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TESTIMONY HOUSE COMMITTEE ON VETERANS' AFFAIRS

DECEMBER 18, 2024

Mr. Chairman, Ranking Member and members of the Committee, thank you so much for the opportunity to provide my views on the great opportunities our clients' victories in *Loper Bright Enters., Inc. v. Raimondo/ Relentless, Inc. v. Dep't of Com.*, 144 S.Ct. 2244 (2024) (*Loper Bright/Relentless*) provide the Congress to work its will, direct the executive branch and, among other things, improve veteran's lives. I have worked many years to overturn *Chevron* deference, as has my organization the New Civil Liberties Alliance ("NCLA"). Now that that task has been accomplished the Congress can reassert itself, as the Founders believed it would and should, to set the course for law and policies of the Federal Government.

Since the momentous decision on June 28, 2024, I've been asked about the effect of the decision on administrative agencies and on law making of the end of *Chevron* deference. Some commentators and the press have predicted the end of important environmental and social regulations merely because the agencies are no longer able to create "ambiguities" and then fill those ambiguities with whatever regulations they like whether the law Congress passed authorized them or not. This is not so. Since the creation of the Interstate Commerce Act of 1877 to address the regulatory challenges of the intercontinental railroads, administrative regulatory power has been exercised by Congress and affirmed by courts, including the Supreme Court. In 1946 the Congress passed, and President Harry Truman signed, the Administrative Procedure Act ("the APA"). When *Chevron* deference came along in 1984 Congress had been creating administrative agencies that made regulations covering huge swaths of American life, including Securities, Energy, the Environment and Education for over 100 years. *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). That case did not

even mention the APA that Congress had enacted to control agency regulation and its adjudication by the Courts. Chief Justice Roberts' decision for the majority in *Loper Bright/Relentless* relied on the language of the APA to strike down *Chevron* deference. While I and my organization believe that the Constitution itself forbids Article III courts from deferring to an interpretation of the law by the Article II executive branch, it should be understood that the majority opinion relied on this Congress's written will that "*courts* must 'decide all relevant questions of law.'" 5 U.S.C. § 706 (cited in *Loper Bright*, 144 S.Ct. at 2260) (emphasis in original).

The case does not limit the ability of Congress to enact statutes to regulate, nor does it prevent constitutional delegation of authority on agencies. As Chief Justice Roberts said for the majority "[This] is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has." *Id.* at 2268. The holding of the case is that "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Id.* at 2273.

The subject of this hearing is "how Congress can exercise its constitutional authority to ensure its legislative intent is being effectively communicated and implemented at the VA to serve veterans, their families, and their survivors in the most effective way possible." *Loper Bright* does not change the power of Congress to control agencies, but it does mean that agencies

will have to point to actual language and authority in a statute to support regulations or regulatory actions. The basics are probably well-known to this committee. When Congress uses the words "the Secretary shall" do such and such it is taking away authority. When it says the "Secretary may" do such and such it is granting authority.

Last week the Supreme Court issued its very first opinion of the term in a case that is all about how Congress grants discretion to agencies and withholds them. *Bouarfa v. Mayorkas*, No. 23-583, 2024 WL 5048700 (2024). In that case, Justice Jackson for a unanimous court notes the things Congress can do to grant wide discretion and also to cabin that discretion. The Court noted that Congress had stated the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any [visa] petition." *Id.* at *3. That case notes that the immigrant statutes is made up of "mandatory statutory rules paired with discretionary exceptions." *Id.* at 2. For the purposes of this Committee, courts are likely to interpret similar statutory language similarly. *Bouarfa* contrasts the broad discretion granted to the Secretary in revoking or not revoking visas for prior "sham marriage" violations with that granted to the Attorney General of the United States who can only exercise discretion for clemency after making certain findings of fact (such as the length of time the non-citizen has been in the country). *Id.* at 5.

In addition to the familiar words "may" to grant discretion and "shall" to take it away, and cabining what a Secretary "may" do by requiring preconditions to exercise discretion, such as finding certain facts, there is an important interpretive canon that applies to veterans that needs to be considered. That is the pro-veteran canon of construction. In NCLA's petition for *certiorari* to the Supreme Court in *Buffington v. McDonough,* 143 S.Ct. 14 (2022) (*denying certiorari*), we described it as "the pro-veteran canon of construction—an interpretive tool that

this Court has regularly invoked for nearly 80 years—when assessing petitioner's statutory right to resume disability benefits after finishing a period of active duty." This is the interpretive tool courts should use under which "interpretive doubt is to be resolved in the veteran's favor," *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Our petition to the Supreme Court on behalf of a veteran denied benefits was denied but sparked a dissent by Justice Gorsuch prefiguring the end of *Chevron*. While the veteran's canon has come into question it is still extant and when providing benefits to veterans the Committee should be aware of it. *See Rudisill v. McDonough*, 601 U.S 294, 314 (2024) (Kavanaugh, J., joined by Barrett, J., concurring) (calling into question substantive canon that favors one class).

So, what kind of errors might the Veterans Administration make when interpreting statutes passed by this body? First, they might, as we believed in *Buffington*, fail to provide benefits to veterans that Congress intended to benefit. Second, it might provide far greater benefits than Congress provided or, more likely ,provide benefits to those Congress did not believe should receive them under the statute. One administrative error NCLA has dealt with over the last few years has been the Department of Education cancelling student loans *en masse*. There are many programs of the Department of Education for cancelling student loans and, indeed, as a non-profit, we take advantage of one. But the agency determined to cancel over 430 billion dollars in debt and affect nearly all borrowers because the statute allowed the Secretary to "waive or modify' loans did not mean "completely rewrite." *See Biden v. Nebraska*, 143 S.Ct. 2355, 2373–5 (2023). The Court then went on to use the major questions doctrine in addition to statutory interpretation to strike down the executives' attempt to seize budgetary authority of that magnitude from the Congress. *Id.*

So where does that leave us? The first problem, not providing benefits or courses of action Congress expected, is most easily solved. If Congress wants a loan program or housing benefit or other such matter to reach Veterans, it can use mandatory language that the Secretary "shall" provide such benefits when such-and-such conditions are met. But what if in the Veteran's context the executive branch could do the same thing the Education department did in the student loan context? The Secretary could characterize discretionary, particularly emergency discretionary authority, in order to vastly expand a benefit or program Congress has created. This is the problem that is most difficult for Congress to solve and address. As we saw in the student loan context private parties often do not have standing to sue. The case that made it to the Supreme Court involved a state (Missouri's) loan program which was injured by the Secretary of Education's action. Congress with budget authority often has standing to sue in its own right when private parties do not. But that arcane area of the law is beyond the real scope of my remarks and it is less than ideal to have the Congress suing the Executive branch with any frequency.

So how can Congress use statutory language to husband the resources it provides the Veteran's Administration and the Federal Government in general for those things it has deemed worthy to do? One thought is to create a statutory "major questions doctrine" when broad emergency or other authority is granted to the Secretary. This committee may want to provide a housing, health or educational benefit through statute. But we all know it cannot be expected to know all the situations veterans might face everywhere in a continental nation. The educational, housing or healthcare situations on a remote island off the Gulf Coast or in Maine; the housing or educational situation in every State, or what future conditions may be in any of those areas likely

require the committee to provide discretion to the Secretary as the Supreme Court has noted it may.

There are a number of ways to prevent such discretion from being abused. First is requiring the Secretary to find certain facts as in *Bourfa* before exercising the discretion. Second, the Congress can insist on individualized findings of need or injury to prevent such sweeping actions as have been attempted in the student loan context. If that would be too cumbersome, when providing discretion, the Congress could cap the number of people the Secretary could relieve of obligations or provide benefits to under the discretion granted per year. This could be tied to budgetary or dollar numbers. For instance, "the Secretary may in his discretion relieve a veteran of obligation of payment on a finding of hardship but in no event may this discretion be exercised beyond X millions of dollars per year."

There is one last consideration that concerns the Court's *Loper Bright* decision that I think will be useful to the committee. In that case, and in the effort to overturn *Chevron* deference, one result of that deference that struck judges and commentators as unfair was that the exact same law could mean regulations changed 180 degrees with a change in administration. It would be particularly hard on veterans if their benefits and resources see-sawed in that way. When a new law is passed the way the first administration deals with that law issues regulations and its interpretation of the new law is likely, in my view, to set the tone and parameters of the regulatory scheme going forward. The Court went out of its way to note the "respect" the executive branch's interpretation of a statute "was issued roughly contemporaneously with enactment of the statute and remained consistent over time." *Loper Bright*, 144 S.Ct. at 2258. The Courts have signaled, I think, that they are suspicious of vast changes in the obligations and benefits a citizen receives under the same statute with no change in the statute by Congress.

Vague language will no longer be allowed to empower the agencies. At oral argument in *Loper Bright* Paul Clement posited that legislative compromise was being stymied partly because each side had incentive to assume when its party had the Presidency any vagueness in the law would redound to its benefit. Whether he was right or wrong about that if there was such an incentive it's gone now. Clarity on what the Congress wants will now be rewarded and vagueness is unlikely to allow the Executive to work its will unchallenged by the Courts.

Congress no longer has any incentive to allow its statutory intent to be unclear in the hopes a friendly administration will be empowered to do what it did not clearly command. I thank you for this opportunity to lay out my thoughts on the new regulatory landscape.