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Happy 30th Anniversary, Chevron – Part II

by

Randolph J. May *

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In my Aug. 8 column for The Hill titled "Happy 30th anniversary, Chevron!," I commemorated the Supreme Court's landmark decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* As I explained, *Chevron*" fundamentally altered the existing jurisprudence regarding deference owed decisions of administrative agencies by reviewing courts." By requiring courts to give greater deference to agency opinions interpreting ambiguous statutory provisions than previously required, the court's 1984 decision has facilitated the expansion of the agencies' regulatory reach.

Chevron's deference doctrine rests primarily on notions of political accountability. In the key passage, the court stated: "While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices." Therefore, according to the court, it is proper to rely on "the incumbent administration's" policy views. In my Aug. 8 column, I suggested that *Chevron*'s political accountability rationale for requiring greater judicial deference "provided a foundational construct for fitting administrative agencies into the separation of powers doctrine at the core of our constitutional regime."

The court's rationale may make sense as a matter of separation of powers doctrine — but only up to a point. As I first argued in a 2006 law review article, "Defining Deference Down: Independent Agencies and *Chevron* Deference," the case for giving heightened judicial deference to the decisions of the so-called independent agencies, such as the Federal Communications Commission (FCC), Federal Trade Commission (FTC), the Securities and Exchange Commission (SEC) and the Commodities Future Trading Commission, is considerably less persuasive.

The reason: Executive branch agencies, such as the Environmental Protection Agency (EPA), Occupational Safety and Health Administration, and the Departments of the Interior and Education, are much more subject to control by the president than are the independents. Hence, the court's statement in *Chevron* concerning "the Chief Executive's" direct accountability to the people is less apposite with regard to the independent agencies.

The commissioners — the decision-making officials — of the multi-member independent agencies serve staggered, fixed terms. No more than a bare majority may be from the same political party. Most significantly, the independent agency commissioners generally cannot be removed from office by the president except upon a showing of "good cause." This limitation on the president's removal power was held constitutional in 1935 in the *Humphrey's Executor v. United States* case when the Supreme Court, after examining the distinguishing features of independent agencies, determined that independent agency commissioners were intended to be "free from executive control."

This limitation on the president's removal power is inapplicable to the executive agencies. While there might be political fallout, the president can fire the EPA administrator or the secretary of Education tomorrow if he wishes to do so — and he doesn't have to provide any reason. Not so with the FCC or SEC commissioners.

The president's inability to remove independent agency commissioners without good cause — and I know of no such attempted removal since President Franklin Roosevelt's ill-fated removal of FTC Commissioner William Humphrey in 1933 — is what leaves the independents primarily "free from executive control." And it is this freedom from executive control that calls into question applying *Chevron*'s heightened deference requirement to independent agencies' decisions. Recall that *Chevron* asserts that the heightened deference requirement is justified because the agencies — in that case the EPA — rely on the politically accountable "incumbent administration" of the chief executive to inform their views.

While *Chevron* does provide a plausible rationale for fitting administrative agencies into the tripartite separations of powers doctrine central to our constitutional system, it is a much more comfortable fit for the executive branch agencies than for the independent agencies. As I said in my 2006 "Defining Deference Down" article, "it is odd in a constitutional system with three defined branches for courts to give controlling deference to agencies that, not without reason, are commonly referred to as 'the headless fourth branch.'"

So far, the Supreme Court has shown little inclination to consider head-on my suggestion that *Chevron*'s heightened deference standard ought not to apply in the same way to independent agencies. But I am not without hope. In a 2001 law review article, "Presidential Administration," then-Harvard Law School Dean Elena Kagan agreed with me. Kagan, distinguishing independent agencies from executive agencies, and especially focusing on the president's lack of removal power with regard to independent agency commissioners, explicitly suggested that a *Chevron* doctrine "attuned to the role of the President would respond to this disparity by giving greater deference to executive agencies than independent agencies."

I agree. And perhaps before too many more *Chevron* anniversaries come and go, Supreme Court Justice Kagan can persuade her fellow justices to this view that is more compatible with our constitutional regime.

* Randolph J. May is President of the Free State Foundation, an independent**,** nonpartisan free market-oriented think tank located in Rockville, Maryland.