Fishing for Rules

High court likely to curtail agencies' rulemaking powers

By JOSHUA DUNN

The Office for Civil Rights (OCR) in the Department of Education has long been known for its tendency to overstep in its rulemaking. Many federal agencies are tempted to avoid the notice-and-comment requirements of the Administrative Procedures Act (APA) by fabricating administrative law in the form of "clarifications" and "guidance"—but no agency has succumbed to that temptation more than OCR. As Shep Melnick has pointed out (see "Rethinking Federal Regulation of Sexual Harassment," *features,* Winter 2018), OCR has used "Dear Colleague" letters (DCLs) to rewrite Title IX and wade into hot-button issues such as bathroom access for transgender students, school resources, and racial disparities in school discipline. In fact, playing fast and loose with administrative procedures seems to be part of the office's DNA. When OCR was first obligated to create rules for enforcing Title VI of the Civil Rights Act of 1964, it published them not in the Federal Register but in *The Saturday Review of Literature.*

Soon, however, the U.S. Supreme Court will decide two cases that could dramatically curtail rulemaking by OCR as well as federal agencies that oversee such areas as health care and the environment. Both cases, *Loper Bright Enterprises v. Raimando* and *Relentless, Inc. v. Department of Commerce,* involve regulatory burdens imposed on the fishing industry. Both challenge what is known as the Chevron doctrine, which originated from the 1984 case *Chevron v. Natural Resources Defense Council.* In that case, the high court ruled that judges should defer to agencies' interpretations of ambiguous federal statutes. Agencies, the court maintained, have expertise that generalist judges do not, so deferring to agencies promotes consistent application of statutes. Under *Chevron,* guidance documents are not supposed to be accorded the same level of deference as regulations that have gone through the formal rulemaking process required by the APA, but courts have often treated guidance issued by OCR as if it were settled law. OCR has in turn pointed to judicial opinions to justify extending its authority via new "clarifications," to which courts have then deferred. As Melnick argued, this leapfrogging has allowed OCR to construct a thicket of rules far removed from the actual text of the laws it is supposed to be clarifying for colleagues.

NEW CIVIL LIBERTIES ALLIANCE (2)

Members of the New England Fisherman's Stewardship Association protest a government agency rule that requires fishing ships like the* Relentless *to pay to transport and house federal inspectors.

Critics of *Chevron* have long maintained that it empowered agencies to make law, not just apply it, and that it compromised the judiciary's authority to interpret the law. The conflict in *Loper* and *Relentless* originated with a rule created by the National Marine Fisheries Service (NMFS) requiring fishing operators off the coast of New England to transport and house federal inspectors—and to pay their salaries. However, NMFS had previously covered the costs of these inspectors, who collect data to prevent overfishing, and Congress had never explicitly authorized charging operators for these expenses. Herring boat operators, including Loper and Relentless, are especially burdened by this new rule because they keep their

boats at sea for lengthy periods of time. Lower courts upheld the agency's authority, saying that it constituted a reasonable interpretation of the law.

During oral argument in the two cases in January, the six justices in the conservative bloc seemed inclined to overturn *Chevron* on the grounds that the doctrine is unworkable and threatens the stability of the law. Justice Brett M. Kavanaugh noted that *Chevron* "ushers in shocks to the system every four or eight years when a new administration comes in." The court's liberal wing of Justices Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson cautioned against overturning the longstanding precedent.

In *Chevron v. Natural Resources Defense Council* (1984), the court ruled that judges should defer to agencies' interpretations of ambiguous federal statutes. Agencies, the court maintained, have expertise that generalist judges do not.

If the court does not overturn *Chevron,* a majority will almost certainly limit the doctrine—and either action would signal that the court wants to curtail policy freelancing on the part of federal agencies. If policies that have gone through the rulemaking process do not deserve judicial deference, then DCLs that appear almost *ex nihilo* should receive even less respect. And if the court emphasizes Kavanaugh's concern, OCR would be well-advised to focus on creating consistency rather than imposing wholesale revisions—unmoored from the language of statutes—with each new administration. Kavanaugh easily could have cited the office's oscillating DCLs as Exhibit A for "shocks to the system." The Obama Administration's 2011 DCL on sexual misconduct, which Harvard Law School's Jacob Gersen and Jeanie Suk Gersen criticized for stripping students of due process rights and creating a "sex bureaucracy," was rescinded by the Trump Administration in 2017. Now the Biden Administration is in the process of reimposing it. This kind of regulatory whiplash is hardly consistent with the rule of law. At a minimum, reining in the hyper-deference that courts have accorded OCR would reduce the uncertainty generated by the agency's promiscuous use of DCLs and force it to go back to Congress if it wants to extend policies beyond the scope of existing statutes.

Joshua Dunn is executive director of the University of Tennessee, Knoxville's Institute of American Civics at the Baker School of Public Policy and Public Affairs.