

ADMINISTRATIVE REFORM IN A POST-CHEVRON WORLD

Overview

It appears apparent that soon the Supreme Court will overturn Chevron in some fashion in *Loper Bright Enterprises v. Raimondo* and its companion case, *Relentless Inc. v. Department of Commerce*. Currently, the Chevron doctrine permits executive agencies the ability to interpret ambiguous statutes. If the interpretation, and by extension application, is challenged, Courts must defer to how the agency chose to interpret the statute.

This has given agencies considerable power. For example, in the facts in front of the Supreme Court, the National Marine Fisheries Service (NMFS) chose to make fishermen pay for agents to monitor their boats and fishing practices. This requirement to pay did not exist in the statute, but because of Chevron deference, the fishermen had no basis to challenge the legal authority of the NMFS.

This problem has existed for 40 years and has been applied in countless instances. Many precedents may no longer be in effect. Administrative law may soon be turned on its head. In this time of flux, now is the time to create stability through new laws while also returning power back to Congress where it rightfully belongs. Here are ten proposals to accomplish this task.

1. The Chevron Review Act

This bill would order the Government Accountability Office, or other nonpartisan/bipartisan commission, to have legal experts conduct a survey of cases where the federal courts have relied upon Chevron to reach a decision in favor of deference. The project should compile a list of statutes and regulations that are currently in effect where deference has been given. The analysis should consider and report on the private party interests that were impacted as a result of the government receiving deference.

2. The Agency Predictability and Accountability Act

This bill would direct all agencies to conduct review of litigation since Chevron where an executive agency has primarily or substantially relied upon Chevron to support its interpretation of a regulation or law. The agencies must identify the law/regulation, the position it took, what alternative interpretations were asserted by another party, and reassess the agency interpretation with a written memorandum supporting, reversing, or modifying its interpretation. These memorandums must be posted online and made available to the public to make the agency's position known to the public.

3. The Level the Playing Field Act

This bill would create a statutory requirement that both federal agencies and private parties share the ability to interpret a statute, regulation, or other federal policy. A court shall not defer to an agency interpretation. Rather, a court is to adopt the best and most reasonable interpretation, regardless of who the interpretation benefits.

4. The Proper Delegation Act

This bill would prevent agencies from asserting authority to regulate unless the power to do so is expressly delegated. The law would require that the scope of authority is limited to what is stated in a statute. If there is any ambiguity, the default is non-delegation.

5. Agency Employee Interpretation Accountability Act

This bill would order agencies to evaluate employees to determine who substantially and personally contributes to the interpretation of statute or regulation. Any such employee who interprets statutes or regulations shall be considered to be exercising duties reserved for members of the excepted service.

6. The Overcriminalization Reduction Act

This bill would prohibit agencies from promulgating regulations with criminal penalties unless a criminal intent element is expressly stated. It would also prohibit agencies from enforcing criminal penalties for violations of regulations already in existence unless clear intent of the party exists in the regulation. Any regulation that has an absence of intent will be void.

7. Congressional Direction in Civil Penalties Act

This bill would prohibit agencies from issuing civil penalties for violations of regulations, agency guidance, or other legally binding federal actions that lack a clear mens rea requirement where Congress has not expressly authorized strict liability standards under the relevant underlying statute.

8. Fairness in Administrative Adjudication Act

The administrative state has increasingly ventured into the judicial branch's lane through its administrative courts and adjudicative bodies. This process can greatly reduce the ability of private parties to efficiently challenge questionable government actions by zapping their resources before finally reaching an independent Article III court. Further, when parties finally exhaust their administrative remedies (i.e., final adjudication by Article II bodies), they most often leave with an agency decision, record, and a burden of proof that all favor the government.

This bill would ensure private parties, when appealing to an Article III court, are not disadvantaged. In the event that parties are not entitled to a direct appeal to an Article III court –the appeal will be de novo, no deference will be given to the agency decision, and the court shall create a new record upon the request of the private party

9. Access to Independent Courts Act

This bill would establish the right of private parties to timely access an Article III court – and bypass any established Article II adjudicatory body – in the absence of an express statutory requirement to exhaust administrative adjudicatory remedies governing the underlying federal action.

10. Transparency in Agency Action Act

This bill would establish that any final agency action may only rely on pre-published, publicly available and easily accessible materials in the form of regulations, agency guidance, memorandum or other types of agency policy documents. If a court determines that an agency action is not clearly and easily accessible to a member of the general public on a website or similar online database prior to the decision being made, the agency action relying on such inaccessible policy guidance shall be considered void.