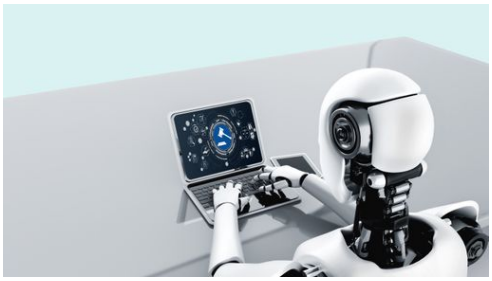
Securities Regulation Daily Wrap Up, AI NEWS—U.S.: Relentless, Loper, and Chevron through the lens of artificial intelligence, (Jan 17, 2024)

By Mark S. Nelson, J.D.



Justice Kagan posed the question of whether Congress can effectively regulate AI in the absence of the *Chevron* doctrine.

The Supreme Court heard oral argument today in two cases that pose the question of whether the Court's *Chevron* doctrine should be overruled. The Court's opinion in *Chevron* set forth the approach federal courts must follow in cases in which an executive branch agency interprets ambiguities in the agency's governing statute. *Chevron* has been controversial because of the deference courts must accord to a federal agency under a two-step test: first, is the statute ambiguous, and second, if so, is the agency's interpretation of the statute permissible or reasonable. It is widely expected that a majority of the justices could strike down *Chevron*, but there are other, narrower outcomes that remain possible in both cases currently before the justices (*Relentless, Inc. v. Department of Commerce*, January 17, 2024; *Loper Bright Enterprises v. Raimondo*, January 17, 2024).

In *Relentless* and *Loper*, a federal law that required in certain circumstances that third party monitors be present on commercial fishing vessels was interpreted by an agency to require vessel owners to pay for these monitors. The cases presented several questions for the Court, but the justices limited the grant of certiorari in both instances to a single question: Whether the Court should overrule *Chevron* [*U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)] or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency. Justice Jackson did not participate in the consideration or decision of the *Loper* petition.

The consequences of retaining or, alternatively, overruling, *Chevron* are perhaps best exemplified by an exchange between Justice Kagan and counsel for Relentless regarding future regulation of artificial intelligence (AI). However, it is necessary to first sketch out a few key observations about today's oral arguments and to frame the question of whether *Chevron* is truly on its way out.

Is *Chevron* a dead letter? Chief Justice Roberts noted early in the oral argument in *Relentless* that the Supreme Court has not directly relied on *Chevron* in over a decade. For securities practitioners, the *Chevron* issue has been just below the surface in cases about whistleblowers, a theme that also stretches across other practice areas. Counsel for *Relentless* and *Loper* essentially argued that *Chevron* is currently all but dead and should be formally overruled by the Court.

For example, counsel for Relentless, Roman Martinez of Latham & Watkins, LLP, set the tone in his opening remarks. According to Martinez, Article III of the U.S. Constitution makes it clear that judges, not agencies, should decide legal issues and that *Chevron* forces courts to adopt agency views formulated by inferior officers that have political and policy facets. He also argued that *Chevron* violates Section 706 of the Administrative Procedure Act, which grants courts the authority to conduct *de novo* review of agency actions. Lastly, Martinez posited that the sole justification for *Chevron* is its theory of implied delegation, but that that theory is in reality a fiction because Congress likely would not grant agencies the right to resolve any statutory ambiguity in perpetuity.

In his opening statement in *Loper*, Paul D. Clement of Clement & Murphy, PLLC, echoed Martinez. Clement began with the facts, noting that while it was a burden for commercial fishermen in both cases to accommodate federal monitors, it was crippling to their businesses for them to pay the salaries of independent monitors; Clement explained

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that the court below in *Loper* deferred to the agency because the statute was supposedly silent regarding who was to pay for the monitors. For Clement, overruling *Chevron* is about overruling *Chevron*'s methodology. In *Chevron*'s place, Clement would have the federal courts focus solely on what should be the best reading of the statute in question.

Both Martinez and Clement, and several of the justices, suggested the possibility of a post-*Chevron* world in which the justices might apply *Skidmore* deference as a replacement for *Chevron*. Under *Skidmore*, several factors may come into play that ensure that courts consider an agency's views, but the heart of *Skidmore* deference is whether a judge or multi-judge panel is persuaded by the agency.

In reply to a question from Justice Thomas, Martinez said: "I think deference becomes problematic when it requires a judge to say that the law means X when really the judge thinks the law means Y. I think *Skidmore* deference is not problematic because it doesn't require that."

Justice Kagan would question whether *Skidmore* is a viable backup in the event *Chevron* falls in an exchange with Clement in the *Loper* oral argument. " *Skidmore* is not a doctrine of humility, but *Chevron* is," said Justice Kagan. She would later touch upon the issue of *stare decisis*, something Justice Barrett also would address (see below). Said Justice Kagan to Clement: "And you're saying blow up one doctrine of humility, blow up another doctrine of humility [*stare decisis*], and then expect anybody to think that the courts are acting like courts."

In *Loper*, Justice Alito would ask Clement what had changed since *Chevron* was decided and many people, at that time, agreed that it was a wise decision because it took judges out of the role of having to make policy. Clement said "…we now I think are all textualists. The focus is much greater on the text of the statute." Clement then added: "And once you recognize that, you recognize the problem with deferring at a certain point to the agencies."

A significant part of both oral arguments was consumed by questions seeking to explain what Justice Barrett meant by "Kisorizing" *Chevron*. In *Kisor*, handed down in 2019, the justices upheld the Court's *Auer*/*Seminole Rock* form of deference when a federal agency interprets its own regulation (not to be confused with *Chevron*, which involves a federal agency interpreting a statute). The *Kisor* opinion, however, conditioned the continued use of *Auer*/*Seminole Rock* on federal agencies meeting additional requirements to obtain judicial deference. The question in *Relentless* and *Loper* is whether the justices could do something similar with *Chevron*.

During argument in *Relentless*, Justice Barrett asked Martinez why *Chevron* is different from *Kisor*. According to Martinez, an agency can flip flop its view under *Chevron* quite easily, whereas under *Kisor* an agency cannot do this as readily. Other justices, such as Justice Alito, would ask about *Chevron*'s Step 1 and what it means for a statute to be "ambiguous." *Kisor* stated that, like under *Chevron*, "a court must exhaust all the 'traditional tools' of construction" and reiterated that the court must do the hard work of ferreting out unambiguous meaning and only go ahead with a full *Chevron* analysis if there is in fact genuine ambiguity. Solicitor General Elizabeth B. Prelogar said the *Kisor* test of "ambiguity" was the best available.

The question of "Kisorizing" *Chevron* would return at the end of the *Loper* oral argument when Justice Kagan, the author of the *Kisor* opinion, asked General Prelogar what Justice Barrett's phrase means. General Prelogar said "Kisorizing" *Chevron* would entail several things, including: (1) having the justices reemphasize that Chevron's Step 1 has rigor and that judges cannot waive the ambiguity flag too soon; and (2) having the justices reinforce that the reasonableness of the agency interpretation under *Chevron*'s Step 2 does not mean that just anything goes.

The justices also asked about the effect that overruling *Chevron* might have on older cases decided in reliance upon *Chevron*. According to Martinez, petitioner's only concern is for applying a *Chevron* replacement prospectively because *stare decisis* would protect any older cases, including a key environmental case interpreting "stationary source."

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But Justice Barrett pushed back somewhat on whether older cases would remain protected by *stare decisis*. “So maybe nothing happens immediately to those cases, but isn't the door then open for litigants to come back and say: Well, ‘stationary source’ really means X or, you know, ‘broadband’ or whatever the specific term was in -- in *Brand X*.” The Justice added: “So isn't it inviting a flood of litigation even if for the moment those holdings stay intact?”

Can Congress effectively regulate AI. During the summer of 2023, nearly a year after OpenAI’s Chat-GPT app was publicly released, Congress began to take seriously the possibility of regulating AI by establishing two frameworks by rival groups of senators—one framework envisioning an AI regulatory agency to register and license products, and another also contemplating AI regulation but without a singular AI regulator. Many more topical bills on AI have been introduced in Congress, and related data protection legislation remains incomplete at the federal level. The Biden Administration also has issued an Executive Order calling on numerous federal agencies to issue guidance and, in some instances, regulations on AI.

That background perhaps can set the stage for a series of exchanges in the *Relentless* and *Loper* oral arguments pondering what Congress and federal regulatory agencies might be able to do (or not do) in the absence of *Chevron*. The question is important because AI has the potential to evolve rapidly and, thus, threaten to hamstring any legislative or regulatory body that cannot keep pace with technological developments.

“So I was thinking what is the next big piece of legislation on the horizon and who knows, don't have a crystal ball, but I'm going to say -- I'm going to guess that it's artificial intelligence,” asked Justice Kagan of Martinez during the *Relentless* oral argument. Justice Kagan posited a situation in which Congress enacts a law on AI, possibly with an AI regulatory body, but frames the statute in terms of creating numerous delegations of authority to agencies to fill in the gaps. For Justice Kagan, the question is what does Congress want? She partially answered her own question by noting what Congress may not know: “Congress knows that there are going to be gaps because Congress can hardly see a week in the future with respect to this subject, let alone a year or a decade in the future.”

Martinez replied, “…I don't think Congress wants the Court to do policy.” He added that “I think Congress wants the Court to do its ordinary function, which is interpret the law and figure -- and apply the best understanding of the law.”

In one last exchange between Justice Kagan and Martinez about AI, Justice Kagan summed up the consequences of potentially overruling *Chevron* thus: “The issue we're deciding here is more like that, is more like the countless policy issues that are going to confront this country in the years and decades ahead. Will courts be able to decide these issues as to things they know nothing about, courts that are completely disconnected from the policy process, from the political process, and, you know, that just don't have any expertise and -- and experience in an area, or are people in agencies going to do that?”

Martinez replied, “I think the constitutional answer is that Congress needs to set the rules with respect to AI.” He then added: “It can delegate some policymaking discretion to agencies, but once the law is written and the interpretive function has begun, then that job is -- is for the courts.”

Justice Gorsuch would bring up the AI theme briefly in an exchange with Martinez over the question of whether judges should decide policy questions about AI or any other topic. According to Martinez, “…we a hundred percent agree that judges should not do policy. We just think that they should do law.”

AI popped up in one last exchange in the *Loper* oral argument between Justice Barrett and Clement. The context of the exchange was twofold: (1) Justice Barrett asking if overruling *Chevron* would help the Court in dealing with its emergency docket (by way of background, the emergency docket has mostly been used to request extra time to file briefs or for other truly emergent matters, but has recently been used to push the Court to decide merits questions on an expedited basis without the aid of traditional oral argument); and (2) Justice Barrett posing the question of how the major questions doctrine might apply if congress uses vague language (e.g., “appropriate,” “feasible,” or

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"reasonable") that could suggest a delegation to an agency.

With respect to AI (and technology more broadly), Clement replied: "You know, some -- some day, somebody is going to litigate whether crypto is an investment contract. Justice Kagan's confident that, you know, AI is going to get here because of a statute. I think it's more likely that Congress is going so say, well, there's some scientific officer in commerce; we'll let them fix the problem."

Clement mentioned crypto in his reply to Justice Barrett, and earlier in the argument, he had used crypto as an example of a technology issue that Congress might have dealt with after the FTX implosion, but has not because of what Justice Sotomayor and other justices suggested was Congressional gridlock. Clement's response may be of interest to securities practitioners, if only for its parting shot at SEC Chair Gary Gensler. Said Clement of why crypto legislation has not been enacted: "Because there's an agency head out there that thinks that he already has the authority to address this uniquely 21st Century problem with a couple of statutes passed in the 1930s."

Thus, although *Relentless* and *Loper* are ostensibly about the absolutely necessary, but also very old, business of commercial fishing, the Court's opinions in these cases will likely set the tone for future legislation and agency regulation on a variety of technology issues, such as AI and crypto.

The cases are Nos. 22-1219 (*Relentless*) and 22-451 (*Loper*).

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Companies: Relentless, Inc.; Loper Bright Enterprises

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