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BLOGS

Separation of Powers Restoration Act Undermines Essential Judicial Procedures

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On Wednesday, the House Judiciary Committee will mark-up H.R. 4768, the "Separation of Powers Restoration Act of 2016" ("SOPRA"). SOPRA is a product of the Article 1 Project, an effort from conservative members of both the House of Representatives and the Senate to increase the powers of Congress. SOPRA would overturn decades of settled law, undermining cornerstone principles of American administrative law and creating significant uncertainty for federal agencies, regulated industries, and consumers.

At its core, the intent of SOPRA is to completely invalidate the *Chevron* and *Auer* doctrines – two unanimously decided, foundational cases in modern American administrative law. The *Chevron* doctrine establishes a framework for courts to review government agency decision-making. Under the *Chevron* doctrine, the courts look to whether Congress has expressly and unambiguously spoken to the precise question at issue. If it has, the agency must follow Congress' clear direction. If the statute is silent or ambiguous on the issue, courts defer to the agency's construction when it is reasonable and permissible within the boundary of the statutory authority, even if courts prefer other interpretations. Similarly, under the *Auer* doctrine, courts permit a government agency's interpretation of its own rules to stand unless it is "plainly erroneous or inconsistent with the regulation." Conversely, under SOPRA, these existing judicial review procedures for agency action

would be eliminated, and would be replaced by *de novo* judicial review.

Judicial deference to agency decision-making is critical in instances where Congress' intent is unclear because it balances each branch of government's appropriate role and acknowledges the realities of the modern regulatory state. First, the current framework places policymaking and political considerations in the hands of Congress, as the framers intended. Congress may provide explicit, unambiguous policy directives for federal agencies to carry out. Government agencies deviate from express congressional intent at their own peril.

Second, the current system acknowledges that Congress often affirmatively chooses to leverage the significant subject-matter expertise of the regulatory agencies. Under *Chevron*, Congress can choose to rely on agencies to compile a comprehensive record, collect data, and convene stakeholders and experts to make complex policy choices in instances where Congress may be unsuited or unwilling to do this work.

Third, judicial deference to Congress and agencies keeps courts from becoming unelected, unconstrained policymakers who would substitute agency decisions with their own policy choices and political preferences. Under SOPRA, this delicate balance would be upended. Requiring courts to instead apply *de novo* review to agency actions effectively instructs courts that they are free to replace agency decision-making with their own policy preferences – granting vast, unchecked power to a judiciary that conservatives have long accused of legislating from the bench.

SOPRA's proponents claim that judicial deference under *Chevron* and *Auer* has led to "tyranny" by concentrating executive, legislative, and judicial power in the hands of unelected bureaucrats. They believe regulators have been given carte blanche to create law, enforce the law, and decide, via judicial deference, what the law is. If passed, SOPRA would create unprecedented chaos and uncertainty for administrative agencies, regulated entities, and consumers. The late Justice Antonin Scalia may have best pointed out the dangers of unconstrained *de novo* judicial review in *City of Arlington, Texas v. FCC*. *De novo* review would transfer interpretive decisions regarding how to best construe ambiguous statutory directives "in light of competing policy interests—from the agencies that administer the statutes to federal courts."

> [This] would simply punt that question back to the Court of Appeals, presumably for application of some sort of totality-of-the-circumstances test—which is really, of course, not a test at all but an invitation to make an ad hoc judgment regarding congressional intent. Thirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules un- predictable

> and destroy the whole stabilizing purpose of Chevron. The excessive agency power that the dissent fears would be replaced by chaos.

The Federal Communications Commission is a particularly ripe target for this politically charged distaste for judicial deference. Congress' grant of authority to the agency can appear ambiguous – from its public interest standard for transaction reviews to the prohibition in 47 U.S.C. § 202(a) against common carriers engaging in "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service." However, Commission proceedings are often complex, highly technical, and attract thousands of comments (or in the case of net neutrality, 4 million!), making the prospect of *de novo* review by subject-matter novices particularly troubling.

Further, even the spectre of less deferential judicial review could having a chilling effect and freezes all agency action, including initiatives with overwhelming bipartisan, industry, and consumer support, such as ensuring telephone calls in rural America are connected; efficiently managing the nation's spectrum resources; updating and modernizing America's 9-1-1 systems; and promoting accessible, affordable broadband for all Americans. The consequences are wide-reaching.

SOPRA's supporters cannot seem to point to any benefits that outweigh the chaos and uncertainty the bill would inflict on the policymaking process, which indicates that their goal is less about addressing constitutional concerns and more about grounding any and all agency action to a halt. Particularly when one considers the fact that this bill instructs courts to give no deference to an agency's interpretation of its own regulations, it becomes clear that the true aim of this bill is to incapacitate the government's regulatory power, regardless of any high-minded debates about separation of powers. We hope lawmakers on both sides of the aisle will vote down the Separation of Powers Restoration Act of 2016.

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