HOW BADLY WILL SCOTUS WOUND THE ADMINISTRATIVE STATE?

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[Skye's Links 12/21/23 gave you a heads up here: This could lead to the most important Supreme Court win in the past century – no kidding. The case is Loper Bright v Raimondo. SCOTUS arguments start Jan 17 for why at least 5 Justices should overthrow a 1984 Court monstrosity called "Chevron Deference" allowing administrative agencies like ATF to act as lawmakers. They create "rules" and "regulations" based on existing law, then use Chevron to affirm their rule change as "reasonable." This is a Very Big Deal!]

On Wednesday (1/17), The Supreme Court's conservatives appeared inclined to cut back the regulatory power of federal agencies, with several justices during a pair of arguments seeming ready to overrule a legal doctrine that has bolstered agencies' authority for decades.

Over more than three hours of argument, the justices put the Biden administration's top Supreme Court lawyer on defense as she sought to preserve Chevron deference, which instructs courts to defer to agencies' interpretation of federal law if it could have multiple meanings.

The practice has strengthened presidential administrations' ability to regulate wide aspects of daily life. The range of examples referenced at the arguments revealed the breadth of Chevron's impact: artificial intelligence, cryptocurrency, environmental protections and more.

A majority of justices appeared sympathetic to the conservative lawyers who urged them to outright overrule the precedent or at least narrow its scope, which would mark a major legal victory for business and anti-regulatory interests.

In particular, three members of the high court's conservative wing — Justices Clarence Thomas, Neil Gorsuch and Brett Kavanaugh — reiterated their long-publicized concerns about the precedent's viability.

"The government always wins," Gorsuch said.

Critics contend that Chevron requires judges to abdicate their responsibility to interpret the law. They also note a lack of consensus on when a statute is ambiguous enough to trigger deference to an agency, and how some federal judges have openly criticized the doctrine.

"Should that be a clue that something needs to be fixed here?" Gorsuch said.

The court's three liberal justices, Sonia Sotomayor, Elena Kagan and Ketanji Brown Jackson, meanwhile, expressed opposition to overturning Chevron. They emphasized a desire to defer to subject-matter experts at agencies when ambiguous, complicated policy issues arise, rather than having a judge attempt to draw the line.

"My concern is that if we take away something like Chevron, the court will then suddenly become a policymaker," Jackson said.

Kagan gave a hypothetical about whether a judge or the Department of Health and Human Services (HHS) should be the one to decide whether a cholesterol reducer should be considered a "drug" or a "dietary supplement."

"In that case I would rather have people at HHS telling me whether this new product was a dietary supplement or a drug," she said.

Kagan added at one point, "Judges should know what they don't know."

The liberals also questioned whether overturning Chevron would unleash a flood of litigation, as people who lost cases because of the doctrine would seek to have their issues reheard.

Conservative Justice Amy Coney Barrett, who posed fierce questions to both sides, also raised concerns about a shock to the system.

The lawyers attempting to overturn Chevron pushed back on the notion, insisting that the thousands of decisions that have invoked the doctrine over the past four decades would still be considered precedent and subject to strong protection.

some conservative justices argued the opposite, contending that it is Chevron that has created shocks by giving the executive branch a wide license to flip-flop on its interpretations of statutes to fit its policy goals.

"The reality of how this works is Chevron itself has shocks to the system when a new administration comes in," Kavanaugh said.

Meanwhile, Chief Justice John Roberts, who has been reluctant to overrule the court's precedents, questioned whether the doctrine had already been overruled in practice. The Supreme Court has not invoked Chevron since 2016, and in some recent cases, the justices have either enacted carveouts or simply ignored the precedent.

"How much of an actual question on the ground is this?" Roberts asked.

The justices weighed whether to replace Chevron with another, more narrow test known as Skidmore, under which a judge would decide to defer to an agency only if the agency's argument is persuasive. As part of that analysis, judges examine consistency or whether an agency has flip-flopped.

Kavanaugh characterized Skidmore as being about "the power to persuade, not the power to control."

The high court considered the weighty dispute through two separate cases Wednesday that are near-identical.

In both, herring fishermen are challenging a rule mandating their companies fund federal monitors onboard their vessels. Invoking Chevron, lower courts deferred to the agency and upheld the rule.

Each group of plaintiffs had a veteran Supreme Court advocate arguing for them and is also backed by an anti-regulatory group.

The justices first heard from Roman Martinez, a partner at Latham & Watkins, who is representing a Rhode Island-based fishing fleet alongside the conservative New Civil Liberties Alliance.

And in the second case, the plaintiffs are represented by the conservative Cause of Action Institute and Paul Clement, who served as former President George W. Bush's top Supreme Court lawyer and has successfully argued cases that resulted in some of the biggest wins for conservatives at the high court in recent years.

Jackson is recusing herself from that case, as she had heard oral arguments in the dispute while sitting on a lower court.

Decisions in the cases, Loper Bright Enterprises v. Raimondo and Relentless, Inc. v. Department of Commerce, are expected by the end of June.

Zach Schonfeld is the courts and legal policy correspondent for The Hill, while Rachel Frazin is The Hill's energy and environmental correspondent.