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The looming post-Chevron fight over the administrative state

BY ELI NACHMANY, OPINION CONTRIBUTOR - 12/15/24 8:00 AM ET

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In the wake of the Supreme Court's departing from Chevron deference, a new battle is brewing. Here are some of the court's landmark ruling in Loper Bright Enterprises v. Raimondo, the government is continuing to claim broad regulatory powers — now motivated by the decision in Loper Bright itself.

In several cases, the government is taking an aggressive reading of Loper Bright's acknowledgment that Congress sometimes delegates discretionary authority to agencies.

Courts should proceed with caution when evaluating these arguments, both to protect judicial authority and to safeguard the separation of powers. To start, courts should scrutinize the factual allegations. Additionally, against the backdrop of a broader-scale constitutional revival, courts should be clear about the constitutional limits on delegation.

Loper Bright was a seal change. Since at least 1984, federal courts have deferred to certain agency interpretations of ambiguous federal laws. This framework — known as "Chevron deference," because it largely grew out of the Supreme Court's decision in Chevron v. NRDC — encouraged federal agencies to take increasingly expansive interpretations of the limits on their statutory authorities. In Loper Bright, the court declared the end of this practice. Now, when an agency bases a regulation on its interpretation of a statute passed by Congress, courts must exercise independent judgment in determining whether the agency's interpretation is the best reading of the law, rather than defer by default to the agency.

But the court in Loper Bright established a limitation on the decision: It acknowledged that sometimes "the best reading of a statute is that it delegates discretionary authority to an agency." While inaugurating a new era of rigorous review of agency interpretations, the Loper Bright court cautioned that certain cases still presented courts with a more limited role.

The government saw an opportunity in these words. Yes, after the court decided Loper Bright, the government could no longer formally claim deference for its interpretations of federal law. But it could argue in certain cases (and it has) that a court should refrain from rigorous review because the best reading of a given statute is that Congress has delegated discretionary authority to the agency to determine the law's meaning. Thus, Loper Bright notwithstanding, a class of cases remains in which courts essentially defer to agencies' interpretations of federal law.

To take one post-Loper Bright example, the government argued in a case involving the Securities and Exchange Commission's Climate Disclosure Rule that the court should uphold the rule under Loper Bright. Quoting from Loper Bright itself, the government contended that the securities laws expressly delegate "to the [SEC] discretionary authority both to 'fill up the details of a statutory scheme' and to 'regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility.'" Thus, in the government's view, the court should respect that delegation — and defer to the SEC's interpretation of the securities laws as allowing the agency to require disclosure of climate-related information.

The same thing happened with the EPA's Carbon Reduction Rule. Responding to a requested stay of the rule in the Supreme Court, the government submitted that Section 111 of the Clean Air Act — the claimed authority for the rule — delegates authority to the Environmental Protection Agency. Like with its defense of the Climate Disclosure Rule, the government quoted Loper Bright and urged that the court "respect the delegation." Reporting on this development, one legal commentator described the government's argument as implicating "an exception to the 'no-deference' rule in Loper Bright."

And courts are accepting this argument. In a recent case (Mayfield v. Department of Labor), the Fifth Circuit Court of Appeals reviewed the validity of the Labor Department's 2019 Minimum Salary Rule. The regulation updated the minimum salary requirement for the White Collar Exemption to the Fair Labor Standards Act to apply. The court rejected a challenger's argument that the rule exceeded the department's statutory authority, citing Loper Bright for the proposition that Congress had "clearly delegated discretionary authority to [the] agency."

The end of Chevron deference is important, no doubt. But as Professor Adrian Vermeule predicted as soon as Loper Bright came down, "[i]t is entirely possible that much or most of what was (somewhat misleadingly) called 'Chevron deference' can be and will be recreated under a different label. 'Loper Bright delegation.'"

What to do about it? Two ideas.

First, courts will need to develop a framework for how far delegation goes. The federal code is littered with statutory language that sounds in delegation: authorizations for agencies to do what is "reasonable," "appropriate," "feasible" and the like. The next frontier will involve the question of just how far agencies can go when implementing language like this. Courts will need to parse "the outer boundaries of [the] delegation" — just as the Fifth Circuit, to its credit, did in Mayfield before ruling in the government's favor.

Second, courts must heed the Supreme Court's warning that some delegations violate the Constitution. In Loper Bright, the court emphasized that "when the best reading of a statute is that it delegates discretionary authority to an agency," a court must "effectuate the will of Congress subject to constitutional limits." Those limits can be found in the nondelegation doctrine, pursuant to which Congress cannot delegate legislative power to the executive branch. Thus, if Congress grants too broad of a discretion to an agency, the whole regulatory scheme might be unconstitutional.

These two ideas work in tandem. Under the principle of constitutional avoidance, courts read statutes as best as they can to avoid constitutional problems. A nondelegation issue would be one such problem. Courts therefore will need to read delegations narrowly to avoid constitutional issues.

Either way, the post-Loper Bright landscape is emerging, and the government has found a new way to claim deference for its actions.

Courts should be vigilant about ensuring that the government does not just smuggle Chevron deference back into administrative law in a substantial subset of regulatory cases. If early post-Loper Bright signs are any indication, the government is trying to do just that.

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