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Chevron's Possible Demise, Independent Agencies – and Justice Kagan

by

Randolph J. May *

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On January 17, the Supreme Court will hear oral argument in the closely watched case of *Loper Bright Enterprises v. Raimondo*. The Court will consider whether to overrule, or at least curtail in one way or another, the deference doctrine articulated in its landmark *Chevron v. Nat. Res. Def. Council* (1984) decision.

As readers of this space know, stated in its simplest form, *Chevron* requires that if a statutory provision is ambiguous, a reviewing court must defer to the agency's interpretation if it is based on a "permissible" construction of the statute. Indeed, the Court in *Chevron* said, when Congress has left a gap in the statute for the agency to fill, the agency's interpretation is to be given "controlling weight."

Whether intended or not by Justice John Paul Stevens, who authored the unanimous opinion, the *Chevron* regime has come, over the years, to be viewed as significantly altering the then-existing understanding of the judiciary's role in reviewing agency decisions. Loper Bright

Enterprises, and others who support Loper's position in the Supreme Court, argue that the *Chevron* doctrine violates fundamental separation of powers principles because it deprives the judiciary of exercising the judicial power the Constitution assigns to it under Article III. In other words, by virtue of requiring that agencies' interpretations of ambiguous statutory provisions be accorded "controlling weight," or such strong deference, the Court transferred the law-making power that the Constitution assigns to Congress to the executive branch. On many previous occasions, for example, in this recent co-authored law review article, I have indicated that I am sympathetic to this separation of powers claim.

But here I don't want to rehash the arguments in favor of or against the *Chevron* doctrine. Rather I want to consider – and have you consider – whether, if the *Loper* Court decides not to "go all the way," that is, not overrule *Chevron* outright, one of the ways it might curtail its reach is by holding that decisions of the so-called "independent" regulatory agencies like the SEC, FCC, FTC, and others should be accorded less deference than those of executive branch agencies.

I confess I suggested this very point nearly two decades ago in my law review article, "Defining Deference Down: Independent Agencies and *Chevron* Deference" (2006) and then in a follow-on article, "Defining Deference Down, Again: Independent Agencies, *Chevron* Deference, and *Fox*" (2010). In those articles, I argued *Chevron* was based primarily on the separation of powers rationale that, as opposed to the judiciary, executive branch agencies are politically accountable. Therefore, according to the Court, the executive agencies should make policy judgments that Congress itself fails to make. Considering this primary separation of powers rationale, I argued that decisions of independent agencies should receive less deference than those of executive branch agencies, say, for example, the Department of Commerce's National Marine Fisheries Service, which rendered the decision at issue in *Loper*.

In both of my "Defining Deference Down" articles, I discussed the structural characteristics, following the Supreme Court's decision in *Humphrey's Executor v. United States* (1935), that typically were considered sufficient to render multimember agencies like the FTC and FCC "independent" and, thus, "free from executive control" – the requirement for bipartisan membership, and fixed and staggered terms for the commissioners. And, for good measure, for some of these multimember agencies like the FTC, their enabling statutes expressly provide that a commissioner may be removed only for "inefficiency, neglect of duty, or malfeasance in office."

Not alone, but lonelier then than now before the advent of decisions such as *Securities and Exchange Commission v. Jarkesy*, *Free Enterprise Fund v. Public Company*, and *Axon Enterprise Inc. v. Federal Trade Commission* involving the independent agencies, I questioned the applicability of *Chevron* in light of the status of the independent agencies. In the first "Defining Deference Down" article, I said this:

> It is odd to premise judicial deference to agency interpretations on separation of powers principles, as *Chevron* does, and not to question the soundness of the doctrine's applicability to agencies that by their very nature present constitutional difficulties on separation of powers grounds. And it is odd in a constitutional system with three defined branches for courts to give controlling deference to agencies that, not without reason, are

> commonly referred to as 'the headless fourth branch.'. . . With respect to the independent agencies, the judicial branch should reassume a pre-*Chevron* posture of applying more exacting scrutiny to the statutory interpretations of independent agencies.

I concluded this way:

> [A]t least with respect to the independent agencies, which are not politically accountable to the people in the same measure that the President and Congress are accountable, . . . a reading of *Chevron* that accords less deference to the decisions of the independent agencies than to those of the executive branch agencies would be more consistent with our constitutional system and its traditions.

I am not predicting, if the Court in *Loper* decides not to overrule *Chevron*, but rather to adopt some more limited curtailment of its reach, that it will decide that the decisions of the independent agencies should receive less deference than those of the executive agencies.

But it worth noting that Justice Elena Kagan, as I explain in detail in my first "Defining Deference Down" article, did suggest just this in her lengthy 2001 *Presidential Administration* law review article. She was then dean of the Harvard Law School. Justice Kagan proposed to "link deference in some way to presidential involvement." Because, in accord with the prevailing understanding of *Humphrey's Executor*, presidential involvement in the decisions of independent agencies necessarily is constrained, Justice Kagan called for a new "more refined version" of *Chevron*. Indeed, she explicitly declared that the new *Chevron* doctrine "would begin by distinguishing between actions taken by executive branch agencies and those taken by independent agencies." And she concluded that a *Chevron* doctrine "attuned to the role of the President would respond to this disparity by giving greater deference to executive than to independent agencies."

As I was saying. . .at least I was in good company. We'll see whether Justice Kagan, or anyone else, happens to pursue this point regarding the proper application of *Chevron* deference to the independent agencies at oral argument.

* Randolph May is Founder and President of the Free State Foundation. He is a former Chair of the ABA Section of Administrative Law & Regulatory Practice, a former Public Member and now Senior Fellow at the Administrative Conference of the United States, and a Fellow at the National Academy of Public Administration. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it. *Chevron's Possible Demise, Independent Agencies – and Justice Kagan* was published in the *Yale Journal on Regulation* on January 10, 2024.