

BY SAM LOUIS TAYLOR

Will Chevron Keep its Stripes?

Following the will of Congress is often a complicated endeavor for regulators, especially when lawmakers leave aspects of a regulatory law unclear. That uncertainty often leads to litigation. But how should courts determine if an administrative agency has gone outside the bounds of the law when designing regulations? This is an important question for regulators, like the Fed, that have been charged with implementing laws passed by Congress.

In the 1984 landmark case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* the Supreme Court established a process to determine whether an agency has acted properly in creating a regulation in the face of legislative uncertainty. This concept, commonly referred to as *Chevron* deference, has been a critical legal concept that has governed how courts oversee the regulatory process for the past 40 years. In January, the Supreme Court heard arguments in two cases that could overturn *Chevron* and set out new expectations for how agencies should implement laws passed by Congress.

In *Chevron*, the Supreme Court established a two-part test to determine the lawfulness of a regulation. First, when a regulation is being challenged, a court will determine if Congress has spoken clearly on the matter. “If the intent of Congress is clear, that is the end of the matter.” But if Congress does not clearly state how it wants a statute to be implemented, then courts should defer to an agency’s interpretation of the statute that is within its administration so long as it is a “permissible construction” of the law. The court based this deference on three reasons: ambiguity in a statute amounts to an implicit delegation of authority by Congress to an agency to resolve outstanding questions of implementation; an agency has

greater subject matter expertise than courts to resolve this ambiguity; and an executive branch agency is a better venue for reconciling “competing political interests” than the courts because the president has greater political accountability.

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The Supreme Court has combined two cases in its current term, *Relentless, Inc. v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo*, in which two herring fishing companies have challenged a rule from the National Marine Fisheries Service that requires the industry to pay for on-board observers to monitor federal conservation efforts. Lower courts cited *Chevron* in rejecting the companies’ challenges. The petitioners have asked the Supreme Court to overrule *Chevron* or at least significantly curtail the deference given to agency determinations.

What would be the impact of ruling against the government in these cases? Legal scholars have predicted that agencies could become more constrained in their interpretations of statutes and more hesitant to create

regulations in response to new and emerging issues without going to Congress for more authority. Experts have also observed that Congress would need to clearly state its intent when drafting laws or be willing to come back and tackle new issues as they arise. There are also predictions that regulations would more often be challenged in court because agencies could not count on judicial deference to their interpretations of statutes.

There are many in the political and legal sphere who see these potential changes as a feature, not a drawback, of overturning *Chevron*. In an amicus brief led by Sen. Ted Cruz, R-Texas, Republican members of Congress have argued that *Chevron* has inappropriately expanded the role of agencies into policymaking, a power reserved for Congress.

“Over time, it’s proven to be a harmful precedent because it shifts decision making away from democratically elected members of Congress to the permanent members of the bureaucracy,” the Republican members of Congress argued.

Others have argued that Congress purposefully provided agencies with leeway to respond to new threats that it could not have anticipated. A brief filed by Sen. Sheldon Whitehouse, D-R.I., on behalf of a group of Senate Democrats stated, “As industries grew more complex, Congress delegated some regulatory authority to administrative agencies. *Chevron* deference has been an important element in this endeavor, allowing Congress to rely on agency capacity and subject matter expertise to help carry out Congress’s broad policy objectives.”

Regulators and other interested parties will be following the ruling closely to better understand the limits courts are likely to impose on the way agencies operate in the future. **EF**