FREE STATE FSF FOUNDATION

Perspectives from FSF Scholars
January 27, 2025
Vol. 20, No. 6

What's Up First – MQD or BR?

by

Randolph J. May *

Yale Journal on Regulation
January 24, 2025

In a recent post in this space, "The (Likely) End of the FCC's Long-Running Net Neutrality Saga," I explained why the Court of Appeals for the Sixth Circuit's decision in Ohio Telecom Association v. FCC on January 2 likely signals the end of the FCC's lengthy history of imposing, abandoning, and reimposing "net neutrality" mandates on Internet service providers, depending on whether the five-member agency is controlled by Democrats or Republicans.

Prior to the demise of the *Chevron* deference doctrine as a result of the Supreme Court's Loper Bright Enterprises v. Raimondo decision, each net neutrality switcheroo, as the Sixth Circuit pointed out, was sustained on the basis of the application of *Chevron* deference, despite the fact that the relevant statutory provisions remained unchanged. You can review my recent post to appreciate why I characterized the FCC's actions regarding net neutrality like Bobby Vee's bouncing "Rubber Ball."

In setting aside the Biden FCC's net neutrality regulations, the Sixth Circuit merits panel, post-*Loper Bright*, examined the relevant text of the Communications Act provisions, their context,

and their history. After doing so, the panel determined that the "best reading" (BR) of the statutory provisions, indeed, their "plain meaning," precluded the FCC's action. I happen to agree that the court's reading of what I've called the "techno-functional" statutory language is the "best reading," but you can make your own judgment about that.

For my purposes here, I want especially to call your attention to this statement in the unanimous merits panel's opinion: "Given our conclusion that the FCC's reading is inconsistent with the plain language of the Communications Act, we see no need to address whether the major questions doctrine also bars the FCC's action here." And the court didn't.

But now contrast the merits opinion with the earlier per curiam opinion, released on August 1, 2024, by three different Sixth Circuit judges staying the FCC's net neutrality order before it became effective. There, the stay panel declared the challengers "are likely to succeed on the merits because the rule implicates a major question…." The court determined there was no "clear mandate" for the FCC's assertion of authority to impose net neutrality regulations on ISPs: "The Communications Act likely does not plainly authorize the Commission to resolve this signal question."

The per curiam opinion was filed a full month after the Supreme Court's *Loper Bright* decision, and supplementary materials were submitted to the court by both sides regarding *Loper Bright's* impact. But the per curiam opinion, relying on the MQD, did not attempt to discern the "best reading" (BR) of the statute. (One of the stay panel's members, Chief Judge Jeffrey Sutton, in a separate opinion, concluded that the "best reading of the statute" did not authorize the FCC to adopt its net neutrality regulations.)

Same case, same result – two different approaches. One panel relied on the MQD without ever considering the BR, and the other relied on the BR without ever considering the MQD.

So, this raises the question. In a post-*West Virginia*, post-*Loper Bright* world: What's up first – MQD or BR?

Surprisingly, I haven't yet seen any writing on this specific question by scholars or commentators. Sure, there's an awful lot of ink spilled, justifiably, regarding the MQD and *Chevon's* demise as a result of *Loper Bright*. But this writing focuses, mostly separately, on the MQD and BR – their lawfulness, wisdom, parameters and problems, proper and improper applications, and so forth and so on. Not on how a court should approach deciding a case in which the challengers to the government's action rely on both the MQD and BR.

I'm not prepared at this point to offer my own further thinking on the question. Perhaps Dick Pierce is right when he concludes in "Two Neglected Effects of Loper Bright" that "*Loper Bright* eliminates any justification for continued application of the powerful new version of the major questions doctrine that the Court created in 2021 and has now applied in four cases." He concludes that taken together, *Ohio v. EPA* and *Loper Bright* "eliminate any plausible basis for the major questions doctrine." I have some sympathy for this view, even if I'm not fully convinced.

I also find Justice Amy Coney Barrett's insightful concurring opinion in Biden v. Nebraska useful in thinking about the question. She explains why, in her view, the MQD often usefully may be invoked as "an additional point" that "reinforces" the conclusion reached as a result of a "best reading" analysis. In this view, the MQD doctrine is not so much a substantive canon as what Justice Barrett calls an "interpretive tool" reflecting common sense regarding the way Congress is likely to delegate a policy decision of major economic and political significance to an agency. I also have some sympathy to this way of thinking about the relationship between the MQD and BR.

But Dick Pierce and Justice Barrett do not constitute a Supreme Court majority. Because I don't believe a majority of the Justices necessarily have abandoned the MQD as some sort of substantive canon, or yet have wrestled in any definitive way with the MQD's place in a post-*Loper Bright* world, I hope this post inspires some scholarly responses to the question: In a challenge to an agency action, which comes first: MQD or BR?

A final note: I'm grateful to Nick Bednar, Daniel Deacon, and Chris Walker for their helpful responses that furthered my thinking on the subject – even if I'm still thinking on it!

* Randolph J. May is President of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland. 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. *What's Up First – MQD or BR?* was published in the *Yale Journal of Regulation* on January 24, 2025.