Consumer Finance Monitor Podcast (Season 8, Episode 34): Loper Bright Enterprises One Year Later: The Practical Impact on Business, Consumers and Federal Agencies

Speakers: Alan Kaplinsky and Cary Coglianese

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm, and I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'll be moderating today's program. For those of you who want even more information, either about the topic that we're going to be discussing today or for that matter, any other topic in the world of consumer finance don't forget to consult our blog, which also goes by the name of Consumer Finance Monitor. We've hosted our blog since July 21st, 2011 when the Consumer Financial Protection Bureau became operational. So there's a lot of relevant industry content there.

We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com. And if you like our podcast, please let us know about it. You can leave us a review on Apple Podcasts, YouTube, Spotify, or wherever you have obtained your podcasts. Also, please let us know if you have ideas for other topics that we should consider covering or speakers that we should consider as guests on our show.

I'm very proud to report that the podcast database service a company called Million Podcasts, has ranked our Consumer Finance Monitor podcast in the top 25 among hundreds of financial services podcasts nationally. The service recently published a list of the top 100 financial services podcasts. Consumer Finance Monitor, also ranked as the very top law firm podcast among the top 100 financial services podcasts, as well as the only one focused on consumer financial services. The rankings are based on key factors such as review count and ratings, topic, relevancy, consistency of fresh episodes, and total number of episodes. For the rankings Million Podcasts relied on an extensive database of more than two and a half million podcasts from various industries, and that number is probably growing by about a million every day. It seems like everybody is into podcasting these days.

So let me turn to the subject of the day. And it's a subject that we haven't really addressed in about a year, but when we last addressed it, we had several podcasts, we had several webinars on the subject, and we blogged about it incessantly. And I'm referring to the US Supreme Court opinion that came down on June 28th of last year in the *Loper Bright Enterprises v. Raimondo* case. There was another case consolidated with the *Raimondo* case for purposes of the oral argument in the Supreme Court. And the issue in that case dealt with the deference or the amount of deference that federal agencies should give to regulations issued by or to regulations that are issued by federal agencies pursuant to various statutes and in the opinion. And we're going to get into a lot more detail, and we'll probably be refreshing a lot of your recollections because it has been about a year since the opinion has come down, and there was a great amount of fanfare at that time. But since then, I'd say it has become quiet, and we'll talk about that as well. It was such a big deal when it came down, but then things have seemed to cool off a little bit.

So I have as my guest today, Cary Coglianese. Cary is the Edward B. Shils Professor of Law at the University of Pennsylvania Law School and specializes in the study of administrative law, regulatory processes and environmental law and policy. He's authored more than 300 articles, book chapters, and essays on administrative law and regulatory policy. If you don't believe

me, go on SSRN, which is the repository of a lot of literature, not only pertaining to legal issues, but it pertains to all kinds of topics. And Cary has got a ... I didn't count the number of articles that were on there, but it seemed like it was well over a hundred. Cary is the founding director of the Penn Program on Regulation. He previously served as Penn Law's Deputy Dean for Academic Affairs with graduate training in both law and public policy. As well as a PhD in political science, he holds an appointment not only in the law school, but in the political science department at Penn.

Prior to joining the Penn faculty, he spent a dozen years on the faculty of Harvard University's JFK School of Government, where he founded and chaired the school's Regulatory Policy Program, and he was an affiliated scholar at the Harvard Law School, and he's also been a visiting professor at Stanford and at Vanderbilt. So Cary, a very warm welcome, really delighted to have you back.

Cary Coglianese:

Well, thank you. It's wonderful to be back. Thank you for the kind introduction, and I'm looking forward to talking today.

Alan Kaplinsky:

Okay. Well, we've got a lot to cover, but I always like when I'm doing a podcast with whoever it might be to build the foundation so that people who aren't as familiar who are listening to this and may not be as familiar with the topic that we're going to discuss will understand what we're talking about. So let's start at the very beginning. Since we're going to talk about the Supreme Court's decision from about a year ago, overruling *Chevron*. What was it that *Chevron* was all about, Cary?

Cary Coglianese:

Well, *Chevron* was a decision back in the early 1980s by the Supreme Court, in a case involving a Reagan administration regulation that was making environmental policy decisions that were more flexible, more deregulatory at the time. And the EPA at that time had decided to create a more flexible understanding of the word "source" in the Clean Air Act, "source" of air pollution. And the case in *Chevron* centered around whether the Court should decide what the word "source" means, or whether the agency's more flexible understanding of the word "source" should prevail. And the Court there articulated basically what has come to be known as a two-step framework or two-step process for judges to follow in deciding questions about whose meaning should be given to a word in a statute. And the first step is to see: Is the statute very clear all on its own? And if it is, obviously, then that should prevail no matter what the agency thinks. And that's what was called *Chevron* Step One. So, we may well at times refer back to *Chevron* Step One, and that's all it's about.

In some ways, *Chevron* Step One is really just the standard rule of law. If a statute is clear, everybody has to follow it, including other government agencies. But the real trick comes about when a statute is unclear or silent in its meaning. When it's not evident, or when it's ambiguous what it means. And that was the case in the *Chevron* situation. The court there said: Well, we've used all the traditional tools of statutory interpretation to figure out what source means. Is it a single smokestack? Or is it more flexible, like the Reagan EPA at the time wanted it to mean to encompass all of the smokestacks at a facility and allow for some averaging across them that was more cost-effective and flexible for businesses?

And the court said: Well, it's just not clear. It was never defined in the act. We look at the legislative history, we look at the purpose. It's not really clear whether one meaning or the other should prevail. So then the court said: Well, let's think about this for a minute. Congress did create this agency, the EPA, to carry out the Clean Air Act, and it gave it rulemaking authority, and it's using that rulemaking authority here to define "source" in a flexible way that permits what was called the bubble policy, because it allowed for thinking about pollution coming out of an imaginary bubble over a factory. It's ambiguous, and all of these other factors are there. So maybe we should think about going to Step Two, which is to ask: Well, is the agency's interpretation a reasonable one? And if it is, given that Congress had delegated this authority to the agency to carry out the Clean Air Act, then as courts, maybe our obligation is really to just follow what the agency said.

And in fact, that's what Step Two of *Chevron* deference stands for. If the statute has ambiguity in it and the agency has been given this authority to carry out the statute, then courts have to follow what the agency said. And that's a mandatory deference to the agency that courts were supposed to give under *Chevron* because of this delegation of authority to them and the honoring of the statute that created the agency or gave it its power to carry out that statute.

Alan Kaplinsky:

The *Chevron* deference doctrine. I think there are a lot of Supreme Court rulings that get the name of it being considered or characterized as a doctrine. And so over the years, I would've thought that when the *Chevron* opinion came down, there was this huge landmark opinion that the media would've been all over it. The legal media, the law reviews, everybody would be all over it. But I'm wrong. You've written two articles now, one that's already been published, which we'll talk about in a little bit, another one that'll be published soon. And one of the things I've learned is that there wasn't really a lot of coverage of the opinion. It wasn't considered that big a deal.

Cary Coglianese:

No. No. The Court's opinion itself was one that came down without any dissents. It was one that, by its own terms said it was based upon well-settled principles that go back to actually cases from the 1930s and '40s and really a long stream of cases ever since where courts had been deferring to what agency's understanding of ambiguous statutes might mean. And at the time it was handed down, the silence was deafening.

Alan Kaplinsky:

Yeah. Yeah. And then in the first few years after it came down, the Supreme Court was relying upon it, but all of a sudden it never got overruled during this period of time, but all of a sudden it went into disfavor, I guess is the best way I could put it. There was a long period of time they, in agency deference cases, they didn't even cite it just like it didn't exist.

Cary Coglianese:

Yeah. After it came down, by the way, conservative justices like Antonin Scalia embraced it. And again, keep in mind it came about as a way of deferring to a Reagan-era, pro-industry, if you will, flexible regulatory decision. And it had been embraced by conservatives. It wasn't really probably until the Obama administration that it became the bête noire of a lot of conservative judges, legal commentators and lawyers. And there was a pretty orchestrated campaign to go after it. And the Court itself ceased to rely on it for quite a number of years, even before it overturned it in *Loper Bright*.

Alan Kaplinsky:

Right. Right. Even though the lower has had never been overruled, the lower courts felt compelled to use that doctrine. And so am I right? There was a lot of-

Cary Coglianese:

It was one of the most cited Supreme Court decisions in administrative law certainly, but probably of all Supreme Court decisions.

Alan Kaplinsky:

So let's now turn to the *Loper Bright Enterprise*'s opinion. Interesting. The first three words in the opinion I believe is *Chevron* is overruled. I don't know if-

Cary Coglianese:

Actually that comes in one of the final paragraphs.

Alan Kaplinsky:

Oh, okay. The final paragraph toward the beginning. Wasn't it mentioned right at the beginning?

Cary Coglianese:

Well, it's obviously in the syllabus. When you go to it, you see that right away. But the Court says it's—really these three words, "*Chevron* is overruled," come at the very end of the decision. Really, the second to last paragraph says, "*Chevron* is overruled." It's interesting because in some ways ... And we may want to get into it. The way much of the opinion's core logic reads is akin to an earlier decision that the Supreme Court handed down in *Kisor v. Wilkie*, which involved whether courts should defer to agencies' own interpretations of their regulations. And *Chevron* was about deference to statutes. *Kisor* was about this notion of *Auer* deference—or sometimes called *Seminole Rock* deference, if we really want to get into the weeds–but where courts were similarly supposed to defer to agencies understandings of their own regulations. And the Court, a few years prior to *Loper Bright,* had the opportunity to overrule these *Seminole Rock* and *Auer* decisions but didn't, and they kept them in a case called *Kisor v. Wilkie*. But they modified, or at least clarified, the reasoning behind deference in those circumstances. Much of the *Loper Bright* opinion, I think, can be said to read a lot like *Kisor v. Wilkie* in its core. But then at the very end, the court says "*Chevron* is overruled." Surprise!

Alan Kaplinsky:

Yeah. Yeah. Well, you point out in one of your articles that could very well be that they were going to be, as you put a *Kisor*-izing in *Loper Bright*. That they weren't going to overrule it, but then perhaps in order to get the vote that they needed, they ended up overruling *Chevron*.

Cary Coglianese:

Yeah. That's how it reads almost. I'm not privy to what was going on. It certainly wouldn't surprise me if that was what was going on.

Alan Kaplinsky:

On. So let's get to the opinion itself. It's a rather lengthy opinion, but you really boil it all down there was only one reason that they proffer for overruling *Chevron*. Essentially they ... Go ahead. You tell us what they did.

Cary Coglianese:

Well, they do have a lot of rhetoric in the opinion that no one could disagree with. They quote *Marbury v. Madison* and the Federalist Papers, and they sing praises to judicial responsibility for interpreting laws and saying what the law means. But when it comes right down to it, it's not a decision that they base upon anything grounded in Article Three or the Constitution, but

rather in the Administrative Procedure Act and Section 706, which says, they quote time and again, just a snippet from 706, that says that courts should decide "all relevant questions of law." And they put a real emphasis on the word "all." They overlook the word "relevant," and they also overlook some language that precedes the part that they emphasize over and over again. But it is a statutory decision, ultimately, in which they say that *Chevron* is inconsistent with this provision within the Administrative Procedure Act.

Alan Kaplinsky:

Yeah. I think at this provision and the Administrative Procedure Act predated *Chevron*. Am I right? It existed.

Cary Coglianese:

Oh, yeah. Right. The Administrative Procedure Act was adopted in 1946.

Alan Kaplinsky:

And in the *Chevron* opinion itself, do you recall whether that issue ever got discussed, that Section 706, or was it just ignored?

Cary Coglianese:

Well, it's not mentioned in *Chevron*, and the *Loper Bright* Court kind of snidely chastises the *Chevron* Court for failing to discuss and consider how its framework could be compatible with Section 706. And the irony there, of course, is that Section 706 didn't apply in the *Chevron* case because the way the Administrative Procedure Act works is it provides a common floor for administrative procedure across all federal agencies and all their actions, unless there's something in a specific, what we would call substantive or organic statute, that might differ from it. And in the *Chevron* case, there was this substantive, organic statute called the Clean Air Act that had its own separate judicial review provision that didn't have this language in it at all.

So it's one of the infirmities—I think, quite frankly, almost matters of professional malpractice—that in this monumental decision overturning a prior precedent of the Supreme Court that had been cited more than any others in administrative law for four decades and has been relied on by thousands of courts dealing with so many different statutory issues, that in its own effort to interpret the key statute that it relies on, it really does a very sloppy job of it. It doesn't consider, for example, that in *Chevron*, the APA wasn't even relevant.

Alan Kaplinsky:

Unbelievable. So let's turn to this article that is still a draft. I thank you for sharing it with me. It has not yet been published yet, but is expected to be published later this year in the *Penn Law Review*. And it's entitled, *Loper Bright's Disingenuity*. You've co-authored it with David Froomkin at the University of Houston. What did you and Professor Froomkin mean by the title of your article? Were you actually, when you referred to disingenuity, referring to the thing you just mentioned about 706 of the Administrative Procedure Act not even being applicable?

Cary Coglianese:

Well, that's one of many aspects of the decision that I think make us, quite reluctantly, but nevertheless, I think quite fairly, call the Court out in its majority opinion. Again, for such a monumental decision to have a series of flaws and ultimately to have a logic that isn't really any different from *Chevron* and yet to say "*Chevron* is overruled," is disingenuous. Maybe it's not intentional. We have no idea. We can't read—and proclaim no ability to read—the justices' minds. We have no reason to think other than they might be acting in good faith. And certainly, it's the case that in crafting an opinion, one has to try to bring

together a lot of different justices' views and forge a compromise. And again, maybe there was a thought that this was going to be a *Kisor*izing decision initially, and then this language about overruling *Chevron* was thrown in that isn't really consistent.

So, we use the word "disingenuity" for two reasons. One is because we don't think the claim that "*Chevron* is overruled" is consistent with what's happening in this opinion, if you just read the opinion and judge it on its own terms. And I can talk more about that in a second. But also we use disingenuity because it suggests something that's the opposite of "ingenuity," too, that is, also just not very careful or thoughtful. But in terms of the incompatibility, let me just highlight the key thing here is, first of all, if one were to go back, as we do in our article, and look at the *Chevron* decision itself under the reasoning given in *Loper Bright* and the logic that it lays out, the outcome wouldn't be any different. Now, that in itself is, I think, a curiosity. Maybe it's not definitive proof of real deception on the Court's part. I suppose it's theoretically possible to overrule a decision and yet have that decision have come out the same way under a new test. But it's curious and odd, at least. We don't usually think of decisions that are being overruled coming out the same way. One wouldn't imagine that after *Brown v. Board of Education* that school districts could have separate schools for black children and white children.

So that's one thing. And the second thing is just that when one looks at the actual language of the majority opinion in *Loper Bright*, it really tracks conceptually what *Chevron* said. And that is, yes, courts are supposed to be in the business of interpreting statutes, but there may be times when the best reading of the statute is that the agency has the discretion to figure it out. And the courts must, even in *Loper Bright*, the Court says in those circumstances, the court must go with what the agency said. And those circumstances are ones in which the statute has delegated authority to the agency to give meaning to the statute. Essentially the same thing that was underlying *Chevron*.

And then, of course, the way the Court handles the Administrative Procedure Act is so incompatible with its own rhetoric throughout the *Loper Bright* opinion about how judges are the experts in interpretation and how they have a responsibility to find out what the best reading of a statute is, and yet they overlook key provisions including one in the APA that says that when agencies engage in rulemaking, one of the things they can do is—and the APA uses this word— is "interpret" the law. And yet throughout the *Loper Bright* opinion, there are all these passages that say it's only the courts that can interpret the law. The APA, the very basis for its decision in overruling *Chevron,* actually authorizes agencies to interpret the law.

Alan Kaplinsky:

Yeah. Somewhere in the opinion they talked about ... I don't know whether I would call them exceptions to the new *Loper Bright* rule that Congress can, in the statute that can expressly delegate to the agency rulemaking authority. Sometimes it can be very detailed and specific, but other times it can be very general, presumably because that's what Congress wants. Congress may recognize it's an area that requires great expertise, highly technical, and Congress may want to rely on the agency. The Supreme Court seems to acknowledge that, at least I think. But yet there was that language in it in ... It was in *Loper Bright*. Yeah. I think it was in *Loper Bright*. There was delegation language in that. I can't remember the name of the federal statute now. Deals with fisheries. Didn't it have delegation language?

Cary Coglianese:

Sure. So, *Loper Bright* was dealing with the Magnuson-Stevenson Fisheries Act. And the main issue in the *Loper Bright* case was whether the Department of Commerce, in the National Oceanic and Atmospheric Administration, could, in a rulemaking, require fishers to pay for observers to go out on boats and make sure that they're complying with fishery requirements. And the Court in *Loper Bright* does acknowledge that sometimes when courts are doing their own independent review of the underlying statute, they may find that the statute has either expressly delegated to the agency the ability to specify the meaning of the statute, or it may leave it to the agency to fill up details in cases of silence. And in fact, in *Loper Bright*, that was really more what was at issue, that the statute was largely silent on whether fishers could be made to pay for these observers. Incidentally, I would just say that, in so many regulatory areas, there's no question on that, and there never needs to be any congressional language saying that the regulated entity has to pay for what it costs to comply with the regulation.

But then a third area is that sometimes the court said the language used will be such that it's clear that, maybe through flexible words or ambiguous words like "appropriate" or "reasonable," and there's even a footnote with another statute that gives the possibility of other language that could be construed to be of this nature, that allows for the agency to specify the meaning of the statute. Incidentally, these are the same rationales that expressly were stated in the *Chevron* decision, which said that sometimes Congress will either explicitly delegate the authority to the agency to give meaning to the statute or it will be implicit. And the Court in *Loper Bright* says basically the same thing. It doesn't speak as much in the language of "deference," but it does speak about "respect" and it does speak about "delegation." Maybe semantic differences, but conceptually, it is not an opinion that reads like it was really overruling the *Chevron* doctrine.

Alan Kaplinsky:

So you also, in your article, I call in your critique contained in the article, call the courts, you call it facile formalism. That's how you refer to the opinion. And what did you mean by that?

Cary Coglianese:

Well, basically I just mean by that the court clings to this notion that anything that involves interpretation must be judicial. And doesn't really grapple with the fact that, well, to execute the law, as Article Two—and the cabinets and departments that make up the executive branch are charged with doing, they sometimes have to figure out what a statute means. Maybe we cannot call it interpretation. That's why in this paper, David and I say, okay, let's not call it "interpretation." Let's just call it "specification." Filling up the details, giving some meaning that's more specific to a statute. But really, it's facile because it just seems almost a semantic difference. And by the way, the Court never grapples with the fact that, in situations where there is real genuine ambiguity about what a provision means, then whoever is defining what that statute means could be said to be *legislating*.

And so, if they're really clinging to this notion of three very distinct branches of government, they need to recognize that what they may be claiming now for themselves, in situations where there's genuine interpretive ambiguity, if they think that, oh, court should give the meaning to it, maybe that's a legislative power. The point is, in the realm of administrative agencies, we have, and throughout really our constitutional history and our structure, yes, we do have three branches of government, but to just simply declare one particular activity as solely judicial is pretty facile. We have the ability for agencies to create rules, that's legislative, they're executive agencies. And again, the APA even authorizes agencies to "interpret." That is never mentioned in *Loper Bright* whatsoever.

Alan Kaplinsky:

Well, the other irony, you don't not mention this I don't think in your article, but one of the ironies I see is that during the Trump 2.0, we see a lot of talk about the unitary executive theory. That the president has got all these ... any powers. It's almost like it's the opposite of what it says in the Constitution. That there's any power. It talks about powers that are not expressly dealt with belong to the states. But this presidency believes that everything, all the power resides in the executive. And he's issued an executive order requiring all executive agencies and all so-called independent agencies not to do anything important unless they clear it with the White House. And this, what they've done here, saps, takes away power from the executive. Even though this is something that the conservative on the Supreme Court I think have wanted to do for a while, it's not completely consistent with other things that are happening at the same time.

You take, for example, Trump's firing of all the Democratic members of four or five different federal agencies. And he's claiming he's got the power to do that, notwithstanding a Supreme Court opinion in 1935, *Humphrey's Executor* comes out and says he can't do, that's got to be for cause because the Federal Trade Commission Act says you can only fire a member of the Commission for a cause. So there's a lot of tension there. I don't know if you see that, but it's one of the things I've seen

because I've been spending a lot of my time these days also focused on what's been going on in terms of firing all these members of federal agencies. And so now, several of them are run only by Republicans.

Cary Coglianese:

Well, I think you're right if you follow the facile formalism of *Loper Bright*, that *interpretation* is only for the judiciary. But if you, again, follow the full logic of the majority opinion, that gets you basically the same flexibility in *Chevron*, it wouldn't surprise me if the Supreme Court is able to cite *Loper Bright* down the road for affirming a Trump administration decision and saying that, well, the statute clearly gave the executive branch the power to do that. I would also just say, and I don't know how much we want to talk about it, but this second article you mentioned (it has been published already) I think is relevant here. In thinking about how does the *Loper Bright* fit in with what's going on in the Trump administration and the Court's blessing or perhaps predicted blessing of the full-throated unitary executive theory with respect to firing independent agency heads.

The second article called *The Great Unsettling* with Dan Walters in the *Administrative Law Review*. One thing it says, that it's all about *Loper Bright*, and trying to predict what *Loper Bright* will mean for the administrative state and for what administrative agencies do. And I just want to bring it up here because there's so many different threads that are at play with what agencies are doing. It's not just *Loper Bright*, but it's also this unitary executive theory. It's also the posture of the Trump administration. The administrative governance game, as we call it in *The Great Unsettling*, is a very complex one. And being able to pull out one strand in *Loper Bright* and say, this is really going to work to have one particular effect or the other is very hard to do.

Alan Kaplinsky:

Right. Right. So let's turn now, shift gears a bit and talk about the effect that the *Loper Bright* opinion has had after about a year of experience in operating under it and also what might be in the future of administrative government in the United States. And as you mentioned, you have another article on *Loper Bright* that was published in the *Administrative Law Review* that you co-authored with Dan Walters of Texas A&M Law School, and it's got this title that you mentioned, *The Great Unsettling: Administrative Governance after* Loper Bright. So what has been the effect, Cary, so far that you've seen? First of all, has the Supreme Court said anything more about *Loper Bright*?

Cary Coglianese:

Over the last year, very little. It has sent down some cases to lower courts saying reevaluate them under *Loper Bright*. In two majority opinions, there's been a sentence or two citing or stating something about *Loper Bright*. Neither of which are very illuminating, but people, I think, should be aware, including a decision that was just handed down just the other day in a case called *McLaughlin Chiropractic Associates*. And it's a majority opinion in which was written by Justice Kavanaugh. And it has a sentence that says district courts are not bound by the agency's interpretation, but instead must determine the meaning of the law under ordinary principles of statutory interpretation, affording appropriate respect to the agency's interpretation. Again, if the meaning of the law under ordinary principles of statutory interpretation is that agencies should decide, then that's basically where we're at with *Chevron*. So, it's not anything that really affirms any different position than *Chevron*, but there is, I think a tonal difference. And maybe, like I said before, one could think about what *Loper Bright* was doing was maybe overruling a caricature of *Chevron*: a view of *Chevron* that was one in which lower courts were just too cavalier in jumping to deferring to agencies without actually grappling with the statute. I don't know whether that is really accurate, but that seems to be the biggest target of *Loper Bright* was this caricature or this *Chevron* as a symbol.

And I think I raise this because *Loper Bright* itself is, I think, a very strong symbol to the lower courts. Contrast what we were saying earlier about how when *Chevron* came down and got virtually no attention in the media. It wasn't really something that was viewed as a bombshell or a monumental decision. It took a long time to get to the point where it was so frequently cited and analyzed. *Loper Bright*'s been completely the opposite. Within the first month in the mainstream media, there were hundreds of articles and op-eds. Virtually every administrative law scholar had something published somewhere in a blog post

or in an op-ed somewhere about it. Heck, even *Vogue* magazine had an article shortly after *Chevron* was overruled about *Loper Bright*. Imagine that. So, this has been given just a tremendous national prominence, and, not surprisingly then, it is being cited an awful lot by lower courts. And in fact, over the last year, probably close to about 800 lower court decisions, give or take, have cited it. Now, that doesn't mean that they've necessarily used it to decide anything that they might have decided differently under *Chevron*. In fact, in the vast majority of those cases, I think the agencies are still prevailing, or at least if not the vast majority, at least the majority of them, they still are prevailing.

And when one digs down, there are really only a small number of cases involving rulemaking. There, the agencies aren't prevailing as much. But again, it's hard to say whether that's because of *Loper Bright*. Is it because of the changing composition of the judiciary, which was happening long before *Loper Bright* was occurring? And keep in mind that *Chevron* itself had the opportunity for courts to reject what agencies' interpretations were. It wasn't an automatic agency wins decision. At Step One, a court could say the statute's clear, but it's not what the agency means. Or at Step Two, in principle, they could say the agency didn't adopt a reasonable interpretation. Or there were various ways, over the years, never to get to Step Two, one of which was announced in 2022 in the *West Virginia v. EPA* case, which announced a major questions doctrine that demanded a great deal of congressional clarity before agencies undertook major regulatory actions.

Alan Kaplinsky:

Yeah. Yeah. So I'd like to talk a little bit about the impact that you've seen. I can comment on the impact I've seen at the CFPB and some of the other agencies that govern consumer finance industry. But what's the impact among the federal agencies since *Loper Bright* came down? Have you noted them being more resistant to proposing regulations or finalizing proposed regulations because of concern that they might get overruled by the courts?

Cary Coglianese:

Well, I think a lot of that maybe would require being inside agency offices and being privy to conversations, which I'm not, throughout the whole federal government maybe to opine on. I will say that the Biden administration was still issuing some pretty significant regulatory actions even after *Loper Bright*. I'm sure that there were conversations in general counsels' offices about how do we make sure we at least articulate the basis for what we're doing under the wording of *Loper Bright,* because this is what now everybody will be using. We're not going to be using "deference." I will say that, even before *Loper Bright* came along, even though agencies were granted deference at Step Two of *Chevron*, very seldom did agency lawyers come out and say, Well, the statute's ambiguous and the only reason we're going forward with this is because of the deference we're entitled to at Step Two of *Chevron*. A good lawyer in the pre-*Loper Bright* days, under *Chevron*, was always going to try to say, Listen, the statute is clear and it works in our favor. So, there was an awful lot of that going on in the government itself before *Loper Bright*. Of course, it's hard to say definitively also what *Loper Bright* may mean in terms of what went on in agencies, because for the last six months, those agencies have been overseen by a different administration that, with or without *Loper Bright,* was going to be doing a lot less regulating.

Alan Kaplinsky:

Yeah. Well, what I've seen is I think not dissimilar to what's been happening at other federal agencies, both after *Loper Bright* came down and certainly after Trump got sworn in for a second term. At the CFPB, you never would've known that there was a *Loper Bright* opinion because the then-director of the CFPB, particularly after the election, between that time and the time that Trump got sworn in on January 20th of this year, was full steam ahead. They were proposing regulations, they were finalizing regulations. It almost seemed like they were in a rush to get through as much as they could get through before they knew it was going to be inevitable that Chopra would be terminated by Trump, which he ultimately was. And that there would be either a new director there or as it's turned out, an acting director who's also the OMB director, I'm referring to Russell Vought. But full steam ahead. And then-

Cary Coglianese:

That's often happened for years in administrations at a time of transition. It got a name called "midnight rulemaking" for these rules that, as you know, you're on the way out, there's a burst of rulemaking activity. And so that also was present at the end of the Biden administration and at the end of the CFPB's term as an independent agency. So, it's really hard to say that *Loper Bright* made that much of a difference. I would agree with you.

Alan Kaplinsky:

Yeah. I don't think it did. The other thing which I think the agencies largely, certainly the CFPB, ignored is the Congressional Review Act. If you under that statute within a certain period of time, and it's actually a fairly lengthy period of time after a regulation becomes final, Congress can overrule it by a simple majority in the Senate and the House and the signature of the President. And if it gets overruled, the statute says something like you can't promulgate another rule that's substantially similar to the rule that was overridden by Congress. I don't think the agencies that are on their way out and doing midnight rulemaking are really worried about, oh my goodness, if I rush this through and it gets thrown out by Congress, it won't be good for a future director of the CFPB. I don't think they care.

Cary Coglianese:

Well, I do think actually they have been actually over the years getting more strategic about that very thing. And that may complicate ... The period of midnight, actually may be moved to 11:00 rather than midnight because of this very thing. But especially at the end of a second administration where you know you're a lame duck, you don't know who will be replacing the new president, the strategic thing for an agency to do is to try to get most of its really important rules finished well before the very end of the term. That's easier sometimes to say than to do.

Alan Kaplinsky:

Yeah. Of course. And then now, of course, Trump comes into office and they look at all the recent rules. They look at things that are proposed, and at least at the agencies that I've been following, principally the CFPB, every single proposed rule is canned and all the final rules they think of how they're going to undo them. Two were overthrown through the Congressional Review Act, others are in litigation and being challenged. And the new CFPB is more than willing to all of a sudden flip-flop and agree with the plaintiffs that have challenged the rule that it's invalid.

We're drawing to the end of our program, but I want to ask you, Cary, this final question, and I'd like to bring things full circle by raising a metaphor that you and Professor Walters used in your article, *The Great Unsettling,* that we have talked about. You say there that the *Loper Bright* decision might best be thought of as something of a Rorschach test inside a crystal ball. What did you mean by that? And can you tell us what you see inside your crystal ball? Where are we headed?

Cary Coglianese:

Sure. Well, what we mean by the Rorschach test inside a crystal ball is that different people can look at the *Loper Bright* decision and see different things in it. That's the Rorschach test. Some can focus on the "*Chevron* is overruled," and others can read the majority opinion that reads more like a *Kisor*izing opinion that would be compatible with *Chevron*. And we can look at the decision in lots of different ways. When it comes to the crystal ball aspect, it's hard to say for sure exactly what it will mean in the future because, a, it is hard to know exactly what the Court meant there. And subsequent courts might view it differently. But also because what the courts will do might've been the same thing they would've done otherwise, even if the *Chevron* doctrine had been in place. Or we now have the whole complicating factor of a new administration. So, it's very hard when you look inside that crystal ball to know either what the *Loper Bright* decision meant or what it will mean to future courts or what it will mean to future agencies.

I guess what I would say is in terms of how I would look at the crystal ball, I would look at this in both the short and the long term. And I think in the short term, there's certainly been a very great disruption in legal discourse. *Loper Bright* is an opinion that lots of federal judges now want to cite. It got a lot of media attention, everybody's talking about it. And it is coming at a time of otherwise a great deal of change in administrative law both by the Supreme Court and by the new Trump administration. So it's part of a period of punctuated equilibrium. And I do think it is a decision that has great symbolic meaning and contributes to a disruption or a punctuation in that equilibrium.

The thing about punctuated equilibrium models in social sciences is that sometimes they settle down eventually at pretty much the same place they were before. And I guess in the long term, I think there's at least a decent possibility that the very factors and forces that led courts to be deferring to administrative agencies, for us to have administrative agencies that are making decisions, for Congress to delegate to agencies, those are not going to go away. And modern government has just become so complex. The economy is so complex that the idea that we can have decision-making made through this facile formalism where the President does one thing, Congress does the other, and courts do another, where there isn't that much of an explicit role for administrative agencies, I think that's not realistic. And so I think in the long term, there's a possibility that we may be able to settle back. It won't be probably in the next few years, but down the road we may well be back at a time where courts are seeing within the *Loper Bright* majority opinion something that looked a lot like the *Chevron* decision. And agencies are prevailing in court at a rate that wasn't dissimilar to what they were prevailing at before *Loper Bright* came along.

Alan Kaplinsky:

So we may ... I guess to use another expression wasn't used in your article: right now, I guess you would say it was a big hullabaloo with respect to *Loper Bright* and certainly was not a tempest in a teapot. But we may find out in about four or five years that it was a tempest in a teapot, particularly once the political winds shift and we're back under a Democratic administration perhaps that will be more focused on new rulemaking than what we're seeing now.

Cary Coglianese:

It's entirely possible. And I will also say—and it goes back to a point that you made at the very beginning of the podcast—that there's maybe been less attention to *Loper Bright* in our discourse today among lawyers, law professors than there was a year ago when the decision was handed down. And that's because there really are some substantial shifts in just following regular order, and real threats to the rule of law that this administration that are much more fundamental. And so, to be able to spend this past hour talking about *Loper Bright* might actually be a quaint little exercise in the scheme of things. And we'll have to see where that larger disequilibrium settles out before we even can start to talk about what *Loper Bright* means within it all.

Alan Kaplinsky:

Yeah. Well, we've come to the end of our program, Cary, and want to thank you for taking the time to join me today on our show. I found it tremendously enlightening. And I also want to, again, recommend to our listeners the two articles that you have written dealing with *Loper Bright*. The one in the *Administrative Law Review* and the one that's soon going to be published at *Penn*, are absolutely must reads for anybody that focuses on *Loper Bright* and *Chevron* and the subject of deference to federal agencies. While there's been a lot written about both opinions, I found your two articles really more eye-opening than a lot of the other things that I've read. So thank you again.

Cary Coglianese:

Well, thank you for having me, Alan. It's always good to talk to you.

Alan Kaplinsky:

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