Chevron Deference

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- When Congress is ambiguous, who decides what they mean?
- Who decided that when Congress is silent, the executive agency decides for them?
- Is this Chevron Deference constitutional?

For decades, Congress has been turning over more and more lawmaking power to the Executive Branch. Frequently this is done by legislation giving the head of some agency or department the power to establish rules which have the force of law. What happens when the legislation doesn't explicitly say that such-and-such department has the power to make a certain rule? To deal with this, courts have come up with something called "Chevron Deference". While the case Loper Bright Enterprises, v Gina Raimondo, Secretary Of Commerce deals with who pays the salaries of federal observers on fishing boards, a more fundamental questioning of the court's deference to government agencies' interpretation of law is the cornerstone of the petitioner's arguments.

Let's start off with a discussion of what is commonly called "Chevron". This precedent comes from the 1984 case Chevron U.S.A., Inc. v NRDC.

Chevron Deference

The primary holding of the Chevron case is:

A government agency must conform to any clear legislative statements when interpreting and applying a law, but courts

will give the agency deference in ambiguous situations as long as its interpretation is reasonable.

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)

The idea seems simple enough. Government agencies must follow any clear legislative statements when they apply a law, However, if there is an ambiguous situation, the courts will defer to the interpretation of the agency as long as it's reasonable. After all, you cannot expect any man-made organization to be able to predict every possible permutation of every situation. So it makes sense, if something in a law is ambiguous (capable of being understood in two or more possible senses or ways), somebody has to decide. And technically, there are three possibilities as to who that might be. The courts, the agency, or Congress. Since 1984 the courts have deferred to the agency to make such decisions. As is often the case though, give an agency an inch and they'll take a mile. Such is true in Loper Bright Enterprises, v Gina Raimondo, Secretary Of Commerce.

The Petitioner

The petitioners, Loper Bright Enterprises, et. al., were represented at the Supreme Court by Paul D. Clement. He starts his argument with the specifics of the case.

Commercial fishing is hard. Space onboard vehicle – vessels is tight, and margins are tighter still. Therefore, for the – for the – for my clients, having to carry federal observers on board is a burden, but having to pay their salaries is a crippling blow.

Congress recognized as much by strictly limiting the circumstances in which domestic fishing vessels could be saddled with monitoring costs and capping them at 2 to 3 percent of the value of the catch. But the agency here showed no such restraint, requiring monitoring on 50 percent of the trips at a cost of up to 20 percent of their annual returns.

Nonetheless, the court below deferred to the agency because it viewed the statute as silent on the "who pays" question.

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Congress established by law that domestic fishing vessels had to be monitored to insure they follow the law, but they didn't specifically say who was to pay for the monitoring. The Department of Commerce decided that since Congress didn't say they couldn't make the fishing vessels pay the monitor's salaries, they had the statutory authority to do so. As you would expect, the petitioners disagreed.

There is no justification for giving the tie to the government or conjuring agency authority from silence. Both the APA and constitutional avoidance principles call for de novo review, asking only what's the best reading of the statute. Asking, instead, is the statute ambiguous is fundamentally misguided. The whole point of statutory construction is to bring clarity, not to identify ambiguity.

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Both the Administrative Procedures Act (APA) and the concept of constitutional avoidance (federal courts should avoid a constitution based decision when a statutory or regulatory one is available) state that the court review the case de novo, or anew, to determine the best understanding of the law. Though that is exactly what Chevron Deference by-passes.

The government defends this practice not as the best reading of the APA but by invoking stare decisis. That is doubly problematic. First, at issue here is only Chevron's methodology, which is entitled to reduced stare decisis effect. We have no beef with Chevron's Clean Air Act holding, and we could not take issue with its APA holding because it failed to mention that statute. But, second, all the

traditional stare decisis factors point in favor of overruling Chevron's methodology. The doctrine is unworkable as its critical threshold question of ambiguity is hopelessly ambiguous. It is also a – a reliance-destroying doctrine because it facilitates agency flip-flopping. So the reality here is the Chevron two-step has to go and should be replaced with only one question: What is the best reading of the statute?

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The Defense

Representing the government is Solicitor General Elizabeth B. Prelogar. She opened her defense with.

Throughout this litigation and at times this morning, Petitioners have sought to characterize this case as presenting a fundamental question of the separation of powers and a test of Article III: Will courts continue to say what the law is?

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While that belief is commonly held, the purpose of Article III courts is not to arbitrarily say what the law is, but to decide controversies based on those laws. Since the specifics of those laws need to be considered when applied to the specifics of any case, there is obviously some interpretation that goes along with the role of a judge. Gen. Prelogar then sets up a straw-man for the court.

Imagine, for example, if the statute said, in Chevron, "stationary source" as defined by the Administrator. I take both Petitioners to give that up and recognize that is a delegation and courts should respect that.

The role of the court in that circumstance is to make sure that the agency has followed the proper procedures and stayed what – within whatever outer bounds Congress itself has set. And all of that complies with the Constitution, of course, because Congress has Article I authority to delegate gap-filling authority to agencies, and the executive has core Article II authority to fill in those gaps.

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First Gen. Prelogar attempts to redirect the question at hand. Petitioners are questioning the deference to the agency when Congress is silent, not when they have explicitly delegated authority to an agency. This is based on two fundamental errors by Gen. Prelogar. First, nothing in the Constitution delegates to Congress the authority to delegate to another the power to "fill in the gaps" in their legislation. Second, neither does the Constitution delegate to the executive branch the authority to fill in those gaps.

Still, there is a more fundamental constitutional flaw in Gen. Prelogar's argument.

If Congress can expressly vest an agency with authority to interpret the law through an express delegation, then it can do the same thing implicitly, especially in a world where Congress has to provide the agency with the express authority to carry the statute into operation with the force and effect of law.

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Gen. Prelogar's straw-man doesn't show Congress vesting authority to interpret the law, but to apply the law. In her argument, Congress gives the "Administrator" authority to define the term "stationary source", not to interpret the law whichever way they want. To make matters worse, Gen. Prelogar

claims that when Congress does not tell an agency they can do something, that means they have the power to do it. This not only violates the plain language of the Constitution, but places the executive agencies above the very Congress that created it. After all, if any agency can interpret for itself what the law means, their word becomes law. Only after those harmed by such totalitarian rule have spent years and untold dollars pursuing a court case, can they expect any sort of redress of grievance for those agencies' actions, and then only if the court finds the agencies' interpretation "unreasonable". A very fickle standard indeed. Should Congress draft new legislation to restore its intent to the law, we once again would have a long and fraught process, one that does not guarantee that the original intent of the law is applied.

Questions From the Justices

After each attorney presented their case, the justices had a chance to ask them questions.

JUSTICE SOTOMAYOR: …

It seems like most people agree, if the court – if the statute uses "reasonable," that Congress is delegating the definition of "reasonable" to the agency, and the agency is deciding what is reasonable within some outer limit either set within the statute or – or within the law.

But the point is that I don't – it's great rhetoric, Mr. Clement, but we do delegate, we have recognized delegations to agencies from the beginning of the founding of interpretation. And so I – I – I – I'm at a loss to understand where the argument comes from.

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Here we see Justice Sotomayor using the same sleight of hand

that Gen. Prelogar did. Petitioners are not questioning the agencies definition of "reasonableness", but their actions without ANY statutory language. Remember, the law did not give discretion to the Dept. of Commerce when it comes to who pays the salary for monitors, it was silent on the subject.

JUSTICE KAGAN: Well, because you have no other option. I mean, what – what Chevron is is it's a recognition that in certain cases you apply all those tools and the conclusion you come up with is Congress hasn't spoken to this issue. And if you had no other option, you're a court, there's a case before you, you try as hard as you can, even though you know you're basically on your own.

But, with – when Chevron comes in, when there is an agency, what Chevron says is now there are two possible decision-makers, there's the agency and there's the court, and what we think is that Congress would have preferred the agency to resolve this question when congressional direction has – cannot be found because of the agency's expertise, because of the agency's experience, because the agency understands how this question fits within the statutory scheme. So it's not a question of the court couldn't do it. It's a question of, once congressional direction can't be found, who does Congress want to do it.

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It's not the role of the agencies or the courts to speak for Congress. If Congress did not speak, it did not speak. It's then up to Congress to decide if it wishes to speak on the matter. What Justice Kagan wants is to subvert the separation of powers and to assume the role of medium in order to divine what Congress wants. Even Congress doesn't think that's a good idea.

1. CLEMENT: So, Justice Kagan, if we're going to talk about

> what Congress wants, we probably should at least avert to the fact that we do have an amicus brief in this case from the House in its institutional capacity, and it doesn't want Chevron. It's on our side of the case, …

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When the actor you're claiming to fill in the gaps for, or at least part of that actor, is telling you that you're wrong, that should pretty much seal the deal. Not for Justice Kagan.

JUSTICE KAGAN: If it doesn't want Chevron, it has total control over Chevron. It can reverse Chevron tomorrow with respect to any particular statute and with respect to statutes generally, and it hasn't. For 40 years, it has acceded to Chevron. Except in super-rare cases, it has basically said this is the background rule, it gives us a stable default rule from which to write statutes, and we've accepted that.

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Oh contraire, Ms. Kagan. Chevron is not the creation of Congress, but of the very court you currently sit on. Yes, Congress could have passed a law that more tightly defines who decides ambiguities, and probably should have, but that would certainly take longer than tomorrow. And just what would keep the courts from simply reinterpreting Congress' intent in the future?

1. CLEMENT:…

[F]undamentally even more problematic, is if you get back to that fundamental premise of Chevron that when there's silence or ambiguity, we know the agency wanted to delegate to the agency.

That is just fictional, and it's fictional in a particular

way, which is it assumes that ambiguity is always a delegation. But ambiguity is not always a delegation. And more often, what ambiguity is, I don't have enough votes in Congress to make it clear, so I'm going to leave it ambiguous, that's how we're going to get over the bicameralism and presentment hurdle, and then we'll give it to my friends in the agency and they'll take it from here.

And that ends up with a phenomenon where we have major problems in society that aren't being solved because, instead of actually doing the hard work of legislation where you have to compromise with the other side at the risk of maybe drawing a primary challenger, you rely on an executive branch friend to do what you want. And it's not hypothetical.

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Again, Mr. Clement brings us back to the point. Because of Congressional laziness, even dereliction of duty, they have given up the work of actually writing complete laws, leaving the executive agencies to "fill in the gaps" in their legislation. While that may be the fundamental intent in some cases, it is a violation of the Constitution of the United States. By deferring all decisions to the agencies, the courts too have violated their oaths to support the Constitution.

JUSTICE THOMAS: How do you – how do we discern statutory – delegation from statutory silence?

GENERAL PRELOGAR: So, Justice Thomas, I think that it would be wrong to suggest that you can neatly categorize cases as those involving silence and those involving ambiguity. And – and the reason for that – I recognize that – that Chevron itself used both of those terms, but I think that the Court was just trying to be comprehensive about those kinds of circumstance where Congress hasn't itself directly resolved an issue.

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Did you catch that switch-a-roo? Justice Thomas ask Gen. Prelogar how to tell the difference between delegation and silence, and she switched it to silence and ambiguity.

Justice Thomas' question has a very simple answer. Delegation is a positive statement "as defined by the Administrator". Silence is the absence of a statement.

Conclusion

The entire issue of both this case and Chevron comes down to a single question: Is governmental power positively or negatively defined? Does a government actor have to have a positive statement that they can do something, or are they free to act unless there is a specific prohibition? When it comes to the federal government the answer should be clear:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Constitution, Amendment X

The United States only has the powers delegated to it by the Constitution. Since, as Article I, Section 1 of the Constitution states:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Constitution, Article I, Section 1

All power for making law (legislative powers) is vested in Congress. They do not have the power to delegate lawmaking power to executive agencies. And since Article III only delegates to the courts judicial power and the power to decide controversies, they do not have the power to "fill gaps" as

Gen. Prelogar claims.

Chevron appears to have been an attempt to “keep things going” when Congress was silent or ambiguous on a specific issue. If Congress leaves gaps in their legislation, it’s up to Congress, the representatives of the people and the states, to fill them in. It’s most certainly not within the powers delegated to the executive or judicial branches. We’ll have to wait and see if a majority of the justices on the court recognize the usurpation of powers Chevron Deference has become.

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