

The U.S. Supreme Court recently heard arguments regarding whether it should reverse or modify the now famous (or infamous) 1984 case of Chevron U.S.A. v. Natural Resources Defense Council. While that case and its numerous progenies over the last 20 years have been subject to many interpretive nuances, at bottom the decision instructed the courts to defer to federal agencies if the enabling statute at issue was ambiguous and the agency’s interpretation was reasonable.

The arguments before the Supreme Court largely focused on complicated questions of administrative law and constitutional separation of powers. The key issue is whether the courts have abdicated their appropriate role in overseeing agency discretion—exercised principally in rulemaking. Subject to much commentary over the years, especially recently, there have been growing concerns that Chevron overly empowered agencies to pursue their own agendas. Further, many believe Chevron enabled the agencies to abuse their authority and removed a meaningful judicial check on unelected agency officials.

If Chevron is overturned or modified in a significant way by the court, some impacts will be immediate. For one, it will affect current litigation, such as the lawsuits that have been filed to challenge the Department of Labor’s independent contractor rule, the Davis-Bacon reform rule and the ESG investing rule.

Judge Diarmuid O’Scannlain, a well-respected federal judge on the U.S. Court of Appeals for the Ninth Circuit, articulated the Chevron deference problem in a concurring opinion involving the National Labor Relations Board in a case involving the Valley Hospital Medical Center. Judge O’Scannlain wrote that the “Board frequently changes its mind, seesawing back and forth between statutory interpretations depending on its political composition” and that the agency “veers violently left and then right, a windsock in political gusts.” Judge O’Scannlain concluded that “the board’s ‘flip-flop problem’ creates nationally unstable labor policy … Perhaps the time has come to reevaluate those doctrines.”

Another federal judge, J. Campbell Barker in Texas, is also considering “the board’s flip-flop problem” in an important case involving an NLRB rule that dramatically expands the definition of joint employment under the National Labor Relations Act. We anticipate his decision soon because the new joint employer rule is scheduled to take effect shortly. Perhaps Judge Barker will share some of Judge O’Scannlain’s concerns that Chevron deference, at least with the NLRB, creates “unstable labor policy.”

The board seems to be concerned with the outcome of the Chevron case, claiming publicly that it is entitled to different “deference rules.” We will have to wait to see how that argument is received. But for the authors, one Constitution and one Supreme Court equal one legal standard.

On the other hand, the administrative state will grind on at the enforcement level, where the regulated citizenry most often bumps up against the awesome power of government. Indeed, whatever the Supreme Court decides, perhaps little will change at the ground level of day-to-day enforcement activities.

How could this be true? Conceptually, one can describe our system of laws as a three-tiered pyramid. Statutes occupy the top with a supportive regulatory structure immediately below, which interprets those statutes through formal regulations and multiple informal directives. But at the broad base of the pyramid is enforcement of all of the above, where the law actually is implemented and where most of the day-to-day application of the law to the citizenry occurs.

An agency officer, for example, might enter a workplace and demand multiple documents under short (or seemingly impossible) deadlines. The official then claims a legal violation based on the agency’s myriad set of regulations, interpretive bulletins and obscure administrative decisions when the documents fail to materialize on time. These alleged violations can result in huge monetary penalties, possible debarment from federal contracts and even criminal sanctions. While the principles of a newly shaped Chevron doctrine could eventually permeate down to this level, employers regulated by government may have to vindicate their newly found rights through expensive and lengthy litigation, which only the most well-heeled can sustain.

In this sense, the so-called and much ballyhooed “Rule of Law” has arguably little real applicability at the enforcement level for those who cannot afford the arduous and costly process of judicial review. Indeed, such review, however meaningful in the abstract, is more ephemeral than real to most. This has been documented in hearings on Capitol Hill and is a reality that most practitioners would attest to. It is entirely consistent with the experiences of the authors, who possess multiple years of experience in the private sector dealing with agencies and their impact on the regulated community.

Agency enforcement officials will likely retain much unchecked discretion in imposing their views of the law and the facts on those targeted, regardless of Chevron. Of course, Chevron issues are vitally important. Nonetheless, other changes should be made to the “base of the pyramid” that can have a more direct and profound impact to protect the regulated from bureaucratic overreach. For example, the abused entity should be entitled to attorney fees and costs when the government loses the case, which would require an amendment to the Equal Access to Justice Act. Perhaps then, the potential defendant would have some hope of avoiding huge costs, and presumably deter agency officials from bringing marginal claims at the outset.

There is no silver bullet to the unfortunate reality of our judicial system when the case is initiated by a government with endlessly deep pockets. This reality, well known, but seldom discussed, needs to be honestly confronted.

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