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Should Congress End Agency Deference?

By Stephen W. Smithson

At its core, agency deference – as enshrined in the United States Supreme Court's decision, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984) – is both reasonable and necessary. Indeed, in *City of Arlington v. FCC,* 133 S.Ct. 1863, 1868 (2013) (citations omitted), Justice Scalia explained why the Supreme Court adopted *Chevron* deference, and why that deference is often desired by Congress:

'When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions.' First, applying the ordinary tools of statutory construction, the court must determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' But 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'

"*Chevron* is rooted in a background presumption of congressional intent: namely, 'that Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.' *Chevron* thus provides a stable background rule against which Congress can legislate: statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency. Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.

Justice Scalia believed that Congress understood that it often lacks the technical expertise to "circumscribe" precise requirements in the statutes that it enacts. Rather, Justice Scalia believed that Congress intentionally leaves ambiguities in its legislation, confident in the knowledge that administrative experts, rather than the courts, will resolve those ambiguities.

Over the intervening years, the mining industry frequently has benefitted from *Chevron* deference. In particular, any time a mine needs to defend a permit against challenge, its interests are aligned with those of the agency that issued the permit, and it will likely use agency deference as a defense to the challenge. Without agency deference, it would be significantly more difficult to protect permits from challenge.

Notwithstanding the merits of *Chevron* deference, agency deference also has rightfully received considerable criticism. In part, this is because courts have shown *Chevron* deference even where an agency's decision-making has been less than rigorous. This had led to both complacency and smugness in agencies, as they have come to "know" that they will receive deference. In turn, this has led to the agencies sometimes cutting corners in their decision-making. More recently, however, the Supreme Court has begun to curtail the scope of *Chevron* deference. For instance, in *Michigan v. EPA,* 135 S.Ct. 2699 (2015), the Court refused to grant deference to the EPA, finding that EPA's statutory interpretation was simply unreasonable.

In light of this tension regarding the scope of agency deference, on January 11, 2017, the House of Representatives passed the "Regulatory Accountability Act of 2017." As passed, the Act would make a number of changes to federal administrative law, including a repeal of *Chevron* deference. In particular, the Act would amend 5 U.S.C. § 706, by directing federal courts to:

[D]ecide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies. If the reviewing court determines

that a statutory or regulatory provision relevant to its decision contains a gap or ambiguity, the court shall not interpret that gap or ambiguity as an implicit delegation to the agency of legislative rule making authority and shall not rely on such gap or ambiguity as a justification either for interpreting agency authority expansively or for deferring to the agency's interpretation on the question of law. Notwithstanding any other provision of law, this subsection shall apply in any action for judicial review of agency action authorized under any provision of law. No law may exempt any such civil action from the application of this section except by specific reference to this section.

Thus, the Act recognizes that ambiguities exist in federal statutes; indeed, it appears to recognize that those ambiguities are often intentional. But, instead of relying on administrative experts to resolve those ambiguities, the Act directs the courts to consider the legal ambiguities *de novo* – that is, to consider them as if no one else had done so previously. Effectively, this would place the courts in the position of actively making law because they would have to "circumscribe" precise requirements that Congress itself failed to provide. As noted by Justice Scalia, it was to avoid this situation that the Supreme Court enunciated the *Chevron* deference standard 33 years ago, and has repeatedly upheld it over the intervening years.

To date, the Senate has not acted on the Act, other than to refer it to committee on January 12. Perhaps, the Senate should amend the language of the Act, rather than to adopt it. As is, the Act is more a sledge-hammer than a scalpel. In an effort to correct the problems with agency deference, the Act also destroys all that is useful about deference. Perhaps, the Senate should take guidance from the Supreme Court's recent agency deference decisions, and should pare back the excesses of agency deference, while leaving the core intact.

For instance, some reasonable limitations that Congress might enact, while preserving the core of agency deference, are:

- Require that the courts weigh the credibility of agency experts, and of any other experts who may be challenging an agency decision. In this regard, if an agency does not provide compelling expert opinion, why should the agency receive deference?
- Require that courts only grant agency deference in areas of actual agency expertise. Thus, if the EPA decides to regulate the electrical energy grid, should it receive deference? ✷

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