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TESTIMONY

Statement of

Jonathan M. Gaffney
Section Research Manager

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Hearing on

"Restoring Congressional Power over VA After *Loper Bright Enterprises v. Raimondo*"

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Chairman Bost, Ranking Member Takano, and Members of the Committee:

My name is Jonathan Gaffney, and I am a supervisory attorney in the American Law Division of the Congressional Research Service. Thank you for the opportunity to testify at today's hearing on the potential impacts of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*[1] on the Department of Veterans Affairs (VA) and Congress's oversight of VA.

Before 1988, VA benefits regulations were not subject to the notice-and-comment requirements of the Administrative Procedure Act (APA), and VA's decisions on entitlement to benefits were not subject to judicial review.[2] The Veterans' Judicial Review Act (VJRA) changed this paradigm, requiring the VA Secretary to adhere to the APA's notice-and-comment requirements and establishing the Article I court now called the U.S. Court of Appeals for Veterans Claims (CAVC) to review VA benefits determinations.[3] In the more than 30 years since the VJRA's enactment, the CAVC, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), and the U.S. Supreme Court have assessed the validity of VA regulations, often employing the two-part test established by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, to determine whether to defer to VA regulations that reasonably interpreted an ambiguous statute.[4]

On June 28, 2024, the Supreme Court released its decision in *Loper*, which overruled the *Chevron* framework.[5] The *Loper* decision has prompted a number of questions from legal scholars and legislators, including what effect to give previous cases applying *Chevron*, whether agencies might change how they draft regulations, and what tools Congress has to review and influence agency regulation. My written testimony addresses several of these questions. First, it provides a background on judicial review of VA regulations before *Loper*. Second, it summarizes and briefly analyzes the *Loper* decision. Third, the testimony examines the potential effects of *Loper* on VA regulations, both through judicial review and in agency practice. Finally, the testimony addresses Congress's ability to review and influence VA's regulations and guidance documents.

Judicial Review of VA Regulations

Since the enactment of the VJRA, when issuing regulations, VA must adhere to the APA's notice-and-comment and publication requirements.[6] Under those requirements, an agency creating, amending, or rescinding a regulation generally must publish a notice of proposed rulemaking in the *Federal Register*

[1] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[2] *E.g.*, H.R. REP. NO. 100-963, pt. 1, at 10 (1988) (noting that VA "was effectively insulated from the APA's requirements" and stating that VA "stands in 'splendid isolation as the single federal administrative agency whose major functions are explicitly insulated from judicial review'" (quoting Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905, 905 (1975))).

[3] *See generally* Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988). The VJRA established the court as the U.S. Court of Veterans Appeals, *see id.* § 301, and Congress gave the court its present name in 1998, Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, 112 Stat. 3315, 3341. This testimony refers to the court as the CAVC throughout.

[4] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); *see, e.g.*, Cowan v. McDonough, 35 Vet. App. 232, 242–44 (2022) (holding that 38 U.S.C. § 5104 "is silent on the form for providing notice to claimants and that [38 C.F.R.] § 3.103(f) reasonably fills that gap left by the statute"); Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs., 476 F.3d 872, 877 (Fed. Cir. 2007) (finding reasonable VA's regulation implementing 38 U.S.C. §§ 1311 and 1318). *Cf.* Brown v. Gardner, 513 U.S. 115, 120 (1994) (concluding that the statutory "text and reasonable inferences from it give a clear answer against the Government").

[5] *Loper*, 144 S. Ct. at 2273 ("*Chevron* is overruled.").

[6] 38 U.S.C. § 501(d); 5 U.S.C. §§ 552(a), 553.

and allow the public the opportunity to submit comments on that proposal.[7] The agency must then consider any comments submitted before publishing a final rule.[8]

In addition to requiring VA to follow the APA's notice-and-comment rulemaking process, the VJRA also subjected VA regulations to judicial review.[9] Congress has authorized two ways to seek judicial review of VA regulations: parties may bring *facial* challenges (that is, challenges to regulations that are not tied to a specific claim) through review by the Federal Circuit and *as-applied* challenges (that is, challenges to regulations as applied to specific claims) through appeals to the CAVC.[10] This section describes judicial review of VA regulations under each of these systems. It then examines the *Chevron* doctrine, including its former application in the veterans law context. This section concludes with a brief discussion of other interpretive tools that courts have used when reviewing VA regulations and guidance documents, including other forms of judicial deference and the "pro-veteran canon."

Facial Challenges to VA Regulations

Parties may bring facial challenges to VA regulations by seeking review in the Federal Circuit under 38 U.S.C. § 502.[11] Such challenges are brought pursuant to the APA's judicial review procedures[12] and are initiated by filing a petition for review with the Federal Circuit within the six-year statute of limitations set by 28 U.S.C. § 2401(a).[13] The Federal Circuit has interpreted this authority to grant jurisdiction to review "'substantive rules of general applicability, statements of general policy[,] and interpretations of general applicability' that must be published in the Federal Register."[14]

The Federal Circuit reviews facial challenges to VA regulations using the APA's standards of review codified in 5 U.S.C. § 706.[15] Section 706 provides, in part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

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[7] 5 U.S.C. § 553(b), (c). For more information on the rulemaking process, see CRS In Focus IF10003, *An Overview of Federal Regulations and the Rulemaking Process*, by Maeve P. Carey (2021).

[8] 5 U.S.C. § 553(c).

[9] 38 U.S.C. § 502.

[10] *Id.* §§ 502 (providing that review of rules adopted via notice-and-comment rulemaking "shall be in accordance with chapter 7 of title 5 [of the *U.S. Code*] and may be sought only in the [Federal Circuit]"), 7261 (granting the CAVC, in connection with the appeal of an adverse benefits determination, to "hold unlawful and set aside" VA regulations).

[11] *Id.* § 502. Although beyond the scope of this testimony, a party bringing a challenge under § 502 must satisfy the Article III case-or-controversy requirement, including the requirement that a party has *standing* to bring the challenge. *See* Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs., 981 F.3d 1360, 1368–69 (Fed. Cir. 2020). For more information on the case-or-controversy requirement, see Cong. Rsch. Serv., *Overview of Cases and Controversies*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-1/ALDE_00013375/ (last visited Nov. 10, 2024).

[12] *Id.*; *see* 5 U.S.C. ch. 7 (setting out the APA's judicial review procedures).

[13] FED. CIR. R. 15(f); *Nat'l Org. of Veterans' Advocs., Inc.*, 981 F.3d at 1384 (invalidating a previous Federal Circuit rule requiring petitions under § 502 to be filed within 60 days of the agency action). The Supreme Court, in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, held that the six-year statute of limitations under § 2401(a) begins to run when a claimant "suffers an injury from final agency action." 603 U.S. 799, 809 (2024). As discussed below, *see infra* "Form of Judicial Review," it is not yet clear what effect *Corner Post* may have on the timing of facial challenges before the Federal Circuit under § 502.

[14] Mil-Veterans Advoc. Inc. v. Sec'y of Veterans Affs., 63 F.4th 935, 938 (Fed. Cir. 2023) (quoting LeFevre v. Sec'y, Dep't of Veterans Affs., 66 F.3d 1191, 1196 (Fed. Cir. 1995)).

[15] 38 U.S.C. § 502; Paralyzed Veterans of Am v. Sec'y of Veterans Affs., 345 F.3d 1334, 1339 (Fed. Cir. 2003) ("'We review petitions under 38 U.S.C. § 502 in accordance with the standard set forth in the Administrative Procedure Act ('APA'), 5 U.S.C. §§ 701–706."). For more information on judicial review under the APA, see CRS Legal Sidebar LSB10558, *Judicial Review Under the Administrative Procedure Act (APA)*, by Jonathan M. Gaffney (2024).

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency actions, findings, and conclusions found to be—
>
> (A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, limitations, or short of statutory right;
>
> (D) without observance of procedure required by law . . . .[16]

The Federal Circuit's decisions under § 502 are subject to review by the Supreme Court via petitions for certiorari.[17]

As-Applied Challenges to VA Regulations

In addition to facial challenges under § 502, parties who are adversely affected by VA benefits decisions can challenge VA regulations in connection with appeals of those decisions to the CAVC.[18] These challenges are not governed by the APA, instead proceeding under a separate statutory system.[19] Appeals to the CAVC generally must be filed within 120 days of the final VA decision.[20]

The CAVC reviews challenges to VA regulations under 38 U.S.C. § 7261(a), which provides in part:

> In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—
>
> (1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;
>
> (2) compel action of the Secretary unlawfully withheld or unreasonably delayed;
>
> (3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
>
> (D) without observance of procedure required by law . . . .[21]

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[16] 5 U.S.C. § 706.

[17] 28 U.S.C. § 1254.

[18] The CAVC has exclusive jurisdiction over final decisions of the Board of Veterans' Appeals (BVA), VA's top-level administrative tribunal. 38 U.S.C. § 7252. The BVA, in turn, has jurisdiction to review all decisions by the VA Secretary "under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." *Id.* §§ 511(a), 7104(a). The government may not appeal BVA decisions to the CAVC. *Id.* § 7252(a).

[19] *See id.* ch. 72. The APA's judicial review procedures represent default rules for courts' review of agency actions, but Congress is free to establish specific procedures in other contexts. *See, e.g.*, Dickson v. Sec'y of Def., 68 F.3d 1396, 1404 n.12 (D.C. Cir. 1995) ("The APA does not require that a statute explicitly provide for judicial review or articulate a standard of review . . . . Rather, the APA provides a default standard of judicial review . . . precisely for situations, such as this one, where a statute does not otherwise provide a standard of judicial review.").

[20] *Id.* § 7266; *see* VET. APP. R. 4(a)(3) (setting out exceptions to the 120-day requirement).

[21] *Id.* § 7261(a).

The Supreme Court has acknowledged the similarities between § 7261(a) and 5 U.S.C. § 706, highlighting that the CAVC's scope of review "is similar to that of an Article III court reviewing agency action under the Administrative Procedure Act."[22]

The CAVC's decisions are subject to review by the Federal Circuit, through appeals as a matter of right, and the Supreme Court, via petitions for certiorari from Federal Circuit decisions.[23]

Chevron Deference

In the 1984 decision *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court articulated the circumstances under which courts should defer to an agency's regulatory interpretation of a statute administered by the agency.[24] The case, which involved a regulation interpreting a provision of the Clean Air Act, set out a two-part test:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[25]

The Court would later explain that *Chevron* deference was based "on a presumption that Congress, when it left ambiguity in a statute meant for implementation by the agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[26]

Some proponents of the *Chevron* doctrine have argued that, by relying on agencies to fill statutory gaps, it recognized agencies' accountability and expertise.[27] Other scholars have asserted that *Chevron* led to more consistent rulings between courts.[28] In contrast, some critics of *Chevron* have contended that the doctrine impermissibly deprived courts of the ability to decide the meaning of federal statutes,[29] while

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[22] Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 432 n.2 (2011).

[23] 38 U.S.C. § 7292; 28 U.S.C. § 1254. The Federal Circuit's review of CAVC decisions under § 7292 is also similar to the APA, requiring the Federal Circuit to "decide all relevant questions of law, including interpreting constitutional and statutory provisions," *id.* § 7292(d)(1), and granting the Federal Circuit "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision," *id.* § 7292(c). The Federal Circuit may not, however, review "a challenge to a factual determination" or "a challenge to a law or regulation as applied to the facts of a particular case." *Id.* § 7292(d)(2). These limitations on the Federal Circuit's review mean, in essence, that although the CAVC may consider how a regulation was applied to the facts of a claimant's case, the Federal Circuit's review is limited to the face of the regulation.

[24] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). For more information on *Chevron* deference, see CRS Legal Sidebar LSB11189, *Supreme Court Overrules Chevron Framework*, by Benjamin M. Barczewski (2024).

[25] *Chevron*, 467 U.S. at 842–43.

[26] Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996).

[27] *E.g.*, David Doniger, *The Significance of* Chevron *Deference*, NRDC (Jan. 12. 2024), https://www.nrdc.org/bio/david-doniger/significance-chevron-deference ("It is . . . publicly accountable federal agencies, not unelected judges, that have the responsibility, as well as the legal and technical expertise, to administer our laws in a way that ensures they achieve the purpose Congress intended.").

[28] *E.g.*, *Panel Considers Challenge to* Chevron *Doctrine and Fate of Administrative State*, YALE L.S. NEWS (Jan. 31, 2024), https://law.yale.edu/yls-today/news/panel-considers-challenges-chevron-doctrine-and-fate-administrative-state.

[29] *E.g.*, Jim Saska, *What Would Congress Do Without* Chevron *Deference?*, ROLL CALL (June 5, 2024), https://rollcall.com/2024/06/05/what-would-congress-do-without-chevron-deference/.

others critiqued the doctrine for potentially allowing agencies to expand their powers beyond Congress's intent or in contravention of the separation of powers.[30] Before *Loper*, several Justices also critiqued *Chevron*, regarding it as "increasingly maligned precedent"[31] that "deserves a tombstone no one can miss."[32] Perhaps reflecting this changing attitude, *Chevron* fell into increasing disuse at the Supreme Court in the decade prior to *Loper.*[33]

Both the CAVC and Federal Circuit have applied *Chevron* when reviewing VA regulations. Before the *Loper* decision, the CAVC had cited *Chevron* in 170 precedential decisions.[34] It first applied the two-step *Chevron* test in the 1993 case *Felton v. Brown*.[35] In that case, the CAVC considered the scope of 38 U.S.C. § 5503, regarding the withholding of a veteran's benefits during periods of incompetency and subsequent repayment.[36] The CAVC, applying *Chevron*, found the meaning of the statute clear and, in the alternative, that VA's implementing regulation was not a reasonable interpretation of the statute.[37]

Between the beginning of 2020 and the Supreme Court's decision in *Loper*, the CAVC cited *Chevron* in 30 precedential decisions. Of those cases, two involved fleeting citation to *Chevron* with no associated analysis.[38] In 17 cases, the CAVC found the underlying statute unambiguous and either stopped at Step 1 or applied *Chevron* Step 2 only in the alternative.[39] The CAVC reached *Chevron* Step 2 in four cases, deferring to VA's regulations as reasonable in three and rejecting a regulation in another.[40] It appears that the CAVC has, in recent years, resolved more cases at *Chevron* Step 1, finding statutes unambiguous, but the reason for this shift is unclear.

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[30] *E.g.*, Nicholas R. Bednar, *The Winter of Discontent: A Circumscribed* Chevron, 45 MITCHELL HAMLINE L.R. 395, 408–18 (2019) (discussing various critiques asserting that *Chevron* impermissibly allowed agencies to expand their power).

[31] Pereira v. Sessions, 585 U.S. 198, 221 (2018) (Alito, J., dissenting).

[32] Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from denial of certiorari).

[33] *See* Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 1000 (2021) (collecting Supreme Court cases citing *Chevron*, including 9 cases in the decade between 2014 and *Loper* (the most recent in 2019), compared to 14 in the decade from 2004 and 2013 and 25 between 1994 and 2003).

[34] CRS used *Westlaw*'s "Citing References" tool on *Chevron* to identify reported CAVC decisions citing the case.

[35] Felton v. Brown, 4 Vet. App. 363, 370 (1993). Although the CAVC cited *Chevron* in two earlier precedential decisions, it did not clearly resolve those cases through application of the doctrine. *See* Hayes v. Brown, 4 Vet. App. 353, 360 (1993) (finding a statutory ambiguity, noting the VA Secretary's "wide latitude in establishing department policy," and describing the regulatory scheme as "confusing at best," but remanding for factfinding about whether the regulation was implicated); Wells v. Principi, 3 Vet. App. 307, 310 (1992) (citing *Chevron* for the proposition that the CAVC could not impose a duty on the VA Secretary where there was "no clear indication that the statute was enacted with an intent to impose such a duty" but not applying the two-part *Chevron* test).

[36] *Felton*, 3 Vet. App. at 368.

[37] *Id.* at 370–71.

[38] Atilano v. McDonough, 35 Vet. App. 490 (2022); Nailos v. McDonough, 34 Vet. App. 379 (2021).

[39] Jackson v. McDonough, 37 Vet. App. 277 (2024), *appeal filed*, No. 24-2135 (Fed. Cir. July 29, 2024); Frazier v. McDonough, 37 Vet. App. 244 (2024), *appeal filed*, No. 25-1068 (Fed. Cir. Oct. 16, 2024); Held v. McDonough, 37 Vet. App. 28 (2023); Terry v. McDonough, 37 Vet. App. 1 (2023) ; Wright v. McDonough, 36 Vet. App. 272 (2023), *appeal filed*, No. 24-1105 (Fed. Cir. Oct. 31, 2023); Cook v. McDonough, 36 Vet. App. 175 (2023); Crews v. McDonough, 36 Vet. App. 67 (2023); Frantzis v. McDonough, 35 Vet. App. 354 (2022); Gumpenberger v. McDonough, 35 Vet. App. 195 (2022); Andrews v. McDonough, 34 Vet. App. 151 (2021); Helmick v. McDonough, 34 Vet. App. 141 (2021); Cox v. McDonough, 34 Vet. App. 112 (2021); Mattox v. McDonough, 34 Vet. App. 61 (2021); Beaudette v. McDonough, 34 Vet. App. 95 (2021); Hatfield v. McDonough, 33 Vet. App. 327 (2021); Cooper v. McDonough, 33 Vet. App. 341 (2021); Bria v. Wilkie, 33 Vet. App. 228 (2021); Welcome v. Wilkie, 33 Vet. App. 77 (2021).

[40] Cowan v. McDonough, 35 Vet. App. 354 (2022) (upholding VA regulation interpreting 38 U.S.C. § 5104); Spicer v. McDonough, 34 Vet. App. 310 (2021) (upholding VA regulation interpreting 38 U.S.C. § 1110), *vacated*, 61 F.4th 1360 (Fed. Cir. 2023); Wolfe v. Wilkie, 33 Vet. App. 25 (2020) (upholding VA regulation interpreting 38 U.S.C. § 7103(a)); *cf.* Bareford v. McDonough, 35 Vet. App. 171 (2022) (holding that 38 C.F.R. § 38.601(c), interpreting 38 U.S.C. 2306, was not entitled to deference).

The Federal Circuit cited *Chevron* in 11 precedential decisions arising under § 502 and in appeals from the CAVC between the beginning of 2020 and the *Loper* decision. Of those cases, one involved only a fleeting citation to *Chevron* with no associated analysis, and two others cited *Chevron* in a discussion of congressional delegation of rulemaking authority.[41] The Federal Circuit found the underlying statute unambiguous and stopped at *Chevron* Step 1 in five cases.[42] In the three cases where the Federal Circuit reached *Chevron* Step 2, it upheld VA's regulations in two cases and remanded for the CAVC to apply Step 2 in the third.[43]

Other Interpretive Tools

In addition to *Chevron* deference, the CAVC and Federal Circuit have applied other interpretive tools when reviewing VA regulations. Two such tools—*Auer* deference (also called *Seminole Rock* deference) and *Skidmore* weight, named after the respective Supreme Court cases that articulated those doctrines[44]—call on courts to give some degree of respect to the government's interpretation of ambiguous statutes or regulations. On the other side of the scales, the pro-veterans canon (sometimes called the *Gardner* canon, after the 1994 Supreme Court case *Brown v. Gardner*), as its name suggests, directs courts to interpret veterans benefits statutes liberally for their beneficiaries.[45] These tools have sometimes come into tension with each other (and *Chevron*), prompting scholars and judges to argue for and against their utility.

Auer Deference

In its 1997 decision in *Auer v. Robbins*, the Supreme Court reinvigorated a deference doctrine it first articulated in the 1945 case *Bowles v. Seminole Rock & Sand Co*: courts are to defer to an agency's interpretation of an ambiguous regulation "unless 'plainly erroneous or inconsistent with the regulation.'"[46] Like *Chevron*, *Auer* deference involves a two-part test: first, whether the agency regulation is ambiguous, and second, whether the agency's interpretation of that regulation is reasonable and not plainly erroneous or inconsistent with the regulation.[47] This test, according to the Supreme Court, stems from a presumption that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[48]

[41] Ortiz v. McDonough, 6 F.4th 1267 (Fed. Cir. 2021); Garvey v. Wilkie, 972 F.3d 1333 (Fed. Cir. 2020); Ravin v. Wilkie, 956 F.3d 1346 (Fed. Cir. 2020).

[42] Spicer v. McDonough, 61 F.4th 1360 (Fed. Cir. 2023); Wolfe v. McDonough, 28 F.4th 1348 (Fed. Cir. 2022); Mil.-Veterans Advocacy v. Sec'y of Veterans Affs., 7 F.4th 1110 (Fed. Cir. 2021); Cameron v. McDonough, 1 F.4th 992 (Fed. Cir. 2021); Carr v. Wilkie, 961 F.3d 1168 (Fed. Cir. 2020).

[43] Veteran Warriors, Inc. v. Sec'y of Veterans Affs., 29 F.4th 1320 (Fed. Cir. 2020) (upholding six regulations under *Chevron* Step 2 but invalidating one regulation as inconsistent with a statute's plain meaning); Atilano v. McDonough, 12 F.4th 1375 (Fed. Cir. 2021) (remanding for the CAVC to consider *Chevron* Step 2); Buffington v. McDonough, 7 F.4th 1361 (Fed. Cir. 2021) (upholding a regulation interpreting 38 U.S.C. § 5104(c)).

[44] Auer v. Robbins, 519 U.S. 452; Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[45] Brown v. Gardner, 513 U.S. 115, 117–18 (1994) (citing King v. St. Vincent's Hosp., 502 U.S. 215, 220–21 n.9 (1991).

[46] *Auer*, 519 U.S. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)); *Seminole Rock*, 325 U.S. at 413–14 ("Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt . . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.").

[47] *See, e.g.*, Kisor v. Wilkie, 588 U.S. 558, 575–76 (2019).

[48] Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 151 (1991).

The Supreme Court revisited *Auer* deference in the 2019 case *Kisor v. Wilkie*, an appeal from the CAVC and Federal Circuit.[49] The Court emphasized the need to first find that a regulation is "genuinely ambiguous" before affording deference.[50] To do so, the Court explained, a reviewing court must "exhaust all the 'traditional tools' of construction,'" as "only when the legal toolkit is empty and the interpretive question still has no single right answer" is deference appropriate.[51]

Both the CAVC and the Federal Circuit have employed *Auer* deference when reviewing VA regulations. From the beginning of 2020 to the *Loper* decision, the CAVC applied *Auer* in four precedential decisions.[52] The Federal Circuit applied it in precedential decisions in two veterans law cases—one arising under § 502; one on appeal from the CAVC.[53]

Skidmore Weight

In cases where *Chevron* would not apply—for example, where an agency interprets a statute through something less than a binding rule—a reviewing court could still give some weight to an agency's interpretation of a statute. In the 1944 case *Skidmore v. Swift & Co.*, the Supreme Court recognized that agency interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[54] Courts applying *Skidmore* should consider several factors to decide how much weight to give an agency interpretation, including "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[55]

The Federal Circuit and CAVC have applied *Skidmore*, albeit somewhat less frequently than *Auer* or *Kisor*. The CAVC last applied *Skidmore* in a precedential decision in 2019,[56] and the Federal Circuit last invoked it in an appeal from the CAVC in 2011.[57]

The Pro-Veteran Canon

In contrast to the deference doctrines described above, a separate interpretive tool, the "pro-veterans canon," has shaped the CAVC and Federal Circuit's interpretation of VA statutes and regulations. The canon's modern formulation—that statutes regarding the provision of veterans benefits should be interpreted in "the veteran's favor"—comes from *Brown v. Gardner*, a Supreme Court case involving the interpretation of the statute governing VA medical malpractice claims.[58] The CAVC and Federal Circuit

[49] *Kisor*, 588 U.S. at 574.

[50] *Id.*

[51] *Id.* at 575.

[52] LaBruzza v. McDonough, 37 Vet. App. 111, 118 (2024); Duran v. McDonough, 36 Vet. App. 230, 238 (2023); Nailos v. McDonough, 34 Vet. App. 279, 283 (2021); Arline v. McDonough, 34 Vet. App. 238, 247 (2021).

[53] Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affs., 48 F.4th 1307, 1314 (2022); Kisor v. McDonough, 995 F.3d 1316, 1319 (Fed. Cir. 2021).

[54] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[55] *Id.*

[56] BO v. Wilkie, 31 Vet. App. 321, 340 (2019) (rejecting VA Secretary's arguments as not persuasive under *Skidmore*), *rev'd sub nom.* Rudisil v. McDonough, 55 F.4th 879 (Fed. Cir. 2022) (en banc), *rev'd & remanded*, 601 U.S. 294 (2024).

[57] Read v. Shinseki, 651 F.3d 1296, 1302 (Fed. Cir. 2011).

[58] Brown v. Gardner, 513 U.S. 115, 117–18 (1994) (citing King v. St. Vincent's Hosp., 502 U.S. 215, 220–21 n.9 (1991)). The earliest form of the presumption appears to have originated in the 1943 case *Boone v. Lightner*, which held that the "Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." 319 U.S. 561, 575 (1943). For a discussion of the evolution of the presumption from *Boone* to *Gardner*, see Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling* Brown v. Gardner*'s Presumption that Interpretive Doubt Be Resolved in Veterans' Favor with* Chevron, 61 AM. U. L. REV. 59, 65–74 (2011).

have each invoked *Gardner* when interpreting VA statutes, though both courts have expressed some uncertainty as to how *Gardner* applies with respect to *Chevron* and *Auer* deference.[59] Both courts appear to agree, however, that the pro-veteran canon does not apply unless statutory ambiguity exists.[60] The Supreme Court, for its part, has not addressed precisely when to apply the veterans canon, though two Justices have expressed skepticism as to its propriety.[61]

The *Loper* Decision

On June 28, 2024, almost exactly 40 years after it decided *Chevron*, the Supreme Court released its decision in *Loper*, pronouncing "*Chevron* is overruled."[62] The Court's ruling was based on section 706 of the APA, holding that *Chevron* deference "cannot be squared with" the APA's command that courts "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[63] Section 706, the Court explained, "codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury* [*v. Madison*]: that courts decide legal questions by applying their own judgment."[64] Under this framework, the APA "prescribes no deferential standard for courts to employ in answering those legal questions," in contrast to its "mandate that judicial review of agency policymaking and factfinding be deferential."[65]

Instead of applying *Chevron*, the Court held that a reviewing court must "exercise independent judgment in determining the meaning of statutory provisions"[66] to determine a statute's "single, best meaning," which is "'fixed at the time of enactment.'"[67] This best meaning, contrary to *Chevron*'s earlier command, is "'the reading the court would have reached' if no agency were involved."[68] Courts can arrive at this meaning using the "traditional tools of statutory construction," the "very point" of which is to "resolve statutory ambiguities."[69]

Eliminating *Chevron* deference does not, according to *Loper*, foreclose agency discretion or the courts' use of agency expertise. In some cases, the Court explained, this best reading of a statute could be that it

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[59] *See, e.g.*, Jellum, *supra* note 58, at 88–96; *accord* James D. Ridgway, *Toward a Less Adversarial Relationship Between* Chevron *and* Gardner, 9 U. MASS. L. REV. 388, 398 (2014) ("In theory, it should be very hard for the courts to avoid the tension between the canons of veteran friendliness and agency deference. Once a court finds ambiguity in a veterans benefits statute, it must apply a rule to resolve that ambiguity when the agency and the claimant are at odds. In their simplest forms, each of the competing doctrines states how ambiguity should be resolved in veterans law cases, and each doctrine typically points to opposite outcomes in cases in which the claimant and the VA Secretary are at odds.").

[60] *E.g.*, Spicer v. McDonough, 61 F.4th 1360, 1364 (Fed. Cir. 2023) ("Only where there is 'interpretive doubt,' after using ordinary textual analysis tools, do we rely on the pro-veteran canon for guidance."); Sharp v. Shinseki, 23 Vet. App. 267, 275 (2009) ("In the face of statutory ambiguity and the lack of a persuasive interpretation of the statute from the Secretary, the Court applies the rule that 'interpretative doubt is to be resolved in the veteran's favor.'" (quoting *Gardner*, 513 U.S. at 118)).

[61] *See Rudisill*, 601 U.S. at 314–15 (Kavanaugh, J., concurring, joined by Barrett, J.) ("I write separately . . . to note some practical and constitutional questions about the justifications for a benefits-related canon (such as the veterans canon) that favors one particular group over others.").

[62] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

[63] *Id.* at 2263; 5 U.S.C. § 706(2).

[64] *Loper*, 144 S. C.t at 2261.

[65] *Id*.

[66] *Id.* at 2262.

[67] *Id.* at 2266 (quoting Wis. Cent. Ltd. v. United States, 585 U.S. 274, 284 (2018)).

[68] *Id.* (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.11 (1984)); *cf. Chevron*, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.")

[69] *Id.* at 2266.

"delegates discretionary authority to an agency," such as expressly authorizing an agency to define a particular term or prescribe rules to "'fill up the details' of a statutory scheme."[70] A court's role, in this circumstance, is to define the limits of that discretionary authority and to ensure that the agency acted reasonably.[71] Even absent such a delegation of discretion, an agency may need to interpret a statutory ambiguity to implement a statute, and the agency would presumably draw on its expertise to do so. Quoting *Skidmore*, the Court explained that this expertise still has the "power to persuade" based on the agency's "body of experience and informed judgment," but that the reviewing court should independently determine the meaning of the statute.[72]

Although the Court overruled *Chevron* itself, it did not overturn any of the cases previously decided under *Chevron* Step 2.[73] Instead, the Court held that those prior decisions—including *Chevron*'s own holding regarding the Clean Air Act—"are still subject to statutory *stare decisis* despite [the Court's] change in interpretive methodology."[74] The Court explained that "reliance on *Chevron*," by itself, "cannot constitute a 'special justification' for overruling" a statutory precedent.[75]

Potential Effects of *Loper*

Although *Loper* focused on *Chevron* deference, it appears likely that the decision will impact other judicial deference doctrines, such as *Auer* and *Skidmore*. The *Loper* decision may also affect agencies' ability to change their regulations, potentially reversing or limiting Supreme Court precedent addressing that question.[76]

Loper and *Auer*

The Court in *Loper* did not discuss *Auer* deference; as a result, both *Auer* and *Kisor* are still controlling law. It appears, however, that *Auer* deference may conflict with the APA in a manner similar to *Chevron* deference. Like *Chevron* deference, *Auer* deference rests on a presumption that Congress delegated interpretive authority to an agency—in this case, "that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities."[77] Also like *Chevron* deference, there appears to be tension between that implied presumption, on the one hand, and the APA, on the other. In addition to the APA's command that courts "decide all relevant questions of law" (which the Court considered in *Loper*[78]), the APA directs reviewing courts to "determine the meaning or applicability of the terms of an agency action," which includes regulations.[79] If the Court interprets the scope of courts' review of regulations under the APA as similar to that of statutes, then the Court could potentially overrule *Auer* and *Kisor*.

[70] *Id.* at 2263 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

[71] *Id.*

[72] *Id.* at 2267 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[73] *Id.* at 2273 ("[W]e do not call into question prior cases that relied on the *Chevron* framework.").

[74] *Id.*

[75] *Id.* (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).

[76] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

[77] Kisor v. Wilkie, 588 U.S. 558, 569 (2019) (citing Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 151–53 (1991)).

[78] *Loper*, 144 S. Ct. at 2261–62 (quoting 5 U.S.C. § 706).

[79] 5 U.S.C. § 706; *see id.* § 551(13) (defining "agency action" as including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act").

Loper and *Skidmore*

In contrast to its treatment of *Auer* deference, the Court in *Loper* directly addressed the continuing role of *Skidmore*. Unlike *Chevron*, the Court explained, affording weight to agency interpretations under *Skidmore* is "consistent with the APA," as courts "may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes."[80] Such agency interpretations—especially those "issued contemporaneously with the statute at issue, and which have remained consistent over time"—reflect an agency's "'experience and informed judgment to which courts and litigants may properly resort for guidance.'"[81] In light of the Court's express endorsement of the use of *Skidmore* in appropriate circumstances, it appears likely that lower courts may increasingly turn to *Skidmore* when determining the meaning of statutes.

Loper and Changes in Agency Interpretations

Outside of the question of how courts should defer to or be guided by agency interpretations, *Loper* may affect agencies' ability to change their interpretation of statutes. Before *Loper*, an agency could, by amending a regulation, change its interpretation of a statute, and courts would defer to that changed interpretation so long as it was not arbitrary and capricious and otherwise satisfied *Chevron*'s two-part test.[82] An agency's power to reinterpret a statute by regulation extended even to statutes that had been interpreted by a court, so long as the previous decision did not declare the statute to be unambiguous.[83]

After *Loper*, there is some uncertainty as to how judicial interpretations of statutes will affect agencies' ability to reinterpret statutes via regulation. The Supreme Court has not addressed this issue, and it is not clear whether or when it may do so in a future case. *Loper*'s reasoning, however, suggests that an agency's ability to change its interpretation of a statute interpreted by a court under *Loper* may be limited (though Congress's ability to amend the statute itself would not be limited). Absent *Chevron* deference, courts might apply the general rule that judicial interpretations of statutes "are fully retroactive because they do not change the law, but rather explain what the law has always meant;"[84] in that case, agencies likely would not be able to adopt a contrary interpretation via regulation. In other words, such a judicial interpretation would, in effect, act like a decision prior to *Loper* under *Chevron* Step 1 that a statute was unambiguous, thereby precluding a later, contrary agency interpretation of that statute.[85] An exception might occur in cases where the "best meaning" of a statute is that Congress intended an agency to "exercise a degree of discretion," such as expressly delegating authority "to give meaning to a particular statutory term" or to "prescribe rules to 'fill up the details' of a statutory scheme."[86] In those cases, a court may find that the express delegation permits the agency to change its position, so long as the change otherwise comports with the APA.[87]

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[80] *Loper*, 144 S. Ct. at 2262.

[81] *Id.* (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[82] *See, e.g.*, Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005).

[83] *Id.* at 982–83.

[84] United States v. Rivera-Nevarez, 418 F.3d 1104, 1107 (10th Cir. 2005); *see* Harper v. Va. Dep't of Transp., 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.").

[85] *See Brand X*, 545 U.S. at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

[86] *Loper*, 144 S. Ct. at 2263 (quoting Batterton v. Francis, 432 U.S. 416, 425 (1977), and Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

[87] *See id*.

Loper and VA Regulations

Loper's effect on VA regulations and the judicial review thereof will likely mirror, in large degree, its application to the federal administrative state at large, though it is too soon to know the precise contours of that application. There are, however, several features unique to the veterans law system that may affect *Loper*'s impact in that context. This section examines the potential impact of *Loper* on VA regulations, turning first to judicial review at both the CAVC and Federal Circuit before examining potential impacts on VA's rulemaking process.

Judicial Review of VA Regulations under *Loper*

The most immediate impact of *Loper* on VA regulations will likely come through judicial review at the CAVC and Federal Circuit. To date, the CAVC has cited *Loper* in three precedential decisions,[88] and the Federal Circuit has cited it in only one veterans law case.[89] Until those courts apply *Loper* in additional cases, it is unclear exactly what the impact of the case will be. It appears, however, that the courts' application of *Loper* may depend on several factors, including (1) the form of judicial review (i.e., whether brought as a facial or as-applied challenge) and (2) whether a court has previously interpreted the statute or regulation at issue.

Form of Judicial Review

Whether a case is a facial or as-applied challenge may, at least initially, impact how the CAVC or Federal Circuit applies *Loper*. For facial challenges under § 502, the Federal Circuit applies the judicial review provisions of the APA.[90] As *Loper* specifically overruled *Chevron* in the context of judicial review under the APA,[91] it is squarely applicable to the Federal Circuit's review in § 502 cases. As a result, the Federal Circuit will likely reject any future attempt to seek *Chevron* deference, instead following *Loper* to assess in the first instance the best meaning of a statute.[92]

Separate from the question of *how* the Federal Circuit will apply *Loper* is the issue of *when* the Federal Circuit will do so. As discussed above, challenges to VA regulations under § 502 are subject to the six-year statute of limitations codified in 28 U.S.C. § 2401(a).[93] The Federal Circuit has interpreted § 2401(a) to hold that the six-year statute of limitations for bringing a challenge under § 502 begins to run when VA publishes the rule being challenged.[94] In *Corner Post, Inc. v. Board of Governors of the Federal Reserve*

[88] *See* Laska v. McDonough, No. 22-1018, 2024 WL 4096538, at *5 (Vet. App. Sept. 6, 2024) (citing *Loper* for the proposition that courts use "the traditional tools of statutory construction" to interpret statutes); Rorie v. McDonough, 37 Vet. App. 430, 442–44 (2024) (analogizing to *Loper* to hold that a pre-*Kisor* case applying *Auer* deference was still good law subject to stare decisis); Jackson v. McDonough, 37 Vet. App. 277, 287 n.76 (2024) (noting, days before the *Loper* decision was issued, that the Supreme Court had heard argument in *Loper* and was considering whether to overrule *Chevron*).

[89] Metro. Area EMS Auth. v. Sec'y of Veterans Affs., No. 2024-1104, 2024 WL 5036179, at *4 (Fed. Cir. Dec. 9, 2024) (considering under § 502 the validity of VA regulations governing ambulance transfers pursuant to authority under 38 U.S.C. § 111(b)(3)(C) and citing *Loper* when considering whether to adopt a forfeiture test from another court of appeals). The Federal Circuit's decision did not depend on *Loper*. *Id.* ("We need not resolve these issues about . . . the scope of the D.C. Circuit's forfeiture rule in light of *Loper Bright*, however . . . .").

[90] 38 U.S.C. § 502 (providing that the Federal Circuit's review "shall be in accordance with [the APA,] chapter 7 of title 5").

[91] *Loper*, 144 S. Ct. at 2263 ("The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.").

[92] *Id.* at 2273 ("Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.").

[93] *See, e.g.*, FED. CIR. R. 15(f).

[94] *E.g.*, Preminger v. Sec'y of Veterans Affs., 517 F.3d 1299, 1307 (Fed. Cir. 2008) ("The government is correct that a cause of action seeking judicial review under the APA accrues at the time of final agency action.").

System (a case decided only days after *Loper*), however, the Supreme Court held that § 2401(a)'s statute of limitations begins to run for APA claims when a claimant "suffers an injury from final agency action," not when the action itself occurred.[95] It remains to be seen whether or how *Corner Post* will change when claimants bring facial challenges under § 502. (The *Corner Post* Court appears to have left open the possibility that at least some procedural challenges under the APA still accrue on the date of an agency action, such as the date a rule is published, rather than on some later date.[96])

For as-applied challenges brought through appeals to the CAVC, additional litigation may be needed to officially overrule *Chevron* in that context. In particular, although *Loper* overruled *Chevron* as inconsistent with the APA,[97] the CAVC and Federal Circuit do not review appeals of VA decisions under the APA. Rather, the CAVC reviews VA decisions under 38 U.S.C. § 7261, and the Federal Circuit reviews CAVC decisions under 38 U.S.C. § 7292. As a result, it is not clear that *Loper* overruled *Chevron* in the context of appeals of VA benefits decisions, and neither the CAVC nor Federal Circuit has considered that question. It seems likely, however, that one or both of those courts will ultimately extend *Loper* to review under §§ 7261 and 7292. Both of those statutes use language nearly identical to the APA, directing the CAVC and Federal Circuit to "decide all relevant questions of law" and interpret statutory provisions.[98] Accordingly, the Supreme Court's reasoning that *Loper* conflicts with the APA's command to "decide all relevant questions of law" would seem to apply with equal force to the same phrase in §§ 7261 and 7292.

One potential consideration for courts that may impact *Loper*'s reach is whether 38 U.S.C. § 501(a)—the statute authorizing the VA Secretary to engage in rulemaking—constitutes a delegation of discretionary authority to "fill up the details" of the VA adjudication system.[99] If so, reviewing courts may decide that VA retains some flexibility in how it regulates, either broadly or with respect to specific subjects.

Previous Statutory Interpretations

In addition to the form that a challenge to a VA regulation takes, whether the meaning of a statute has previously been the subject of litigation—and how that challenge was resolved—will likely impact application of *Loper*. In general, if the meaning of a statute has not been the subject of previous litigation, then a reviewing court would apply *Loper* and interpret the statute in the first instance. Conversely, if a court previously found that a statute was unambiguous under *Chevron* Step 1, then that interpretation would control unless the previous decision were overturned or Congress amended the underlying statute. Similarly, if a court previously deferred to a regulation under *Chevron* Step 2, then, as the Supreme Court

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[95] 603 U.S. 799, 809 (2024). For more information on *Corner Post*, see CRS Legal Sidebar LSB11197, *Corner Post and the Statute of Limitations for Administrative Procedure Act Claims*, by Benjamin M. Barczewski and Jonathan M. Gaffney (2024).

[96] *Corner Post*, 603 U.S. at 824 n.8 ("It also may be that some injuries can only be suffered by entities that existed at the time of the challenged action. Corner Post suggests that only parties that existed during the rulemaking process can claim to have been injured by a "procedural" shortcoming, like a deficient notice of proposed rulemaking . . . We need not resolve that issue here . . . .").

[97] *Loper*, 144 S. Ct. at 2263.

[98] *Compare* 5 U.S.C. § 706 *with* 38 U.S.C. §§ 7261(a)(1) *and* 7292(d)(1).

[99] *Loper*, 144 S. Ct. at 2263. Section 501(a) authorizes the VA Secretary to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department," including four specific categories:

> (1) regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws;
>
> (2) the forms of application by claimants under such laws;
>
> (3) the methods of making investigations and medical examinations; and
>
> (4) the manner and form of adjudications and awards.

38 U.S.C. § 501(a).

explained in *Loper*, that previous decision would remain good law subject to stare decisis.[100] This stare decisis for previous decisions applying *Chevron* Step 2 extends to the Federal Circuit's decisions under § 502. It also likely applies to CAVC and Federal Circuit decisions, consistent with the discussion above regarding the similarity of the APA and §§ 7261 and 7292. Consequently, if the CAVC or Federal Circuit has previously deferred to VA regulations under *Chevron* Step 2, those cases likely remain good law.

Although the Supreme Court has held that "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what [courts] have done,'"[101] it "is not an 'inexorable command'"[102] and can be overcome in certain circumstances. The Supreme Court has articulated a number of factors for courts to consider when assessing whether to overrule a previous decision, including (1) "the quality of [the decision]'s reasoning"; (2) "the workability of the rule it established"; (3) "its consistency with other related decisions"; (4) "developments since the decision was handed down"; and (5) "reliance on the decision."[103] Thus, in appropriate cases, the CAVC or Federal Circuit could potentially overrule earlier decisions applying *Chevron* Step 2.

Cases decided under *Chevron* Step 2 could be abrogated or overruled in several additional ways. First, an intervening change in law, such as a statutory or regulatory amendment or repeal, could, depending on the nature of the change, supersede a court's prior decision.[104] Put another way, if a court deferred to an agency's regulation interpreting a statute, and the agency later amended its regulation in a way that changed its interpretation of the statute, the amendment would have the effect of abrogating the court's decision deferring to the original rule. The court would then, if asked to interpret the statute, apply the *Loper* test.

Second, depending on which court issued the decision applying *Chevron*, another court with appellate jurisdiction over the first may be able to overturn that decision, such as the Supreme Court overturning a court of appeals decision or the Federal Circuit overturning a CAVC decision.[105] Similarly, if a three-judge panel of a court of appeals decided the prior case, the full court, sitting en banc, may be able to overturn the decision in a later case.[106]

Structural differences in the veterans law system may impact how these precedential considerations play out. In the federal courts generally, district court opinions have no precedential value, and a court of appeals decision is binding only on that court and the federal courts over which it has appellate jurisdiction.[107] If one circuit court found a statute ambiguous and deferred to an agency regulation under *Chevron*, another circuit court would not be bound by that decision and could reach a different conclusion. This kind of circuit split is one factor the Supreme Court considers when deciding which cases to hear.[108] In the context of veterans law, only the CAVC, Federal Circuit, and Supreme Court have

[100] *Loper*, 144 S. Ct. at 2273.

[101] John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (2008)).

[102] *Loper*, 144 S. Ct. at 2270 (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

[103] *E.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 13, 585 U.S. 878, 917 (2018).

[104] *See, e.g.*, BRIAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 492 (2016) (observing that "a panel decision may be overruled . . . by . . . statutory amendment" (citing Jacobs v. Nat'l Drug Intel. Ctr., 548 F.3d 375, 378 (5th Cir. 2008))).

[105] For more information on the structure of the federal courts, see CRS Report R47641, *Federal and State Courts: Structure and Interaction*, by Joanna R. Lampe and Laura Deal (2023), and CRS Report R47899, *The United States Courts of Appeals: Background and Circuit Splits from 2023*, coordinated by Michael John Garcia and Craig W. Canetti (2024).

[106] *E.g.*, GARNER ET AL., *supra* note 104, at 495–508 (providing an overview of the en banc process).

[107] *See id.* at 491–92 (observing that "federal district courts, including three-judge district courts, must defer to their circuit court" and that "one circuit panel cannot overrule another").

[108] *See, e.g.*, SUP. CT. R. 10(a) (stating that one of the factors the Supreme Court may consider when deciding whether to grant a petition for a writ of certiorari is whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

jurisdiction to consider challenges to VA benefits regulations.[109] Accordingly, there can be no circuit splits with respect to the interpretation of those regulations. As a result, it might be more difficult for parties to tee up statutory interpretation questions for Supreme Court review, which might have the effect of causing the Supreme Court to take up proportionally fewer challenges to regulations upheld under *Chevron* in the veterans law context.

VA Rulemaking Post-*Loper*

Like *Chevron*, *Loper* applies only to how courts review statutes and regulations interpreting them. While it is not binding on VA, it may nonetheless affect VA's rulemaking practices. Some of these potential effects could be substantive, such as changing how VA weighs various legal and policy considerations when engaging in rulemaking. It seems possible that VA might take fewer risks when interpreting statutes, preferring "safe" readings that might be more likely to shape courts' interpretations of a statute under *Skidmore* to constructions that, while once permissible under *Chevron*, would not carry the "power to persuade."[110]

Other potential effects could be more procedural or strategic in nature. As regulatory amendments could have the effect of abrogating a court decision that afforded *Chevron* deference to a regulation, VA might consider whether to amend a regulation (and potentially subject the underlying statute to de novo judicial interpretation) or leave undisturbed a decision deferring to the unamended regulation. Even absent a previous decision deferring to a regulation, VA might wish to look for ways to avoid precedential decisions interpreting the statutes it administers as a way of preventing courts from "locking in" a particular interpretation, thereby maintaining flexibility when amending its regulations.[111] VA could do this, for example, by entering into settlements or agreeing to remand appeals to the agency.[112]

Congressional Oversight and Influence

Against the backdrop of *Loper* and its potential impact on VA regulations, Congress may wish to explore its ability to oversee or influence VA rulemaking and the judicial review of VA regulations.

Shaping VA Regulations

Congress possesses a number of tools to shape agency regulations and rulemaking, including through authorizing legislation, appropriations, and its oversight authority.[113] Some of these tools, such as amending controlling statutes or conducting oversight hearings, could be used to influence future VA rulemaking, including amendments to existing rules. Other tools, such as the Congressional Review Act (CRA) or appropriations bills, could be used to rescind existing regulations or influence VA's enforcement

[109] 38 U.S.C. §§ 502 (vesting the Federal Circuit with exclusive jurisdiction to consider facial challenges to VA regulations), 7252 (granting the CAVC "exclusive jurisdiction to review" VA benefits decisions); 28 U.S.C. § 1254 (authorizing Supreme Court review of circuit court decisions).

[110] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2268 (2024).

[111] *See id*. at 2266 ("It . . . makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.").

[112] *See* U.S. VET. APP. R. 33 (contemplating "joint resolution of the appeal or settlement").

[113] *See* CRS Report R45442, *Congress's Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Sean Stiff (2023).

of them. In addition, many of these tools could also be used to shape VA's informal guidance in how statutes and their regulations should be interpreted.[114]

Influencing Future Regulations

If Congress wishes to influence future VA rulemaking, it could do so in several ways. First, Congress could use its legislative authority to shape future VA regulations. It is axiomatic that "[a]dministrative agencies are creatures of statute" and "possess only the authority that Congress has provided."[115] Thus, by amending VA's authorizing legislation, Congress could modify the VA Secretary's rulemaking authority, either generally or with respect to specific programs. Congress could, for example, grant the VA Secretary a broad delegation to "fill up the details" of a statutory scheme,[116] or limit judicial review of VA rulemakings or adjudications, as it did prior to the VJRA.[117] Conversely, Congress could enact legislation with increased specificity, limiting VA's ability to interpret statutory provisions through regulation. Congress could also codify existing VA regulations as a way of preventing VA from changing those regulations in the future.

Second, Congress could use non-statutory tools to attempt to influence VA rulemaking. These tools include oversight hearings, where Members could question VA witnesses about the implementation of statutes, offer their views on how statutes should be interpreted, and publicize agency actions.[118] If Congress believes that VA is not following controlling statutes, it could also use tools such as censure or its contempt power to encourage a change in agency conduct.[119]

Finally, Members and congressional staff can attempt to influence VA rulemaking proceedings, either through participation in the notice-and-comment rulemaking process or through other communications.[120] At least one court has observed that this kind of communication is "entirely proper," endorsing Congress's duty "vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure."[121] Agencies, in turn, should "balance Congressional pressure with the pressures emanating from all other sources."[122]

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[114] For more information on agency guidance documents, see CRS Legal Sidebar LSB10591, *Agency Use of Guidance Documents*, by Kate R. Bowers (2021).

[115] Nat'l Fed. of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 595 U.S. 109, 117 (2022); *see* La. Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 374 (1986) ("An agency literally has no power to act . . . unless and until Congress confers power upon it.").

[116] *Loper*, 144 S. Ct. at 2263. As discussed above, it is unclear whether 38 U.S.C. § 501 may do this to some degree. *See supra* "Form of Judicial Review."

[117] Traynor v. Turnage, 485 U.S. 535 (1988) (recognizing a the strong presumption in favor of judicial review of administrative action that can be overcome by clear and convincing evidence of a contrary legislative intent and interpreting the scope of 38 U.S.C. § 211, a pre-VJRA statute precluding judicial review of VA benefits decisions); Johnson v. Robinson, 415 U.S. 361, 366–68 (1974) (interpreting § 211 as not barring courts from assessing the constitutionality of veterans benefits statutes); *see also* Sheldon v. Sill, 49 U.S. (1 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

[118] *See* Garvey & Stiff, *supra* note 113, at 18–23.

[119] *See id.* at 34–37.

[120] For an overview of congressional communications with agencies during the rulemaking process, see CRS In Focus IF12368, *Communications Between Congress and Federal Agencies During the Rulemaking Process*, by Maeve P. Carey and Todd Garvey (2023).

[121] Sierra Club v. Costle, 657 F.2d 298, 409 (D.C. Cir. 1981).

[122] *Id.* at 410.

Influencing Existing Regulations

For regulations already in effect or that have been finalized but not yet become effective, Congress has additional tools that it can bring to bear. First, if Congress disagrees with a VA regulation, it could use the legislative process to nullify that regulation. This nullification could occur through the ordinary legislative process.[123] In addition, a separate tool—the CRA—provides special "fast-track" procedures to disapprove of certain agency rules.[124] Under these procedures, the CRA requires agencies to submit rules to Congress and the Government Accountability Office before they can take effect. The CRA then outlines procedures for expedited consideration of a *joint resolution of disapproval* that would prevent a rule from taking effect, subject to presidential veto.[125]

Second, Congress could use its "power of the purse" to control VA's implementation of certain regulations or programs.[126] Congress could, for example, prohibit VA from using appropriated funds to enforce a given regulation.[127] Conversely, Congress could condition funding on VA carrying out certain programs, or use appropriations to direct VA to take certain actions.[128]

Influencing Judicial Review

In the wake of *Loper*'s overruling of *Chevron*, Congress may wish to consider how a reviewing court will interpret an ambiguous statute. Congress again has several tools to do so. First, Congress could attempt to draft legislation with greater specificity, thereby giving reviewing courts more guidance as to Congress's intent in enacting the legislation. By avoiding—or at least attempting to avoid—statutory ambiguities, Congress could limit courts' ability to interpret statutes in a manner inconsistent with congressional intent. This approach may face practical difficulties, including time pressures on legislation and Congress's institutional capacity.[129]

Second, Congress could modify how courts review VA regulations under the APA and 38 U.S.C. §§ 502, 7261, and 7292. Congress could, for example, provide courts with additional guidance on how to interpret

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[123] *E.g.* Kan. Nat. Res. Coal. v. U.S. Dep't of the Interior, 971 F.3d 1222, 1233 (10th Cir. 2020) (observing that "Congress can overturn [a regulation] at any time").

[124] 5 U.S.C. §§ 801–808. The CRA's definition of *rule* is broader than that of the APA and may include agency interpretive rules and guidance documents that are not subject to the APA's notice-and-comment rulemaking requirements. *Compare id.* § 804(3) (CRA definition of "rule") *with id.* §§ 551(4) (APA definition of "rule"), 553(b) (excluding "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" from the notice-and-comment requirement).

[125] *Id.* §§ 801–802. For more information on the CRA, see CRS In Focus IF10023, *The Congressional Review Act (CRA): A Brief Overview*, by Maeve P. Carey and Christopher M. Davis (2024).

[126] The Supreme Court has recognized Congress's broad control over appropriations. *E.g.*, Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) ("[N]o money can be paid out of the Treasury unless it has been appropriated by an act of Congress."). For more information on Congress's appropriations power, see CRS Report R46417, *Congress's Power Over Appropriations: Constitutional and Statutory Provisions*, by Sean Stiff (2020), and Cong. Rsch. Serv., *Overview of Appropriations Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S9-C7-1/ALDE_00001095/ (last visited Dec. 12, 2024).

[127] *E.g.*, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 433, 136 Stat. 4459, 4831 ("None of the funds made available in this Act may be used to implement or enforce the regulation issued on March 21, 2011 at 40 CFR part 60 subparts CCCC and DDDD . . . ."); *id.* § 740, 136 Stat. at 4715 ("None of the funds made available by this or any other Act may be used to implement, administer, enforce, or apply the rule entitled ''Competitive Area'' published by the Office of Personnel Management in the Federal Register on April 15, 2008 (73 Fed. Reg. 20180 et seq.).").

[128] *E.g.*, Consolidated Appropriations Act, 2024, Pub. L. No. 118-42, tit. II, 138 Stat. 25, 44 (conditioning appropriations for the "Veterans Electronic Health Record" on the VA Secretary's submission of quarterly reports to Congress); *id*. § 232(a), 138 Stat. at 53 (imposing requirements on the VA Secretary's implementation of a toll-free suicide hotline).

[129] *See, e.g.*, *Congress in a Post-*Chevron *World: Hearing Before the Comm. on H. Admin.*, 118th Cong. (2024) (discussing congressional capacity to legislate with more specificity), *available at* https://congressional.proquest.com/congressional/docview/t39.d40.tr07230124.o14?accountid=12084.

ambiguous statutes. One way that Congress could do so would be to codify a form of *Chevron* deference. Such a codification is not foreclosed by *Loper* because that decision was based on a conflict between *Chevron* and the APA; amending the APA would, presumably, resolve that conflict. Members of the 118th Congress have introduced various bills that would codify some form of *Chevron* deference.[130] It is unclear, however, whether such statutory enactments of *Chevron* would survive judicial review: although *Loper* was decided on statutory, not constitutional grounds, several Justices wrote separately to express skepticism as to whether *Chevron* deference is constitutional in light of the Supreme Court's duty "to say what the law is."[131]

[130] *E.g.*, Stop Corporate Capture Act, S. 4749, 118th Cong. § 12 (2024); Stop Corporate Capture Act, H.R. 1507, 118th Cong. § 12 (2023).

[131] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2274 (2024) (Thomas, J., concurring) ("*Chevron* compels judges to abdicate their Article III 'judicial power.'"); *id.* at 2285 (Gorsuch, J., concurring) ("[*Chevron*] precludes courts from exercising the judicial power vested in them by Article III to say what the law is."); *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").