limitations running from an agency's action that provided a barrier to chaotic upending of longstanding regulations … NO MORE
- ✓ Will new lawsuits be filed challenging old standards claiming "new" harms?
- Will a "better case" reach SCOTUS in the future again challenging OSHA/MSHA ability to promulgate workplace safety and health rules under the nondelegation doctrine?
- ✓ Stay tuned!
- It has been longstanding practice to have ALJs from OSHRC and FMSHRC adjudicate workplace safety and health violations
- ✓ Will new limits to *Atlas Roofing* impact that in the next wave of cases? If so, will this overturn 50+ years of OSHRC case law precedent?
- The times, they are a-changin' …

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THANK YOU

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