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Re: Legal implications of White House interactions with independent agencies

Dear Agency Heads and Officials:

I write to express the views of the U.S. Chamber of Commerce in light of reports that White House personnel have recently engaged in close contacts with some independent agencies regarding policy and regulatory matters that those agencies have a legal duty to consider through rulemakings, adjudications, and other processes. We understand that these contacts include, but are not limited to, discussions that implement or otherwise respond to Executive Order 14036 of July 9, 2021 (Promoting Competition in the American Economy). The order establishes a White House Competition Council, chaired by the Assistant to the President for Economic Policy and the Director of the National Economic Council, and orders the Chair to "invite" the heads of several independent agencies to participate in the Council; "encourage[s]" all independent agencies "to comply with the requirements of this order"; and "encourages" the heads of independent agencies to take or consider various specific actions, including rulemaking and enforcement activity. In addition, the Order requires detailed consultation between various Executive Branch agencies and independent agencies, with particular attention given to the Federal Trade Commission.

I wish to raise two legal implications of such White House contacts. *First*, White House contacts with independent agencies, if not appropriately restrained, could deprive independent agencies of the opportunity to receive *Chevron* deference for their legal interpretations. *Second*, such contacts could lead independent agencies to violate their duty to engage in reasoned decisionmaking pursuant to the Administrative Procedure Act (APA) or other statutes governing their proceedings. Both of these concerns are relevant not only to rulemakings, but to enforcement and other administrative actions.

White House contacts with independent agencies and *Chevron* deference

In recent years, many questions have been raised about the propriety of *Chevron* deference to agencies' interpretations of statutory provisions that they administer. Many of those concerns are quite serious. But assuming *Chevron* deference is to survive in some form, equally important is the question of what role it should play.

There is a strong case to be made that independent agencies should be entitled to *Chevron* deference only when they are exercising their own independent judgment in their areas of subject-matter expertise, not when they are taking direction from the White House. *Chevron* deference is, after all, grounded in a presumption that Congress intends to delegate interpretive authority over a given statutory provision to an administrative agency because of the agency's comparative advantages of subject-matter expertise and political accountability. But when Congress establishes an *independent* administrative agency, it deliberately insulates the agency from presidential politics and expects it to exercise independent judgment in its area of expertise, channeled through the decisionmaking procedures established by Congress

for that agency. If an independent agency simply takes direction from the President or White House personnel and fails to exercise its own expert judgment, or otherwise fails to respect the substantive and procedural constraints contemplated for the agency by Congress, the basis for presuming that the agency is acting pursuant to a delegation from Congress falls away. So too does any basis for deferring to the agency's (or, in some instances, the President's or a White House staffer's) interpretive position.

Significantly, *Chevron* deference is rooted in a "background presumption of congressional intent." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013). Under that presumption, statutory ambiguity "constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). In other words, *Chevron* deference applies only when a court can appropriately presume that "Congress has conferred on the agency interpretive authority over the question at issue." *Arlington*, 569 U.S. at 312 (Roberts, C.J., dissenting).

In *Chevron* itself, the Supreme Court grounded that presumption of congressional delegation in administrative agencies' comparative advantages of subject-matter expertise and political accountability. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45, 865-66 (1984). In later cases, the Court has further cautioned against finding a delegation unless a statutory question "in some way implicate[s the agency's] substantive expertise." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019). If the agency's resolution of a statutory ambiguity does not implicate its expertise, then the "basis for deference ebbs." *Id.* (citing *Arlington*, 569 U.S. at 309 (opinion of Breyer, J.)). As a matter of constitutional nondelegation doctrine, moreover, it would be difficult to justify a presumption of congressional delegation if a statutory question did not call for the exercise of agency expertise.

Given that foundational premise, it is hard to see why an agency should be entitled to *Chevron* deference if it is not actually bringing its full expertise to bear on an interpretive question concerning a statute, but is instead compromising that expertise, and thus its statutory role, by following the orders of the President or the direction of White House personnel who have not been charged with authority to implement that statute. That is especially true when it comes to independent administrative agencies. Perhaps courts can presume that Congress expects heavy presidential involvement when it delegates "policy-making responsibilities" to an executive agency that is subject to direct presidential control. *Chevron*, 467 U.S. at 865. But when Congress establishes an independent administrative agency, it deliberately provides insulation for the agency from presidential control. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 531 (2010) (Breyer, J., dissenting) (The "Court has recognized the constitutional legitimacy of a justification that rests agency independence upon the need for technical expertise."); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624-26 (1935) (making tenure of members of independent commission dependent on "the mere will of the President" would "thwart" Congress's effort to create "nonpartisan" "body of experts").

Indeed, under current constitutional doctrine, *the* hallmark of an independent agency is insulation from direct presidential control through for-cause removal restrictions. *See Morrison v. Olson*, 487 U.S. 654, 691 (1988). At least where traditional independent agencies are concerned—*e.g.*, multi-member expert commissions such as the FCC, FTC, and FEC—both history and constitutional theory recognize that Congress desires administrators with "technical competence" and "apolitical expertise" who will render decisions founded in their own independent expert judgment. *PCAOB*, 561 U.S. at 531 (Breyer, J., dissenting) (quoting Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1131-33 (2000)).

All of that should make courts especially loath to extend *Chevron* deference to the views of an independent agency when the agency has not actually exercised independent judgment. Just as it would make little sense to presume that Congress intended for an agency to resolve statutory ambiguities if the agency's resolution does not implicate its expertise, *see Kisor*, 139 S. Ct. at 2417, it would make little sense to presume that Congress intended to empower an independent agency to simply take direction from the White House rather than *employ* its expertise. *Chevron* deference depends on congressional delegation. And delegation must be understood in the context of what Congress had in mind when it created and structured an agency and entrusted it with a statutory mission. If an independent agency is not bringing its subject-matter expertise and independent expert judgment to bear, or is otherwise not acting pursuant to the structural constraints that were placed on its decisionmaking by Congress, then the agency is not performing the task that Congress delegated, and hence cannot claim the deference that might attach if it were doing the job that Congress set for it.

White House contacts with independent agencies and agencies' duty to engage in reasoned decisionmaking

As the Chamber recently noted in its amicus brief in the U.S. Supreme Court in *American Hospital Association v. Becerra*, agencies must engage in reasoned decisionmaking—*i.e.*, arrive at legal interpretations and policy decisions that are both substantively reasonable and reasonably explained. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Whether that requirement is understood as an aspect of *Chevron* or as a component of arbitrary-and-capricious review under the APA and other statutes governing agency actions, it means both that an agency's answer to a legal question must be "within the scope of its lawful authority" and that "the process by which it reaches that result must be logical and rational." *Michigan v. EPA*, 576 U.S. 743, 750 (2015). From start to finish, the APA requires *reasoned* decisionmaking.

An independent agency is not engaged in this kind of reasoned decisionmaking if its decision is motivated (whether overtly or otherwise) by a perceived obligation to obey White House policy preferences or presidential directives. "The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public."

Dep't of Commerce v. New York, 139 S. Ct. 2551, 2575-76 (2019). For independent agencies, structured as they are to be insulated from political influence, reasoned explanation must at least be grounded in subject-matter expertise and expert judgment. While that may not require courts to apply heightened scrutiny to independent agency explanations, and may not compel independent agencies to ignore political considerations altogether, *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523-26 (2009) (plurality opinion), it does mean that independent agencies must exercise expert judgment and must not give undue weight to political directives. Anything less not only would render judicial review of the agency's reasons "an empty ritual," *Commerce*, 139 S. Ct. at 2576, but would undermine Congress's decision to entrust administration of a statute to an expert independent agency in the first place.

None of that is to suggest that independent agencies are strictly forbidden from heeding direction from the President or from engaging in substantive back-and-forth with White House personnel. Independent agencies, subject to the valid constraints that Congress imposes on them, are still ultimately part of the Executive Branch. But whether an agency is acting constitutionally and whether it can claim any entitlement to *Chevron* deference – or even pass muster under *State Farm* and other key decisions enforcing the core requirements of administrative decisionmaking – are two very different questions. And if an independent agency's interpretation of a statute is not the product of the kind of reasoned decisionmaking that the APA and other statutes require, then courts have no business upholding that interpretation, much less affording it *Chevron* deference.

Conclusion

For these reasons, officials and staff at each of your agencies should pay special heed to ensuring that communications with the White House regarding policy and regulatory matters appropriately respect the agency's statutory obligation to exercise independent expert judgment in discharging its statutory responsibilities. Likewise, each agency should take care to regulate and channel such communications to prevent violations of the agency's duty to engage in reasoned decisionmaking and other violations of law.

Some agencies already have rules and protocols in place to mitigate such risks and protect agency integrity. In some instances, fresh reviews of such rules and protocols may be appropriate. Other agencies may be advised to consider establishing new rules or protocols to account for the considerations described above.

Thank you for your consideration.

Respectfully,

Daryl Joseffer
Executive Vice President and Chief Counsel
U.S. Chamber Litigation Center