



COMMUNITY EXPLAINER

SUPREME COURT ROUNDUP: WHAT IMMIGRANT RIGHTS ADVOCATES NEED TO KNOW

This FAQ is designed to explain three of the Supreme Court’s decisions from this past term; all three received significant press attention and we want to ensure that you have accurate information about them, especially *Loper Bright*, which directly affects immigration law.

1. What did the Supreme Court decide in *Loper Bright Enterprises v. Raimondo*?

You may have seen news reporting that this decision takes power away from federal agencies and puts it in the hands of the federal courts and Congress. That is, broadly speaking, correct. But what does that mean, really? To understand *Loper Bright*, we must understand how administrative agencies work.

a. What is an administrative agency?

An administrative agency is a government body, usually housed under the Executive Branch (the President), that is responsible for a particular area of law. Congress creates administrative agencies by passing laws that delegate some of their legislative authority to the new agency. That agency will then be responsible for “administering” a particular statute or statute – which can include enforcement, and hearings in administrative settings – and will have the ability to create regulations (agency rules that have the force of law) to add to and clarify the statute. For example, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) both administer the Immigration and Nationality Act. DHS can create regulations related to enforcement and granting benefits, while DOJ can create regulations related to immigration courts and interpreting immigration law. Contrary to popular belief, immigration courts are not federal courts and instead are administrative law courts within DOJ. Immigration courts and the Board of Immigration Appeals therefore decide questions of immigration law only and do so by interpreting the Immigration and Nationality Act.

Agencies are supposed to be staffed largely by non-partisan experts in a particular subject area, who have more knowledge and ability to focus on an issue than does Congress. For example, the Environmental Protection Agency (EPA) staffs many environmental scientists, ecologists, etc., who all contribute to creating rules to protect the environment, as well as to enforcing the Environmental Protection Act, among other statutes. Agency heads, however, as well as many persons who are directing the efforts of the agency, are political appointees who answer to the president.

b. How did courts and administrative agencies decide legal questions before *Loper Bright*?

Federal courts interpret laws using different methods of interpretation, and relying on the prior decisions of other courts, which are collectively called precedent. Before *Loper Bright*, when a federal court decided a case involving an agency's interpretation of a statute, sometimes the court would use a method of interpretation called "*Chevron* deference," which comes from a 1984 decision in which the National Resources Defense Council sued the Environmental Protection Agency under the Reagan administration for weakening emissions standards. When a court used *Chevron* deference, it would first decide whether or not the statute that the agency was administering was ambiguous, meaning that it could be interpreted in multiple ways. If the court decided that the statute was ambiguous, then it would generally accept the agency's reading, so long as the agency's interpretation was reasonable.

c. How will courts and administrative agencies decide legal questions now?

Agencies will still have the power to offer interpretations of statutes in administrative hearings and in their regulations. However, when someone challenges that interpretation in federal court, the federal court will no longer defer to the agency's interpretation of the law. Instead, the court will use its independent judgment to decide what it thinks the language of the statute means.

2. What does the decision in *Loper Bright* mean in practical terms?

There are hundreds of federal courts across the country and there are far fewer administrative agencies. Now that federal courts have more power to disagree with agency interpretations, the law may become more inconsistent in different jurisdictions, which are the geographical area under a court's power. How an agency interprets the law depends a lot on who is president, because the heads of agencies, who determine agency policies, are political appointees. How courts decide cases similarly depends a lot on the policy and political preferences of any particular judge. Although they are supposed to be neutral, judges are also appointed by presidents and often share the values of the president who appointed them. Since federal judges can serve for life and are unelected, they may be more likely to resolve cases, especially in areas where they have no real expertise, along ideological lines. Currently, there are a lot of conservative federal judges, and the majority of the Supreme Court justices are very conservative, so any case that is appealed all the way to the Supreme Court will likely be decided in a conservative way.

It is likely that all federal agencies will become less powerful, and the federal courts more powerful, as a result of *Loper Bright*. Whether or not that is a good thing depends on your political and policy preferences, as well as the agency at issue. It will be harder, for example, for the EPA to create and enforce strict rules protecting the environment. At the same time, it will be easier for people to challenge DHS and DOJ interpretations of immigration law – which may come out positively for immigrants, depending on the judge deciding the case, and how far it gets appealed.

3. What did the Supreme Court decide in *Department of State v. Muñoz*?

For a long time, courts have refused to evaluate or overturn the decisions of consular officials working abroad under a principle called "consular nonreviewability." Under this principle, people do not have any right to due process when it comes to the decisions the State Department makes in consulates outside the U.S. There is a limited exception where a person demonstrates a "fundamental liberty interest" in the outcome of the decision, which triggers a right to due process.

In this case, a U.S. citizen, Sandra Muñoz, married a noncitizen from El Salvador, Luis Asencio-Cordero. They applied for a visa from USCIS based on the marriage, but, because Asencio-Cordero had entered the U.S. without permission, he had to go to San Salvador and apply for the visa through the consulate there. The consulate decided that Asencio-Cordero was probably a member of MS-13 and denied him entry back into the United States based on a provision of immigration law that says that the government can refuse to admit people who the government “knows or has reasonable ground to believe” will come to the U.S. and break the law. When the State Department denied entry to Asencio-Cordero, they did not provide any explanation, but only cited this provision of law. *Muñoz* argued that she had a fundamental liberty interest in residing in her country of citizenship with her spouse and that due process therefore required the government to give a reason for its denial, and a court to be able to review that denial.

The Supreme Court disagreed. It held that a U.S. citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the U.S., and that the government did not have to provide a reason for denying Asencio-Cordero entry, because due process does not apply.

4. What does the decision in *Muñoz* mean in practical terms?

The Supreme Court’s decision does not change how things already operate when it comes to getting visas through U.S. consulates abroad; it was already very difficult to challenge a consulate’s decision. However, having a fundamental liberty interest comes with rights and protections, and the decision makes it much more difficult to bring cases based on a U.S. citizen’s interest in having their spouse with them in the U.S.

5. What did the Supreme Court decide in *Campos-Chaves v. Garland*?

Campos-Chaves is part of a line of Supreme Court cases that began with *Pereira v. Sessions*, which the Court issued in 2018. These cases all have to do with what requirements the government has to meet in order to properly begin deportation proceedings against someone. Immigration law requires the government to provide proper notice to a person of deportation proceedings before being able to deport them; the government does this through a specific document called a Notice to Appear (NTA) that either ICE or CBP issues. Under both *Pereira* and another case called *Niz-Chavez v. Garland*, the NTA has to include both the time and date of the first hearing, or it is defective.

After *Pereira* and *Niz-Chavez* were decided, many people were able to argue that the government did not properly place them in deportation proceedings. They further argued either that they were eligible for relief that they would not have been eligible for had the government actually begun proceedings against them; or that the government should not be allowed to continue with deportation proceedings that it began improperly. In some cases people also successfully got rid of old deportation orders and reopened their cases based on these same arguments.

In *Campos-Chaves*, the Supreme Court limited *Pereira* and *Niz-Chavez*; in this case, *Campos-Chaves* and others fought their in absentia deportation orders (meaning orders that they received when they failed to appear in immigration court), arguing that the NTA was defective. However, they all received subsequent notices from the immigration court that did include the time and date of the hearing. The Supreme Court held that, because they received notices from the immigration court with the required information eventually, the government had begun deportation proceedings and the deportation orders were valid.

6. What does the decision in *Campos-Chaves v. Garland* mean in practical terms?

Fewer people will be able to challenge their deportation orders and proceedings based on arguments that the first NTA did not contain the time and date of the hearing. If the government later sent them a notice with that information, the proceedings and any deportation order will likely be considered valid. People may still be able to challenge their deportation proceedings if the government never sent a hearing notice with the required information or if the notice did not reach them and it was the government's fault.

7. What did the Supreme Court decide in *Trump v. United States*?

In *Trump v. United States*, the Supreme Court decided that former president Trump is immune from criminal prosecution – meaning he cannot be tried or convicted – for certain actions he took while in office, so long as they were “official acts.” The case centers on Trump's attempts to overturn the results of the 2020 election; prosecutors criminally charged Trump for a) using the DOJ's authority to pressure certain states to replace their legitimate electors with a slate of pro-Trump electors; b) attempting to pressure then-Vice President Mike Pence (who was also president of the Senate, as are all vice presidents) to use his role in the Senate to reject states' electoral votes and send them back to state legislatures; and c) pressuring state officials and private individuals to try to change the election results in his favor; as well as allegations related to his tweets and his speech on January 6.

The Supreme Court first stated that a president has absolute immunity for what they do related to their core constitutional powers, for example granting pardons, vetoing legislation, and making presidential appointments. Other actions taken while in office are presumptively immune, meaning that the prosecution would have to prove that the president acted “manifestly or palpably” beyond their authority first, before then proving that those actions violated a criminal law. The Court also said that prosecutors cannot use evidence related to official acts in order to prove guilt for unofficial acts.

With respect to Trump, the Supreme Court decided that he was immune from prosecution for his actions related to DOJ, because control of DOJ is one of the president's official powers. The Court sent the case back to the lower court to decide whether Trump's actions with respect to Pence (as president of the Senate, not as vice president) and with respect to private and state actors, as well as his conduct on January 6 are official or unofficial acts.

8. What does the decision in *Trump v. United States* mean in practical terms?

The Court's decision will certainly delay the prosecution of Trump for election interference, which may reduce the case's influence on the November election. Additionally, the Court's decision will make it much more difficult to prosecute a president for corruption and other criminal conduct; that difficulty may also mean that presidents are more willing to break the law.

The Court majority stated that its decision was intended to allow a president to exercise their power freely, and to ensure that prosecutors and courts do not prevent the president from doing their job. The dissenting justices expressed extreme concern that the Court's decision will endanger our democracy and give too much power to the president; Justice Sotomayor likened the Court's decision to making the president a “king above the law.” This aspect of the Court's decision is concerning, since it has the potential to make the president even more powerful, essentially permitting any abuse of power, so long as it is an “official” one.

9. What did the Supreme Court decide in *City of Grants Pass v. Johnson*?

The Supreme Court decided that the city of Grants Pass, Oregon did not violate the constitution when it created an ordinance that said that unhoused people could be criminally prosecuted for sleeping outside. Previously, older precedent said that the Eighth Amendment, which prohibits cruel and unusual punishment, meant that governments could not punish people for statuses outside their control. That rule came from a 1962 case, in which the Supreme Court struck down a law that criminalized people for being addicted to narcotics. Relying on that decision, the Ninth Circuit Court of Appeals decided in 2018 that cities could not criminally punish people for sleeping outside if they have nowhere else to go. The Supreme Court's decision in Grants Pass overturned the 2018 decision and said that sleeping outside, unlike addiction, is not a "status."

10. What does *City of Grants Pass v. Johnson* mean in practical terms?

Cities will be able to pass ordinances criminally punishing people for being unhoused, even if they have nowhere else to go. Such ordinances are unconscionably cruel, no matter what the Supreme Court says about their constitutionality. People should not be punished for having to sleep outside, which amounts to punishing many people for poverty. However, given the Supreme Court's ruling, it will be up to people acting at the local level to undo and prevent the passage of these laws.



QUESTIONS?

Any questions about this FAQ may be directed to Caitlin Bellis at caitlin@nipnlg.org.