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Supreme Court Overturns *Chevron* Deference: What's Next for FEMA?

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In a landmark decision, the Supreme Court on Friday overturned the 40-year-old precedent that established what is commonly known as *Chevron* deference. The ruling fundamentally alters the balance of power between federal agencies and the judiciary. The decision stems from the valid concern that *Chevron* deference allowed agencies to wield excessive legislative power through regulatory action with limited judicial review. The Court held that "*Chevron* was a judicial invention that required judges to disregard their statutory duties. And the only way to 'ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion,' *Vasquez v. Hillery*, 474 U. S. 254, 265 (1986), is for us to leave *Chevron* behind."

The majority opinion in *Loper Bright Enterprises v. Gina Raimondo* held that the Constitution vests the power to interpret laws in the judiciary, not in administrative agencies. They reasoned that courts should use traditional tools of statutory interpretation to resolve ambiguities rather than relying on agency expertise, stating that under *Chevron's* broad rule of deference:

[A]mbiguities of all stripes trigger deference, even in cases having little to do with an agency's technical subject matter expertise. And even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions, and courts did so without issue in agency cases before *Chevron*.

Importantly, as it relates to regulations established by the Federal Emergency Management Agency (FEMA) in relation to its grant programs, the Court did acknowledge the continuing limitations to judicial review where Congress has conferred discretionary authority on an agency, such as FEMA, but makes clear that such discretionary authority can be pierced by the judiciary when appropriate. The Court stated:

That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has. But to stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA. By forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* does not prevent judges from making policy. It prevents them from judging.

So, what does this mean going forward for APA claims brought against FEMA?

Likely Implications for FEMA

Despite the overturning of *Chevron* deference, FEMA's discretionary authority will still provide significant protection against APA claims brought against the agency. However, that does not mean that this decision by the Court won't have an effect on FEMA's decision-making process going forward.

FEMA can certainly expect to see increased judicial scrutiny when its discretionary authorities are pierced. Likewise, the loss of *Chevron* deference introduces the likelihood of more frequent APA claims brought against the agency. With more frequent legal challenges, it is reasonable to expect FEMA to take extra effort when creating regulation and policy in an effort to withstand judicial scrutiny. The agency will likely also seek clearer legislative actions from Congress to minimize ambiguities in the statutes it administers.

Although the overturning of *Chevron* deference opens the door to a broader spectrum of APA claims to be brought against FEMA, plaintiffs challenging FEMA's actions or policymaking under the APA will still face the burden of overcoming FEMA's discretionary authorities. The Court makes clear that this is not an insurmountable task, clearly noting that the judiciary must ensure that agencies exercise their discretion consistent with the APA.

The Court has also, separately through another decision (*Corner Post, Inc. v. Board of Governors of the Federal Reserve System*), indicated when the statute of limitations for a claim under the APA begins to accrue. The Court makes clear that "a claim brought under the Administrative Procedure Act 'accrues'... when the plaintiff has the right to assert it in court – and in the case of the APA, that is when the plaintiff is injured by final agency action." This is of critical importance in relation to APA claims against FEMA because grant recipients and sub-recipients routinely received multiple "decisions" from FEMA prior to the final agency action, which FEMA will not be able to argue started the clock for an APA claim.

What Does This Decision Mean for Grant Recipients and Sub-Recipients?

While FEMA retains significant discretionary authority, plaintiffs now have a stronger foundation to argue against the agency's statutory interpretations and even its decision-making process. This is particularly true considering the Court has recently indicated in *Weyerhaeuser Co. v. United States Fish and Wildlife Service* the possibility of reviewing an agency's action even when the action is "committed to agency discretion by law." As it relates to the Public Assistance Grant Program, Hazard Mitigation Grant Program, and Building Resilient Infrastructure and Communities Program, this means grant recipients and sub-recipients should be ever more vigilant in both observing FEMA's decisions and questioning the validity of those decisions within the confounds of the Stafford Act. Recipients and Sub-Recipients should always ask themselves:

1. **Is FEMA's decision following required APA procedures?** For example, did FEMA submit its regulation or policy properly for notice and comment and adequately address public comments during the rule-making process? Procedural non-compliance is something the courts will certainly scrutinize.
2. **Is FEMA implementing the grant program in accordance with the objectives of the Stafford Act?** For example, are they providing timely and effective disaster relief? Courts are more likely to scrutinize agency decisions that do not further the legislative intent.
3. **Is FEMA's policy or decision consistent with the mandated actions as provided in the Stafford Act?** Much of the Stafford Act is written in permissive terms; however, there are sections that require FEMA to take an action. There are also sections that restrict FEMA from taking an action. FEMA's violation of these types of mandatory Stafford Act directions will leave room for the courts to strike down the offending FEMA policy or action.
4. **Is FEMA's decision based on a rational and reasonable evaluation of the facts to the requirements within the Stafford Act?** Agency interpretation and application without a sound basis in law or fact could be subject to scrutiny by the courts.
5. **Is FEMA consistently applying its rules and standards?** If FEMA is applying different standards or interpretations of the law through application in similar situations, then the courts will consider

whether the agency's actions are arbitrary and capricious.

6. **Are FEMA's actions causing an unreasonable delay in funding of eligible disaster assistance?**
If FEMA is delaying reimbursement of eligible disaster recovery costs with no justifiable reason under the Stafford Act for such a delay, FEMA's decision-making process can be scrutinized by the courts.

As always, consult with counsel to develop a strategy for potential regulatory or policy challenges. This includes understanding new compliance requirements or exploring opportunities to challenge existing regulations or policies that may no longer hold under the new legal framework.

Baker Donelson's [Disaster Recovery and Government Services](#) professionals work proactively with state and local governments, governmental agencies and authorities, non-profits, and infrastructure providers to provide regulatory compliance, grant management, and legal representation that maximize access to federal funding, assure its effective use, and, as needed, coordinate and negotiate with other governmental entities to maintain funding previously received. If you have questions about current or expected FEMA grant funding, or how the Supreme Court's anticipated consideration and rulings involving *Chevron* may impact any current or past disputes, please reach out to, [Charles F. Schexnaildre](#), [Wendy Huff Ellard](#), or any member of Baker Donelson's [Disaster Recovery and Government Services Group](#).