The Post-Loper Bright Landscape (*A Hard Look*, Season 6, Episode 6)
Transcription and Show Notes

Episode Title

The Post-*Loper Bright* Landscape

Episode Description

On this episode of *A Hard Look*, we're discussing the implications of the Supreme Court's decision in *Loper Bright*; the case that overruled the infamous *Chevron* Doctrine. Since last summer, there has been meaningful legal developments within lower circuits. Professor of Law and legal scholar, Cary Coglianese, joins us to discuss what—if any—indications these decisions mean for a post-*Loper Bright* landscape.(*)

* **Editorial Note:** At the time of recording, this episode referred to the article Professor Coglianese wrote with Professor Daniel E. Walters, "The Great Unsettling: Administrative Governance After *Loper Bright,"* as "forthcoming." This article has since been published and is now available online at the adminstrativelawreview.org.

Show Notes

Listen to our pre-*Loper Bright* episode, where we interviewed Daniel M. Sullivan to discuss the critiques and weaknesses of *Chevron* doctrine, potential constitutional problems with judicial review of agency decisions, and what administrative law may look like after the decision.

Read more, here:

- *Loper Bright Enterprises v. Raimondo* (2024)
- *Loper Bright Enterprises v. Raimondo* on SCOTUS Blog
- Loper Bright Enterprises v. Raimondo *and the Future of Agency Interpretations of Law* by Congressional Research Service (Dec. 31, 2024)
- *The Great Unsettling: Administrative Governance After* Loper Bright by Cary Coglianese & Daniel E. Walters

Episode Transcription

[INTRO MUSIC]

Victoria Paul
Welcome back to *A Hard Look*, a podcast by the *Administrative Law Review*. Your hard look hosts today are Sophia Navedo and Victoria Paul, third-year law students at American University, Washington College of Law. Today, we are diving into the post-*Loper-Bright* landscape, how lower courts have applied the decision and what we can expect moving

forward. It's been months since the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* overhauled the foundations of administrative law by overturning the landmark case *Chevron v. NRDC*. With *Chevron* no longer compelling judicial deference to agency interpretations, the regulatory world is grappling with the unknown.

Sophia Navedo
Joining us today is Professor Cary Coglianese, a professor at the University of Pennsylvania, who will discuss the emerging implications of *Loper Bright* and how agencies may navigate legal risks in this period of flux. Stick around for a deep dive into what's shaping up to be one of the most consequential eras in administrative law.

[MUSIC TRANSITION]

Victoria Paul
First, a quick refresher to what happened last summer: *The Loper Bright Enterprises v. Raimondo* decision. The case involved a challenge to a regulation issued by the National Marine Fisheries Service, which required fishing companies to pay federal observers on their vessels. Companies affected included family-owned commercial fishermen, such as the plaintiff in this matter. At the heart of the case was whether courts should defer to the agency's interpretation of the statute under the longstanding *Chevron* Doctrine.

Since its inception in 1984, *Chevron* established a two-step framework for courts to defer to agencies when statutory language was ambiguous and the agency's interpretation was reasonable. In *Loper Bright*, the Supreme Court upended this precedent, ruling that courts must exercise independent judgment in deciding whether an agency has acted within its statutory authority and may no longer defer to agencies unless Congress's intent is explicit.

Chief Justice Roberts, writing for the majority, argued that judicial deference had improperly shifted power away from the judiciary to the executive branch, eroding the principle of separation of powers. This decision has fundamentally changed how courts review agency actions, placing the burden on the agencies to justify their regulatory decisions in the face of stricter judicial scrutiny. It's a seismic shift that, as we'll hear shortly, has already generated ripple effects across the federal circuits.

Sophia Navedo
With *Chevron* overturned, courts have wasted no time testing the new boundaries of judicial review. To help make sense of this shifting landscape, we're joined by Professor Cary Coglianese, a leading scholar in administrative law and regulatory processes. Professor Coglianese specializes in empirical evaluations of policymaking, public

participation, technology, and business government relations. As the founding director of the University of Pennsylvania Program on Regulation, he has shaped conversations on regulatory excellence and governance. A senior fellow of the Administrative Conference of the United States, or ACUS, Professor Coglianese has chaired its rulemaking committee and held leadership roles in the American Bar Association's section on administrative law and regulatory policy. The author of over 300 works, his recent books include *Achieving Regulatory Excellence* and *Does Regulation Kill Jobs?*. With his forthcoming article, "The Great Unsettling: Administrative Governance After *Loper Bright*," set to appear in the *Administrative Law Review*.

Victoria Paul
Professor Coglianese, thank you for joining us today. So now that we've recapped *Loper Bright*, let's talk about its impact eight months later. In your recent article, "The Great Unsettling, Administrative Governance After *Loper Bright*," you wrote about how this decision ushers in a period of, quote, *flux* for administrative law; comparing the decision to something of a "Rorschach Test inside a crystal ball." Can you elaborate on what you mean?

Professor Cary Coglianese
Well, first of all, let me say it's nice to be here and I appreciate your invitation. Second of all, I really want to note that this article, "The Great Unsettling" that you mentioned is a co-authored work and my co-author is the great Dan Walters, who I've just been really pleased to work with on this article among others. And I should also in full disclosure say that the phrase that you want me to elaborate on a Rorschach Test inside of a crystal ball is really Dan's, so let me give him credit for that creative imagery there.

What we mean by that is there are lots of different views about what the future will hold for the administrative state following *Loper Bright*. The article actually includes an appendix that contains over a hundred different sources commenting on *Loper Bright* in just the first month following the decision. These are op-eds, they're written by administrative law scholars, their commentaries and other in-depth essays. And that's in addition to news articles, which are not included in those hundred. That's in addition to law firm bulletins and so forth. It's been a lot of attention, and when we looked across all of these, we see that they're all over the map in terms of what they think that *Loper Bright* will mean for the future of administrative governance. People are predicting that it will really end the ability of agencies to go forward and take actions that are needed to protect the public and it will be a disaster. Others who at the other end the spectrum of the spectrum sort of say, no, this really hasn't changed anything at all. And then there's some people in the middle. And the point is that we really don't know and the whole article is, is really elaborating why it's so hard to know for sure, right now. Why is it—in other words—a Rorschach test inside of a

crystal ball. When you look inside of the crystal ball, you're seeing this inkblot—*Loper Bright*—and different people are seeing different things out of it.

Sophia Navedo
It was honestly a very good metaphor. It is a little bit unpredictable at this point. Do you think that it's maybe a matter of time then? We just need a lot more metrics to understand it?

Professor Cary Coglianese
It's certainly at least going to take that. However, it's going to be difficult even down the road for a number of reasons. One is that *Loper Bright* is occurring at the same time that a lot of other changes are happening with a new administration.

Sophia Navedo
Right.

Professor Cary Coglianese
And maybe later we can talk more about those things that may be even more consequential than even the Supreme Court's decision in *Loper Bright*; and that may just sort of overwhelm any effects that *Loper Bright* itself may have.

Second reason is that it's not clear whether *Loper Bright* as a legal matter really did change much despite saying that it overruled *Chevron*. There's a really good argument that as a legal matter, it hasn't. In fact, that's an argument that another great co-author of mine—David Froomkin—and I make in an article that's forthcoming in the *University of Pennsylvania Law Review*, where we critique *Loper Bright* from an internal perspective of the law.

There's also the question—the third challenge—is how much does the internal perspective of the law really matter? How much is really driving the courts and agency action here based upon law or how much is really based upon politics. And you know, you can see even before *Chevron* was overruled certain circuits being very aggressive toward agency actions, they didn't need to necessarily have *Loper Bright* overrule *Chevron* to take positions that struck down agency actions. If it's all politics then it may be hard to sort out how much *Loper Bright* matters because those politics were in place long before *Loper Bright* happened.

We outline in our paper what we call myths of *Loper Bright,* and we call them "myths" because they kind of are ineffable at this point in time at least. A lot depends on your

attitude or how you view that "Rorschach Test inside of a crystal ball" based upon whether you think law is going to be driving the Court's decision; whether you think the law has really changed or not; or whether you think politics is really driving this decision—by that I mean judicial politics too.

There's also—as we outline in the paper—just a very complex set of interactions that we call the administrative governance game, and sorting out one piece of that, which is the *Chevron* doctrine, or the *Chevron* doctrine being overruled, just going to be hard to sort out from all of the other effects that might be happening, some of which may be prompted by the overruling of *Loper Bright*, but some may be happening for other reasons. And to really pull out and say definitively, even down the road, it may be just really challenging to say, "Yeah *Loper Bright* did this."

Not ruling it out…

Sophia Navedo
Right.

Professor Cary Coglianese
You know—Dan and I are empiricists; we're social scientists. We believe in looking for empirical evidence. But we just wanted to have some kind of humility enter into the conversation where people were definitively saying the sky was falling or this is a nothing burger. To say, "wait a minute," you know. And we do take a little bit of a position in the paper, in the sense that we say, "We think there's good reason to think that something has changed here." The overruling of *Chevron*, if nothing else has been a pretty significant symbolic action.

A lot of people are talking about it. When you look at *Chevron* for any conversation in the media at that time, we found one article in the *New York Times* that referred to it and that was about it. Talk about a kind of "nothing burger." It emerged, and then a deafening silence. That hasn't obviously happened with *Loper Bright*.

Just one thing that's kind of interesting in this regard: among the hundred or so immediate "postmortems" on the *Chevron* doctrine being overruled was an article in *Vogue Magazine*!

Sophia Navedo
Wow!

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Professor Cary Coglianese
How often do administrative law cases get written about in *Vogue Magazine*, right?

Sophia Navedo
[Jokingly] Yeah, not where we would go.

Professor Cary Coglianese
It's something that is likely to be a shock to the system. And we say that, you know, like an earthquake—which I think it is, in that it is unsettling, that's part of the "great unsettling" metaphor that we're calling attention to. But when an earthquake happens, it's often not immediately apparent whether one's building is damaged or not. You have to have structural engineers come out. I mean obviously if your building is totally collapsed, that's obvious, but sometimes it's not immediately evident and you have to investigate it further. So that's really what we're suggesting.

There is something here, but exactly what, and which direction and whether—even if it changes something in the short term, will it kind of return to where it was. There's an argument to be said that that may happen too. The exigencies of government, and the technical nature of administrative actions and statutory interpretation complexities, may lead a lot of judges to simply to do what they had been doing before, which is in many cases letting the government win or having the government win. The government is likely to still be a very strong advocate for its position and to be probably one that will often get some good bit of practical deference, even if not legal deference. But again, in certain circuits that are antagonistic toward administrative power that might not play out.

Anyway, this is a call for humility by lawyers to making any kind of grand pronouncements about exactly what a *Loper Bright* will mean and, as you say, it may take some time.

Victoria Paul
Thank you. I want to point out your discussion about how politics may be impacting the judiciary. We know that Chief Justice Roberts is highly concerned about this and doesn't want it to appear that the Court is responding to how the public feels about certain things. So, does *Loper Bright* try to address and dismiss that or does it try to address any of the other myths that you identify in the paper?

Professor Cary Coglianese
That's a great question. First of all, I don't have any inside track. I haven't talked to Justice Roberts, or I don't way of peering into his mind. But I read *Loper Bright* opinion as him kind of struggling to take a position that is, on the one hand, rhetorically supportive of sort of the

extreme end of the spectrum of the Court that really was antagonistic towards *Chevron*. And so much of the opinion really is *dicta*. You know it's just a lot of rhetoric about the courts and their majesty and the importance of their primacy in interpreting the law. And then, "Oh by the way, we just resolve this at the end on the grounds of Section 706 of the Administrative Procedure Act. It's not a constitutional case. So, all these references to *Marbury v. Madison,* and so forth, are there as I think rhetorical flourishes. Maybe he's struggling to kind of satisfy one end with that.

At the other end, to have a passage that really acknowledges that Congress can delegate authority to agencies to carry out a statute that might be ambiguous and, in the process, to give meaning to those ambiguities in the statute. *Loper Bright*, I think from an internal perspective, if you're looking at it as lawyer, it really doesn't say that it's changing much at all, if anything, from *Chevron*. *Chevron* was always all about delegation, too. We just will never refer to this any more as, as "two steps." It's a question of did Congress delegate the decision to the agency.

Victoria Paul
So, you mentioned how in light of *Loper Bright*, certain court decisions may have come out the exact same under *Chevron*. I want to use a case example to exemplify that for our audience. Using *Restaurant Law Center v. U.S. Department of Labor*, where in August 2024, the U.S. Court of Appeals for the Fifth Circuit vacated a Department of Labor regulation governing the way tipped employees are paid, finding that that rule violated the APA.

Just some context for our listeners, the Department of Labor rule comes from their interpretation of the Fair Labor Standards Act, which permits employers to pay tipped employees $2.13 an hour in case wages below the federal minimum wage of $7.25 under the theory that employees earn at least $5.12 per hour in tips. Over the years, the Department of Labor has followed guidance, interpreting tipped employees as those who spend at least 80% of their time doing work for which they receive tips and no more than 20% of their time engaging in quote non tipped work. And in December 2021, the Department of Labor issued a final rule effectively codifying that longstanding 80/20 guidance.

The Fifth Circuit, in that suit, the plaintiffs challenged the final rule arguing that the Department of Labor exceeded its authority under the Fair Labor and Standards Act, since the Act defined a tipped employee as (quote), "any employee engaged in occupation in which he customarily and regularly receives more than $30 a month in tips" (end quote). The Fifth Circuit found that the Department of Labor's line drawing definition that focused on "duties" was contrary to the clear statutory definition for tipped employees. Ultimately, the court held that that inconsistency in the final rule and statutory language rendered the rule arbitrary and capricious.

This decision was identified as one of the first examples of an appellate application of *Loper Bright*. But I'm curious on whether the Fifth Circuit could have just as easily overturned the tip rule under *Chevron* and what that means for the impact of *Loper Bright*.

Professor Cary Coglianese
Well, listen, the Fifth Circuit was taking decisions that were striking down administrative actions long before *Loper Bright*, okay. So, there's no reason really to think that just because there's some decision now that has struck down an agency action and cited *Loper Bright*, that that necessarily indicates some kind of causal relationship. As a social scientist, it's also just a single case. So, even if all the indications were that *Loper Bright* mattered in this case, what we're really looking for is whether there's going to be some systemic change. And you can never determine that from one single case. But that said, you know, you're right to ask, wouldn't the Fifth Circuit been able to reach the same outcome under Chevron, and I think the answer is probably "yes." The *Chevron* two-step doctrine gave judges a lot of possibilities in play. If a judge didn't think that the agency interpretation of the statute was correct, then you could strike it down at Step One and say the statute means a tipped employee is one who regularly receives more than $30 a month in tips. And if that's the statutory definition, it's clear. Coming up with an 80/20 may be sensible as a policy matter, maybe not, but that's not for the courts to decide. "We just call balls and strike and the statute is clear."

The other possibility of course would be to say, "well you know, maybe there is some room for ambiguity." But starting to create these distinctions between functions and agencies. Why 80% and not 75? And why not 85 and so forth? That's all unreasonable at Step Two. So, courts had a good bit of flexibility under the *Chevron* doctrine. I mean part the flexibility also just comes from, really, the whole enterprise of statutory interpretation, which is a very difficult enterprise to begin with, but it's also one that's not rule-like itself. It is an interpretive process, and different judges could approach things in different ways.

You know, we started off by the way, asking about *Loper Bright* being a Rorschach Test inside of a crystal ball. But I should note that the *Chevron* doctrine itself was sometimes labeled as a Rorschach inkblot. Jack Beermann has a really nice paper in which that's essentially the title of the paper. So, *Chevron* itself had a good bit of play in it. I think that's one of the reasons why *Chevron* also became such a target of the political right. Because it did have a lot of ambiguities itself, and it could be painted as it was as a form of judicial abdication, even though if you read it, it certainly wasn't. The court in *Loper Bright* says that there's no compatibility between the *Chevron* doctrine and the APA. Why? Because the APA says that courts shall decide all relevant questions of law. And the majority in *Loper Bright* really places stress on the word "all" but virtually overlooks entirely the word "relevant." And it may be not a relevant question to decide what the statute means, if you have as a court already decided the really relevant question, which is whether the agency

has that authority delegated to it. And I should add that for all of the ink that the majority spills in *Loper Bright* about how it's the courts' responsibility to interpret the law—it's ironic that they ground their decision on the APA, where the APA in Section 551, defines rulemaking as a power that agencies have to, among other things, "interpret the law!" That's a power.

Victoria Paul & Sophia Navedo
[Laughs]

Sophia Navedo
Plot twist.

Professor Cary Coglianese
Go figure! So, this is the—sort of the—duplicity, if you will, I think of *Loper Bright*. It's a tangled web, to be sure.

Sophia Navedo
Right.

Victoria Paul
To that point, would it be wise to say that the absence of *Chevron* deference forces agencies to fend their actions on narrower statutory grounds where, you know, courts may be more willing to second guess their decisions?

Professor Cary Coglianese
Well, you know, actually, I was on a panel earlier today in Washington, talking about *Loper Bright*, and this kind of came up. I don't know that agencies were ever really cavalier in their general counsel's offices and saying, "Who cares whether we have the statutory authority for this at all? We've got *Chevron* deference, right?" Agency lawyers' job is always to put forward a best reading of the statute.

Why was that the case even under *Chevron*? Well, because you only get *Chevron* deference if you get to Step Two. Right? And, so you have to always argue even under *Chevron* that "the best reading is ours." Right? And then you could say "in the alternative, if you don't accept that, then it's at least ambiguous and here's why it's reasonable." So, I don't know that it really fundamentally changes the task for agency lawyers. They have to

do a good job of statutory interpretation today, but I think that they had to do it before then, too.

Sophia Navedo
Kind of looking then on the plaintiff's side, are you seeing trends among circuits or subtle forms of forum shopping as litigants navigate this new legal landscape, or is it just the same that we saw before?

Professor Cary Coglianese
I don't see that that's really fundamentally changed with *Loper Bright*. I mean, I think there were always reasons to go to the Fifth Circuit. For example, if you wanted to upend an agency rule, if you could get there, that would be a good thing. And as a lawyer on the challenger side, you would always try to seek out for your client the best forum you possibly could. And forum is not really something that that *Loper Bright* would affect. It's really probably affected more by judicial appointments.

Victoria Paul
So, with agencies now facing this heightened judicial scrutiny and the shifting legal framework, many are grappling with how to adapt. What practical advice would you offer to agencies or plaintiff attorneys as they navigate the legal risk, and we try to maintain effective governance?

Professor Cary Coglianese
Well, we talked about earlier how it's just as important today to scrutinize the statutory basis for an agency action; to do that good statutory analysis. And that's important today as ever. And so, for agency lawyers, that's going to be really important. For any law students, taking a class in statutory interpretation or legislation, it's going to be really important.

Sophia Navedo
Definitely.

Victoria Paul
Very interesting time in our classes.

Sophia Navedo
[Laughs]

Professor Cary Coglianese
Yes, exactly. The other thing, though, we haven't talked about is that agencies may shift their argument about what they're doing from construing the statute or interpreting the statute to simply making a policy choice.

Sophia Navedo
Interesting.

Professor Cary Coglianese
And they may find—and this is in the abstract, I mean, I'm not sure how much agencies will be going forward with fact-based arguments about adding new regulations to the books for the next couple of years. They're going to be probably making more arguments on statutory interpretation grounds to try to get rules off of the books. But to the extent that they can shift whatever they're trying to do, framing it as a policy choice and one that is a reasonable one under the arbitrary and capricious standard, that would be another way of getting around this and sort of shifting away from *Chevron*, *Loper Bright* altogether. Moving things more into the world of facts, policy choices, and so forth.

To some extent, that might be sort of a fictional move, just a reframing, but it is, I think, one that *Loper Bright* seems to invite.

Sophia Navedo
In an interview with Bloomberg, you mentioned the impacts of the tech industry. You share about how *Loper Bright* will make responding to emerging technology under old statutes a lot more difficult. Are there any other industries you think may be particularly impacted by the similar issue?

Professor Cary Coglianese
Well, you know, I spent a couple of years chairing a National Academy of Sciences committee that was looking at, of all things, the statutory authority of the U.S. Coast Guard and how it might be facing challenges over the next ten years or so that might fall outside the scope of its statutory authority. And we identified a broad range of new developments that are happening in the maritime industry from climate change to changes in technology in how ships are operating and so forth to immigration issues and demographics there. Lots of things that are happening, and the world is constantly in flux, you know, across all

industries, including the maritime industry, as well as what we would think of as the big tech firms. And there are questions about whether there's an adequate amount of legal authority for agencies to address some of these new challenges.

Cybersecurity is, for example, in the maritime sector increasingly important. If ships are being directed no longer by mechanical or more simple forms of technology based upon compasses that are looking for magnetic signals from the poles but rather are looking at more signals from satellites and so forth, what does the Coast Guard have by way of authority to respond if there's some kind of cybersecurity challenge or hacking into these systems that are used to navigate vessels around the country? We could think about that in aviation, but we could think about it increasingly in automobiles that have so many digital parts to them. Does the National Highway Traffic Safety Administration have the authority?

Whether it should or shouldn't—if you think it should be setting some kind of standards, say, for cybersecurity for onboard computers and cars, does it have that authority? These are new technological developments, new challenges that in many cases were not contemplated at the time earlier statutes were developed. I mean, this is like a constant, almost a golden rule in law—in that it is playing catch up to changes in the world. I mean this was really the virtues of the common law method, right? That it could adapt as society was adapting. In a world that's driven by legal authority grounded in statutes, then we constantly have this challenge of new problems that are emerging that agencies have some responsibility to the public to address, but do they have the authority to do so? That's another question.

If you read *Loper Bright*—in combination with *West Virginia v. EPA*, the major questions doctrine—to say the Supreme Court's going to be very skeptical about agencies trying to deal with new problems like artificial intelligence, cryptocurrencies, geospatial directional technology, satellites, autonomous vehicles or autonomous vessels, you name it—If really that all has to be spelled out very clearly today because the Supreme Court's going to be very skeptical of agencies stepping in and addressing these problems, then that, I think, is the real worry here. From *Loper Bright*, certainly from *West Virginia v. EPA* as well, and just from the overall "anti-administrativist" kind of posture of the current Supreme Court. It's not any secret that this Court is deciding cases that are working against the agencies and that evince a sort of skepticism of administrative power. And with that in mind, yes, it's going to be, I think, a little bit harder, maybe a lot harder for agencies to adapt and respond in the face of new challenges under older statutes.

Victoria Paul
That's a very interesting take on the flexibility of common law as we start to rely more on statutes. What do you see as the role of Congress in this evolving landscape? Should we

expect to see legislative fixes to clarify statutory ambiguities or are we seeing new offerings to new authorities?

Professor Cary Coglianese
Well, I think we could see a couple of paths that maybe courts would find useful and it might be advisable for Congress to consider. Whether Congress would actually do this, I don't know. I mean, one would be for Congress to step in and decide how courts should interpret statutes in these sorts of situations. Professor Abbe Gluck at Yale has sort of said we're still left adrift even after *Loper Bright* without any clear guidance from the Supreme Court about how to approach statutory interpretation at all and certainly how to approach it in these contexts with agencies. Congress could step in and adopt, like some state legislatures do, a kind of a code or set of principles for statutory interpretation.

One alternative would be to codify something like the *Chevron* Doctrine. Do I think that's going to happen anytime soon? No, but that's one possibility.

The other possibility is to have some of these older statutes clarified or updated as needed. In fact, in that National Academy of Sciences project that I chaired, that I mentioned a moment ago, that was—first of all—a project initiated at the behest of Congress, the relevant congressional committees that are responsible for maritime security and safety wanted to know, "What should we be kind of focused on by way of giving the Coast Guard the authority that it needs to deal with new problems."

We went through a process that was a model for what I call "legal foresight." And I think more agencies ought to engage in that. And what do I mean by legal foresight? Well, first contrast it with strategic foresight, which a lot of agencies are doing. And that is just trying to look ahead to the future and see what new challenges might be coming up. And the Coast Guard has a really terrific strategic planning and strategic foresight process already been in place for many years called the Evergreen Project. And they are, they're doing that. That's great.

But what we failed to find was any evidence that lawyers at the agency were involved in that. And what we said is that, you know, it's really a good idea to bring lawyers on board and to be able to say, "Okay, at the same time we're looking forward and seeing these problems as an agency down the road, let's ask whether we're going to have the authority to deal with them and, if not, then we need to go to Congress." And in that case, at least Congress was receptive enough, at least at the committee level. And we'll see where it goes. I would recommend legal foresight for all agencies.

Victoria Paul
Professor, if I may ask, who was at the table if lawyers weren't?

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Professor Cary Coglianese
Well, security experts and the maritime experts. You know, there's a lot of folks within administrative agencies who have tremendous knowledge, whether they're coming from engineering, science, economics, policy analysis, industry expertise. And in any agency, lawyers are one part of that.

In many agencies they are not necessarily integrated into the strategic visioning for the agency, believe it or not. They kind of come in when the agency's going to decide to take some action, they say, "well, okay," then they bring lawyers. We [the Academy Committee] said, let's bring them in early on so that they can start seeing what these problems are and you can do is mapping between the strategic visioning and a legal visioning process. And if we had agencies doing that more often, at least there'd be some opportunity for Congress to be more informed about what it might need to do.

Doesn't mean, again, that Congress will in fact, give agencies that authority. I think there's probably a greater prospect for agencies dealing with things like security, like the Coast Guard, to get that authority, than maybe agencies that are dealing with environmental problems that are much more contentious and at, you know, the cross currents of very heated politics in our country. But if we're sort of oblivious to these things, then we don't really stand a chance. And I think it would probably help Congress and maybe inform also the public and advocacy groups and so forth, of where things are with the agency's authority base.

I think these could be very meaningful exercises for Congress to step up to the plate.

Sophia Navedo
Professor, with the change of the administration, we're seeing lots of administrative changes. What are some issues you're keeping an eye on in the next few months and how do they compare to the impact of *Loper Bright*, if any?

Professor Cary Coglianese
Yeah, well, you know, it may well be that my own view that I've just been expressing about Congress certainly stepping up to the plate might be a kind of a quaint notion today. But so too might be that thinking that we should worry a lot about *Loper Bright* and what its effects will be, that's maybe somewhat quaint too. Because there's so many different changes going on and so many other foundational challenges to our legal structure that are being raised by the new administration that are really much more front and center, I think, today. We have to think about, you know, first of all, will this administration spend money that Congress has said should be spent? Will this administration keep employed, employees in agencies that Congress said should exist or will they try to dismantle those agencies for all practical purposes by getting rid of their employees? Will independent agencies remain

independent or not? How far will the Court ultimately go with modifying? I think it will modify in some sense *Humphrey's Executor*. Will it overturn it entirely? What will happen to the civil service then? What will happen to the Federal Reserve with monetary policy? How far will this administration, in some kind of post-*Humphrey Executor,* world push the envelope?

Right now, the administration has essentially assumed, it seems, or acted as if *Humphrey's Executor* already has been overturned. And the President's issued an executive order that says that independent agencies ought to be treated essentially much like any other agency on the regulatory front, for regulatory review, on budgetary matters, on employee matters, on strategic matters. All of these aspects of running an agency now have to at least to some degree or another, at independent agencies, run through the White House channels as well. So that's a dramatic change.

The administration has said it's not interested in touching the Federal Reserve's monetary policy, but it's anybody's guess whether that will or how long that degree of restraint will exist. And I think the biggest worry ultimately is if the Supreme Court does back up lower courts, or if it takes a stand itself, that's contrary to what the administration's position is on some of these structural separation of powers matters, will the administration follow what the Court says? So, you know, these a really foundational questions—

Sophia Navedo
Absolutely.

Professor Cary Coglianese
Since the questions are ones that any first-year law student reading the Constitution should realize, you know, that Congress has the spending power. The President executes that. Executive departments execute that. You can't actually just renegotiate appropriations legislation by deciding, "Well some things that that Congress struck a bargain over, funding one thing but not another, well we're going to change that."

Victoria Paul
"We disagree."

Sophia Navedo
[Laughs]

Professor Cary Coglianese
Right!

So, these are really core issues core issues and I think that's what lays ahead for us. And ultimately taking it back to *Loper Bright* and why it's going to be, I think, going to be hard to say what it has to mean in all of this. There's so much else happening that's noise around this. And what's not noise, but really the vital causal issues that would affect any administrative behavior going forward.

I think there is some sense that the DOGE group, apparently and the President, thinks that *Loper Bright* kind of gives him and DOGE somehow more authority to undertake actions. And there's been an executive order that calls upon agencies to go back and look at all of their rules and identify those that aren't based upon, among other things, the best reading of the statute, almost parroting *Loper Bright*—not citing it—but almost parroting it.

They seem to think that that will sort of help facilitate the dismantling of certain regulations or the rescinding of those regulations. It's not clear how much it will make a difference because agencies, again, didn't typically, just say, "Well, the statute's ambiguous, so let's go ahead because we think this is a good idea." There usually was some credible systematic statutory interpretation.

Now, it may be that this administration will disregard that prior interpretation, come up with its own interpretations and say, "Now the best reading is now something different." And then those will be litigated and we'll see where it goes.

You know, if the administration succeeds in laying off a lot of workers, it may be harder for them to find enough people to do much by way of deregulating on these bases. But we'll see where it plays out. It's certainly interesting times we live in, challenging times we live in, from a rule of law standpoint, and those are, I think those are front and center. They've got to be the biggest issues that we should be focused on for at least the immediate future until we see whether some of the rhetoric of the President and Vice President that they can maybe disregard what they don't think they agree with from the Supreme Court, whether they're going to actually do that. I mean, they're saying that or hinting that. How far they're going to take it is going to be very consequential, I think, for a government under the rule of law.

Sophia Navedo
Yeah, lots of issues, so little time, but thank you for pointing those out. And again, this has been very enlightening. So we do appreciate you coming onto the podcast and sharing with our listeners.

Professor Cary Coglianese
It's been my pleasure. Really nice to talk to both of you. Good luck and thanks again for the invitation.

Victoria Paul
Although many believe that *Loper Bright* would cause seismic changes, the dust has yet to settle on how it will impact the administrative state. On the other hand, as previewed by Professor Coglianese, we can expect foundational shifts in other areas in administrative law's jurisprudence.

[OUTRO MUSIC]

Victoria Paul
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[OUTRO MUSIC FADES OUT]