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The Future of Agency Deference

Christina T. Bassick

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Agenda

- *Chevron v. NRDC* Summary
- Chevron Deference
- Other Frameworks for Agency Deference
- Chevron Deference in Energy
- *Loper* and *Relentless*
- Impact of Overturning Chevron
- Impact to the Energy Industry

Chevron, U.S.A., Inc. v. NRDC (1984)

- In 1981 EPA promulgated regulations interpreting the Clean Air Act Amendments related to nonattainment areas. The regulations allowed states to adopt a plantwide definition of the term "stationary source," under which an existing plant that contains several pollution emitting devices may install or modify one piece of equipment without meeting the permit conditions so long as the alteration did not increase the total emissions of the plant.
- Question presented to court: Is the EPA's definition of "stationary source" based on a reasonable construction of the statute?
- The D.C. Court of Appeals vacated the regulations.
- The Supreme Court held that the EPA regulation was based on a permissible construction of the term "stationary source" in the Clean Air Act Amendments.
  - "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."
  - The courts decision granting deference to the agency established Chevron deference.

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Chevron Deference

- Chevron Deference is a type of judicial deference afforded to administrative agency interpretations of a statute that the agency is responsible for enforcing. Ensures courts do not substitute their construction of statutory provisions over agency construction.
  - Agencies receive deference even when determining the scope of their own statutory jurisdiction (*City of Arlington v. FCC).*
  - Agencies also receive deference even when changing their position from a previous interpretation so long as the agency rationally explains the change (*Smiley v. Citibank (South Dakota))*. The question for a reviewing court is whether an agency interpretation is reasonable, not whether the agency interpretation is the best.
- 40-year history of agency deference

Chevron Deference

- **Chevron Steps**
  - **Step 0**: Has congress delegated authority to the agency to speak with the force of law? (*U.S. v. Mead Corporation*)
    - For example, an agency interpretation is eligible for deference if it was adopted through the agency's exercise of congressionally granted authority such as a regulation promulgated via notice-and-comment rulemaking.
  - **Step 1**: Is the statute silent or ambiguous? Did Congress directly address the precise question at issue?
  - **Step 2**: Is the agency's interpretation of the ambiguous provision permissible?
- Major Questions Doctrine: Courts must presume that Congress does not give agencies the power to address significant political or economic issues that are considered "major."

Other Frameworks for Agency Deference

- Skidmore Deference – Established 40 years prior to *Chevron*, says that a court should defer to an agency's interpretation of a statute administered by the agency according to the agency's ability to demonstrate persuasive reasoning in the case. (*Skidmore v. Swift*; *Christensen v. Harris County)*
  - Until recently, applied only to guidance
- Auer Deference – An agency's interpretation of its own regulation is entitled to deference unless plainly erroneous or inconsistent with the regulation (*Auer v. Robbins*)
  - Regulation must be ambiguous
  - May not be used to create new regulation
  - Must fall within scope of agency's ordinary duties

Chevron Deference in Energy

Examples where courts applied Chevron deference and deferred to FERC interpretation:

- *New York v. FERC* (2002) – Supreme Court upheld FERC Order No. 888 which required utilities to unbundle wholesale electricity sales from interstate transmission and provide open access transmission service for wholesale sales
- *South Carolina Public service Authority v. FERC* (2014) – D.C. Circuit upheld FERC's regional planning and cost allocation rule, Order No. 1000
- *Solar Energy Industry Ass'n v. FERC* (2023) – 9th Circuit upheld FERC Order No. 872, which revised FERC's 1980 regulations implementing section 210 of PURPA
- *Solar Energy Industry Ass'n v. FERC* (2023) – D.C. Circuit upheld FERC's interpretation of PURPA Section 210 that a facility consisting of a 160-MW solar array with an 80-MW inverter can be certified as a small power qualifying facility
  - This case was appealed to the Supreme Court

Loper & Relentless

Loper Bright Enterprises v. Raimondo **and** ***Relentless, Inc. v. Department of Commerce***

- Fisheries brought action against the Secretary of Commerce and NMFS alleging that the Magnuson-Stevens Fishery Conservation and Management Act did not authorize NMFS to promulgate a final rule requiring industry to fund at-sea monitoring programs for Atlantic herring.
- Procedural History
  - *Loper* - Both the D.C. District Court and Court of Appeals held that NMFS's interpretation of the Act was reasonable and therefore owed Chevron deference.
  - *Relentless* – Both the Rhode Island District Court and the First Circuit Court of Appeals held NMFS did not exceed its statutory authority when it promulgated the rule.
- Both cases challenged the NMFS rule and the requirement that judicial deference be given to the agency interpretation
- June 28, 2024, the Supreme Court issued their opinion overturning *Chevron* and eliminating *Chevron* deference.

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The Court's analysis centered on three points:

- First, the Constitution gives the judiciary the power to adjudicate cases and controversies
  - "Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies" – concrete disputes with consequences for the parties involved."
  - Agency interpretations may not supersede the judgement of the judiciary. However, the views of agencies may inform the judgment of the judiciary, especially when the agency interpretation is issued contemporaneously with the enactment of a statute or the interpretation has remained consistent over time.

Loper & Relentless

- Second, the Administrative Procedure Act acts as a check on administrators
  - APA specifies that courts will decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of an agency action.
- Third, *Chevron* cannot be reconciled with the requirements of the Administrative Procedure Act
  - *Chevron* defies the command of the APA that the reviewing court should decide all relevant questions of law and interpret statutory provisions.
  - There is a single best meaning which is fixed at the time the statute is enacted. "It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible."
- The dissent and the Government's Brief argued that *Chevron* should be upheld because agencies have subject matter expertise to interpret the statutes they administer.

"*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."

Possible Outcomes

- Apply Skidmore deference instead
  - Skidmore deference currently applies to agency guidance and interpretations. Skidmore deference says that courts should follow agency interpretations only to the extent that they are persuasive and consistent with earlier agency constructions.
- Limit Chevron deference
  - The court could decide to place limits on the existing Chevron framework.
- Narrowing of the nondelegation doctrine
  - The nondelegation doctrine says that Congress cannot delegate its legislative powers or lawmaking ability to other entities. It requires Congress to provide an intelligible principle to which the agency must conform.
  - The court could place limits on what or how authority is delegated to agencies.

Impact of Overturning Chevron

- Judges are no longer required to defer to the expertise of agencies.
- Cases decided at Chevron step one will not be affected because if a statute is neither silent nor ambiguous, then no agency deference given.
- Cases decided based on Chevron step two, where agency deference was granted, may be affected. However:
  - Res judicata – a legal principle that says a cause of action may not be relitigated once it has been judged on the merits – will preclude the reopening of many cases
  - Time bars and statutes of limitations may prevent many new challenges to old actions
    - *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* – Supreme Court broadened previous interpretations of statute of limitations by deciding that a claim accrues when a rule first causes a plaintiff to be adversely affected.
- Overturning Chevron could result in decreased use of the notice-and-comment rulemaking process in favor of interpretive rules and guidance.
- Increased reliance on *Skidmore* deference

Impact to the Energy Industry

- Overturning Chevron deference could impact agencies' ability to consider the climate and conservation impacts of oil and gas projects.
  - For example, overturning Chevron deference could result in challenges to FERC's authority and establish a requirement that FERC consider climate change impacts when approving projects.
- Post-*Chevron*, federal courts will no longer be required to afford uniform deference to an agency's interpretation; accordingly, two different courts might interpret the same statute differently.
  - States may find that courts can be more receptive to concerns about fossil fuel expansion and climate goals. For example, the D.C. Circuit will rule in 2024 on whether FERC can defer decisions on the climate impact of the projects it is approving.
- May impact deregulatory action – EPA announced in 2017 intent to repeal Clean Power Plan

Impact to the Energy Industry

Solar Energy Indus. Ass'n v. FERC

- FERC issued an order stating that a facility consisting of a 160-MW solar array with an 80-MW inverter could be certified as a PURPA qualifying facility.
- The D.C. Circuit used the *Chevron* framework to determine that FERC's interpretation was reasonable and supported by PURPA.
- The Supreme Court vacated the D.C. Circuit's judgement and remanded the case for further consideration in light of *Loper* and *Relentless*.

Questions or Comments?