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Changing the Rules: Reviewing Agency Authority to Rewrite Regulations, Part 1

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From tariffs to immigration, environmental and renewable fuel regulations—not to mention creating billions in payments for farmers while cutting billions in low income food assistance—the Trump Administration has been extraordinarily aggressive in rewriting federal regulations. While not unique to this administration, the number and degree of changes to the rules without corresponding changes from Congress is notable. Among other things, it represents an escalation in the long power struggle among the three branches of the federal government. This struggle remains encapsulated in conflicts over agency authorities and the best method for interpreting statutes; a big topic in any era, amplified in tumultuous times. This article initiates a series reviewing legal matters involved with agency decisions to revise existing regulations without new Congressional authorization; a grappling with baseline questions of power and authority in the American system of self-government.

Background

The foundation underlying this issue connects to the bigger picture inherent to it. The U.S. Constitution accumulated massive power in the federal government and, simultaneously, divided those powers among the three branches. The goal was to prevent the "accumulation of all powers, legislative, executive, and judiciary, in the same hands" which the Founders understood to "justly be pronounced the very definition of tyranny" (James Madison, *The Federalist* No. 47). Accordingly, the Constitution provided the design of the federal government. It vested "[a]ll legislative Powers" in Congress, the "executive Power" was vested in the President who "shall take Care that the Laws be faithfully executed" and, finally, the "judicial Power" was vested in "one supreme Court, and such inferior Courts" as created by Congress, extending to all cases and controversies "arising under this Constitution, the Laws of the United States" and other matters involving the U.S. or controversies among the States (U.S. Constitution, Articles I, II, and III).

Intrinsic to issues of statutory interpretation and agency authority as delegated by Congress in statute are questions of fidelity to this design for separating power, particularly as between the Congress who makes the laws and the President who is to execute them faithfully. When an Agency rewrites a regulation it

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necessarily raises fundamental questions as to whether the Agency is operating within the authority provided by Congress or going beyond it. Simplified for overview purposes, this remains the very core of the issue.

To be expected for an item of such fundamental and profound importance, the subject of the separation of powers has produced a vast canon of judicial and legal academic writing. Few efforts, however, stand as tall as the concurring opinion of Justice Robert H. Jackson in 1952. He enunciated a tripartite test for determining the limits of Presidential power that remains influential to this day:

> "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain . . . 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter"
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> (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring)).

Justice Jackson also memorably stated in that opinion that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government . . . separateness but interdependence, autonomy but reciprocity" and, specifically, that "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress" (*Id*., at 635). Justice Jackson's formulation was built on a sturdy foundation; Chief Justice John Marshall—the chief justice during the founding era—wrote an even simpler formulation, the "difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law" (*Wayman v. Southard*, 23 U.S. 1, 46 (1825)). Moreover, the judicial branch power includes the power to review both Congressional and Executive actions. The Supreme Court has long understood that it is "emphatically the province and duty of the judicial department to say what the law is . . . apply the rule to particular cases . . . expound and interpret that rule" and that where "two laws conflict with each other, the courts must decide on the operation of each" (*Marbury v. Madison*, 5 U.S. 137, 177 (1803)). Given the significance of the separation of powers, the Court has also understood the need for limits and caution; "the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily" (*Wayman v. Southard*, 23 U.S. 1, 46 (1825)).

Discussion

Among the delicate and difficult inquiries are those sorting out whether an agency decision to revise a regulation is within its proper scope; determining the parameters of authority and power as delegated by Congress. In general, this question falls within the first and third parts of Justice Jackson's test quoted above. The inquiry being whether the President (acting through the agency) is operating within the implied or express authorization, or is taking a measure that is not compatible with, the Congressional authorization. Two key Supreme Court decisions from the 1980s will form the starting point of this discussion and the touchstones of the series.

In 1984, the Supreme Court handed down a landmark decision that remains at the center of this intense debate. Ruling on the scope of authority for an agency in the rulemaking process, the Court stated that there are two questions: (1) "whether Congress has directly spoken to the precise question at issue" because if the "intent of Congress is clear, that is the end of the matter" and both court and agency must "give effect to the unambiguously expressed intent of Congress"; but, (2) if "the court determines Congress has not directly addressed the precise question at issue . . . if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute" (*Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984)). Where Congress has left gaps for the agency to fill, the courts are to "give considerable weight" to the agency's "construction of a statutory scheme it is entrusted to administer" so long as the construction is not "arbitrary, capricious, or manifestly contrary to the statute" (Id., at 843-44). Known as

the Chevron Doctrine, the Court's decision is understood to grant deference to the agency's discretion on matters delegated to its discretion by Congress as determined by ambiguity in the statute (Sharpe, 2018). Ambiguity understood as opening the door for agency discretion; delegation defined by means of the clarity and precision in statutory text (see e.g., *Smiley v. Citibank (S.D.), N.A*, 517 U.S. 735, 740-41 (1996)).

The second key decision for this discussion was handed down the year before *Chevron* and it remains a prime example of the authority to change the rules. Congress sought to improve the safety of automobiles by enacting the National Traffic and Motor Vehicle Safety Act of 1966; authorizing regulations to require motor vehicle safety features had produced at least 60 rulemakings by the early 1980s (*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33-34 (1983)). In 1978, the Department of Transportation required automobile manufactures to choose between installing airbags or passive seat belts in all cars by model year 1984. In early 1981, the Reagan Administration's Department of Transportation rescinded the rule. The Supreme Court instructed that an agency could change the rules, including by rescinding a rule, but that in doing so the agency "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance" (*Motor Vehicle Mfrs. Ass'n*, 463 U.S., at 42). In short, the "agency must cogently explain why it has exercised its discretion in a given manner" (Id., at 48). It also has to provide an explanation for its action that is "sufficient to enable [a court] to conclude that the [modification or rescission] was the product of reasoned decisionmaking" (Id., at 52). And these are the parameters to be explored further. Courts have to find that Congress delegated authority and discretion to the agency. Thus, the agency must explain its actions so that a court can determine whether the actions were authorized and remain within the bounds of discretion.

Conclusion

Agencies and the courts are both operating in the Congressional wake when they interpret statutes duly enacted by the Article I branch, trying to divine the direction given and the parameters of the authority that has been granted. Words are inherently imprecise and powers can be overlapping and intertwined, upon which it is difficult to impose clear boundaries; reality complicates matters further. A delegation of the power to make law, often accomplished through ambiguity, requires reasonable interpretation (see e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2412-16 (2019)). The connecting thread is placing the onus on the agency to be clear about what it is seeking to accomplish in order to best determine whether such efforts conform to the boundaries of authority, which is also provided by Congress. Since 1946, agency rulemaking has been governed by the Administrative Procedures Act (APA), which Congress created in the wake of the development of the administrative state out of the New Deal efforts to address the Great Depression and World War II (Shapiro 1986). An important power conferred by the APA that will be critical to this discussion is the authority of the courts to set aside any rule that is found to be arbitrary or capricious, or consists of an abuse of the discretion provided by Congress or is "otherwise not in accordance with law" (5 U.S.C. §706; *Motor Vehicle Mfrs. Ass'n*, 463 U.S., at 41). Thus, the short answer is that an agency can change the rules but that answer is incomplete. Changing the rules, much as writing them in the first place, requires that the agency explain itself, demonstrating to the courts that it is justified in doing so and that it remains within whatever authority Congress has granted it. These will be the issues that will occupy subsequent installations in this series.

References

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