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Leave Chevron Deference Alone to Sustain Agency, Judicial Balance

Joe Kelliher
FedArb

David Hill
FedArb

- **FedArb experts argue Chevron deference should be preserved**
- **Overruling it would empower nonexperts, create uncertainty**

The US Supreme Court is considering whether to overrule or severely cut back on what is known as Chevron deference. It would be a mistake for the court to do that.

Federal agencies such as the Federal Energy Regulatory Commission, Federal Communications Commission, and many others must apply the laws passed by Congress when carrying them out. It's impossible for laws to be crystal-clear on every issue that arises over decades of implementing them, so agencies must interpret those laws.

When parties sue to challenge the agencies' actions, Chevron v. NRDC, decided by the Supreme Court 40 years ago, requires the federal courts to defer to agency interpretations of ambiguous statutory terms.

Plaintiffs in the pending cases, Loper Bright Enterprises, Inc. v. Raimondo, and Relentless, Inc. v. Department of Commerce, say the court should end Chevron deference. They argue it gives the agencies and unelected bureaucrats too much power, and that instead, Congress should do the legislating and policymaking.

Sounds good in theory. But overruling or severely limiting Chevron deference would invite regulatory and litigation chaos. Neither the Constitution nor common sense require that result.

First, Chevron deference actually gives the federal agencies far less license than is often acknowledged by its critics. Chevron certainly doesn't allow agencies to interpret and apply statutes any way they want—their interpretation must be reasonable. Agencies must explain and justify their actions (as required by the Administrative Procedure Act). And judges can sidestep Chevron deference by invoking the "plain meaning" exception, which allows a judge to interpret and apply a statute without deferring to an agency at all.

Judges aren't shy about invoking the plain meaning exception. It happened in an important case arising out of matters we both worked on. In that decision, a US Court of Appeals panel overturned FERC's interpretation of new Federal Power Act language, but split on plain meaning, insisting that two contradictory interpretations were unambiguous.

Even with Chevron deference fully in place, courts already rein in federal agencies. And yet the existence of Chevron deference recognizes expert agencies must interpret and apply statutes

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every day. The agencies and the parties they're regulating should have confidence that expert agencies will receive deference in how they are interpreting and applying the law.

If overruling Chevron results in the end of any judicial deference, the real impact is unlikely to shift power away from the executive branch and back to Congress. Rather, such a decision likely would take power away from both elected branches and place it in the hands of unelected, unaccountable, nonexpert judges.

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Even assuming judges wouldn't allow their own policy preferences to play a part in interpreting federal laws, it wouldn't be in the interest of regulated industries or the general public for more policy decisions to be made by judges—particularly on matters involving technical, scientific, or economic complexity.

Instead, the Supreme Court should resolve the current cases by concluding that properly applied, Chevron deference ensures policymaking remains in the hands of the elected branches of government, as agencies are subject to control by the executive and oversight by Congress. If Congress is unhappy with the way federal agencies are interpreting and applying ambiguous statutes, it can change the law or withhold funding from the transgressing agencies. Congress has done this many times before.

Finally, the court's recent invention of the "major questions" doctrine serves as a new muscular exception to Chevron deference. Under this doctrine, courts reject agency claims of authority with vast economic and political significance unless Congress clearly has authorized agencies to do so. This enables courts to curtail federal agency overreach while allowing agencies to fully function within their authorized realms of expertise and authority.

In sum, the court should decide the Loper and Relentless cases by leaving Chevron deference in place just as it is. There is plenty of existing legal authority for the courts to rein in federal agencies—and yet the agencies also know they can and should receive deference on most matters.

A ruling for the plaintiffs in the pending cases probably wouldn't reorient government power in the way the plaintiffs say they want. Instead, it would deliver exactly what the public doesn't need—more litigation and more regulatory uncertainty.

The cases are Loper Bright Enterprises, Inc. v. Raimondo, U.S., No. 22-451 and Relentless, Inc. v. Department of Commerce, U.S., No. 22-1219.

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AUTHOR INFORMATION

Joseph T. Kelliher is a neutral with FedArb and was Federal Energy Regulatory Commission chairman for five years.

David R. Hill is a panelist with FedArb and legal expert in electric power, natural gas, and other energy matters.