"Hearing on H.R. 4768, The Separation of Powers Restoration Act of 2016"

May 17, 2016

House Committee on the Judiciary: Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Testimony of Jack M. Beermann

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The questions for discussion today concern the desirability of amending Section 706 of the Administrative Procedure Act to require courts to review agency legal conclusions de novo, i.e. without deferring to the agency's construction of its enabling act, its regulations or any other provision of constitutional or statutory law. On March 15, 2016, before the introduction of H.R. 4768, I testified on this subject before this Committee. That testimony is appended to this testimony, which is brief and focused on particular issues that might arise surrounding H.R. 4768. This is an important issue that has caused great controversy and confusion since the early days of the administrative state.

As the Committee is aware, the Supreme Court's landmark 1984 decision in Chevron U.S.A., Inc. v. NRDC,[1] appears to greatly increase the degree to which federal courts should defer to agency decisions of statutory construction. In Bowles v. Seminole Rock & Sand Co.[2] and Auer v. Robbins,[3] the Court appears to mandate even greater deference to agency construction of its own regulations. The language of H.R. 4768 would replace these doctrines with a requirement that federal courts conducting judicial review of agency action decide "de

[1] 467 U.S. 837 (1984).
[2] 325 U.S. 410 (1945).
[3] 519 U.S. 452 (1997).

novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules." In this testimony I will address some concerns regarding the language and structure of H.R. 4768 and discuss language that would allow reviewing courts to take the views of administering agencies into account when reviewing agency legal conclusions.

I. H.R. 4768.

The language of H.R. 4768 would certainly be a complete reversal of *Chevron* and related doctrines. Because APA § 706 instructs reviewing courts to "decide all relevant questions of law [and] interpret constitutional and statutory provisions" it may be argued that H.R. 4768 would restore Congress's original intent in enacting the APA.[4] However, while I share the view that the *Chevron* doctrine went too far and has not succeeded in bringing order to the review of agency legal determinations, the long history of judicial deference to agency legal decisions may point in favor of a less complete rejection of deference to agency legal decisions.

Long before *Chevron*, it was generally understood that reviewing courts should pay close attention to agency reasoning when reviewing agency legal decisions, especially agency construction of the agency's enabling act. This review—designed to ensure that agencies remained within their delegation from Congress—was often expressed as review of the "reasonableness" of agency statutory construction.[5] In the pre-*Chevron* era, judicial deference to agency statutory interpretation was based on a realistic assessment of the degree to which

[4] SEC v. Cogan, 201 F.2d 78, 86–87 (9th Cir. 1952), quoted in John E. Duffy, Administrative Common Law in Judicial Review, 77 Tex. L. Rev. 113, 194 n. 48 (1998).

[5] See United States v. Correll, 389 U.S. 299, 306 (1967) (court's role in reviewing regulations of Commissioner of Internal Revenue is to ensure that "the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner.") See also Jack M. Beermann, End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled, 42 Conn. L. Rev. 779, 820-12 (2010).

Congress had delegated interpretative authority to an agency and the relative position of court and agency with regard to Congress's intent.

What was extreme about *Chevron* was its assumption that statutory silence or ambiguity virtually always indicates Congress's intent to delegate interpretive authority to the administering agencies. However, even if this assumption was erroneous, that does not mean that Congress does not sometimes delegate interpretive authority to an agency. In a highly technical or sensitive area in which Congress expected an agency to apply its expertise, ambiguity might be an indication that Congress would want a reviewing court to be highly attentive to the agency's views.[6] Application of H.R. 4768 might frustrate Congress's intent in such cases. Further, Congress sometimes explicitly indicates that an agency should define a statutory term, and it is unclear how the terms of H.R. 4768 would interact with apparently conflicting statutory language in those instances. Under pre-*Chevron* law, it was widely accepted that reviewing courts should defer to agency statutory construction when Congress explicitly delegated interpretive authority to the administering agency.

Sometimes, the generality of statutory language indicates that Congress intends to delegate interpretive authority to an agency. For example, when Congress delegated authority to the Federal Communications Commission in the Communications Act of 1934, 47 U.S.C. § 309, to award broadcast licenses in the "public interest, convenience and necessity" Congress certainly intended for the agency to be primarily responsible for determining the meaning of those general terms. It would be a fundamental shift in authority if H.R. 4768 were understood to forbid reviewing courts from deferring to agency determinations under that or similar statutory language. While *Chevron* certainly went too far by holding that any ambiguity indicates

[6] See Beermann, End the Failed Chevron Experiment Now, 42 Conn. L. Rev. at 798 & nn. 68-69 (discussing examples of explicit and implicit delegations of interpretive authority).

delegation of lawmaking authority to the administering agency, there are circumstances under which the generality or ambiguity of statutory language is a reliable indicator of such a delegation.

It has been suggested that H.R. 4768 would have the salutary effect of introducing strict construction of delegations of authority to agencies and that this would be a positive step. There are reasons, however, to be cautious on both of these scores. First, merely instituting de novo review of agency interpretations of statutes delegating authority would not necessarily mean that such delegations would be construed narrowly. There are many traditional methods of statutory construction that often point toward broad construction of statutes including delegations of authority to administrative agencies. If Congress expresses broad purposes during the framing of a statute, it might lead a court to construe the statute broadly, in line with that purpose, even if the administering agency read the statute more narrowly. For example, in Massachusetts v. EPA,[7] the EPA denied that it had statutory authority to regulate greenhouse gases emitted by automobiles, but the Supreme Court majority declined to defer to the agency and read the statute more broadly to grant EPA jurisdiction in that case. Under current traditions of statutory interpretation, de novo review cannot be equated with narrow construction.

Second, although there are circumstances in which it is appropriate to read delegations of authority narrowly, for example in determining whether an agency has the authority to pre-empt state law,[8] Congress often intends agencies to have broad authority to address the social problems within its jurisdiction. For example, narrowly construing agency authority to combat communicable diseases or chemical contamination could have serious negative social effects.

[7] 549 U.S. 497 (2007).
[8] See Cipollone v. Ligget Group, Inc., 505 U.S. 504, 518 (1992). Even then, after finding authority to preempt under narrow construction, courts do not necessarily construe the cope of preemption narrowly. See Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 743-44 (1996) (Scalia, J.).

Traditional legal doctrine has, by and large, been successful at distinguishing those situations in which broad interpretation of agency authority is more appropriate than narrow interpretation. It would frustrate Congress's intent if all delegations of authority were read narrowly, even when Congress intended a broad delegation of authority to an agency.

Another issue that frequently arises is whether agency jurisdictional determinations should be afforded deference. Chief Justice Roberts, in dissent, argued recently that they should not.[9] While I sympathize with the Chief Justice's view that courts should decide de novo whether Congress intended to delegate interpretive authority to an agency in a particular matter, I fear that as a practical matter it would be impossible to create a workable distinction between jurisdictional and non-jurisdictional legal issues. A vast array of legal issues addressed by agencies could be characterized as going to the question of whether the agency has authority in a particular area. In my view, it would not be possible in a statutory provision to distinguish statutory construction involving jurisdictional issues from other instances of statutory construction.

There is a further technical problem with H.R. 4768, which is that it does not cover review of agency legal determinations when the administering agency's actions are reviewed under a statute other than the APA. For example, the Clean Air Act, which was at issue in the *Chevron* case itself, contains its own judicial review provision, which mimics the language of APA § 706(2)(A).[10] For any statute to have the effect of overruling all deference to agency legal determinations, broader language would be necessary, language specifically addressed to non-APA judicial review. Language such as "notwithstanding any other provision of law in a statute

[9] See City of Arlington v. FCC, 133 S. Ct. 1863, 1877 et. seq (2013) (Roberts, C.J., dissenting).
[10] See 42 U.S.C. § 7607(d)(9) (providing that rules under the Clean Air Act shall be set aside if they are "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".)

providing standards of judicial review of agency action, the reviewing court shall review de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules." But this would be very complicated because then it would make it difficult for Congress to indicate situations in which it intends deference to agency statutory construction. Multiple statutes with competing standards of judicial review could result in even greater confusion than exists today under *Chevron*.

In sum, H.R. 4768 is a laudable effort to dispel some of the negative consequences and confusion caused by the *Chevron* doctrine. However, insofar as it would disable reviewing courts from taking into account the views of an administering agency on questions of statutory interpretation and make it difficult for Congress to allow deference to administering agencies when appropriate, it may go too far. In the next section, I lay out a proposal, which this Committee has seen before, for a more moderate reform that would eliminate the extreme form of *Chevron* deference while allowing reviewing courts to take agency views into account when appropriate.

II. Alternative Language

In my prior testimony, I suggested language under which Congress could react to all of the problems *Chevron* deference has caused without totally ruling out judicial deference to agency views on legal conclusions. My suggestion, which I repeat here, is to add the following language to APA § 706, after sub-section 2(F):

> Unless expressly required otherwise by statute, the reviewing court shall decide all questions of law de novo, with due regard for the views of the agency administering the statute and any other agency involved in the decisionmaking process.

Under this standard, courts would apply the pre-APA *Skidmore*[11] factors for determining how much to defer to agency interpretations, but they would have flexibility to shape the deference doctrine to meet modern concerns and legal doctrine.[12]

The "due regard" language would allow courts to calibrate the degree of deference to the particular situation.[13] For example, there might be contexts in which minimal to no deference is appropriate, for example where Congress has expressed strong policy preferences but in ambiguous language and thus would expect reviewing courts to ensure agency compliance with Congress's purposes. There may also be statutory gaps that Congress would expect to be filled in accord with its intent rather than by agency policy views. There may be other contexts, however, in which the language, structure and purposes of a statute indicate that Congress expects reviewing courts to defer to persuasive agency reasoning concerning the proper construction of a statute or statutory gaps that Congress would have wanted an agency to fill in line with consistent administrative policy. Concerns over excessive deference would be met by application of the *Skidmore* factors, informed by fidelity to Congress's expressed preference for less deference than has been the case under *Chevron*.

Skidmore includes a sensible set of criteria for determining whether an agency interpretation is worthy of deference. These factors are "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." These have

[11] See Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[12] For clarity's sake, § 706 with the suggested amendment is reproduced in Appendix A to this testimony.
[13] If the Committee is concerned that the "due regard" standard is too vague, the Committee might consider codifying the *Skidmore* factors themselves. For example, in a provision of the Dodd-Frank Act, Congress instructed reviewing courts to review preemption determinations of the Comptroller of the Currency "depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision." Dodd-Frank Act § 1004(b), 12 U.S.C. § 25b(b)(5).

long been the factors that courts not following *Chevron* have applied when deciding whether to defer to agency statutory interpretation. Agency interpretations deserve deference when the agency has thoroughly considered the question, when its reasoning makes good sense and when its views have been consistent (and thus not shifting with the political winds). These factors are good indications that the agency has applied its expertise to the matter and acted with due regard for Congress's intent underlying the statute being construed.

In fact, to some, the term "deference" may be something of a misnomer in this context. When Congress has delegated to an agency the power to administer a statute, and the agency has thoroughly considered a problem, and provided persuasive, valid reasoning for its consistent view of the meaning of a statutory term, a reviewing court is likely to be convinced that the agency has made a correct decision, or at least a decision that is just as likely to be correct as any contrary view advanced by the challengers on judicial review. In such a case, the agency's decision ought to be approved regardless of whether the *Skidmore* factors are considered to be indicators of persuasion or of deference.

This reform would restore to Congress the determination of how much deference reviewing courts should give to agency legal decisions. Under *Chevron*, that determination is made by reviewing courts using unrealistic and indeterminate criteria. This reform would instruct reviewing courts to defer only if there are strong indications that Congress intends deference.

III. Conclusion

While pre-*Chevron* practice under *Skidmore* may not have been perfect, by preserving flexibility it would place Congress in charge of the degree to which reviewing courts should

defer to agency legal conclusions and would allow Congress to calibrate that deference rather than wipe it out altogether, which would be the case under H.R. 4768. Administrative law cuts across a wide swath of governmental functions, implicating important policy issues and fundamental separation of powers concerns. There are good reasons to consider, at this time, reforms designed to make judicial review more responsive to Congress's intent and to bring judicial review back in line with the principles underlying the APA. However, completely ruling out judicial deference to agency legal conclusions may unduly hinder Congress's ability to employ administrative agencies effectively.

APPENDIX A

5 U.S. Code § 706 - Scope of review [with suggested amendment in brackets]

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

[Unless expressly required otherwise by statute, the reviewing court shall decide all questions of law de novo, with due regard for the views of the agency administering the statute and any other agency involved in the decisionmaking process.] In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.