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The Future of *Chevron* Deference and Practical Implications

June 18, 2024

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The *Chevron* Doctrine

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The *Chevron* Doctrine

- *Chevron v. NRDC* (1984) involved interpretation of the term “stationary source” under the Clean Air Act Amendments of 1977.
- The EPA, in a decision considered favorable to industry, held that stationary source can include an entire power plant.
- The Supreme Court upheld the agency’s interpretation under a new legal formulation.
- Two Questions for Reviewing Agency Interpretation
 - Has Congress directly spoken to the precise question at issue?
 - If not, court will defer to agency's interpretation if based on permissible construction of statute

The *Chevron* Doctrine

- Federal courts have used the *Chevron* doctrine for decades to defer to an agency's reasonable interpretation of an ambiguous statute.
- Used for 40 years in over 18,000 judicial opinions
- Surveys show that courts get to step two in 60-70% of the cases under the *Chevron* doctrine.
- The Supreme Court has been cutting back on *Chevron* deference in recent years and has not relied on the doctrine since 2016.
- Nonetheless, lower courts continue to rely on *Chevron*.
- The doctrine is undergoing challenges in two cases pending before the U.S. Supreme Court that were argued in January 2024 and will be ruled on in the next few weeks.

Challenges to the Doctrine

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Challenges to the Doctrine

- Two cases challenge the doctrine
 - *Loper Bright Enterprises v. Raimondo*
 - *Relentless, Inc. v. Department of Commerce*
- National Marine Fisheries Service (NMFS) issued a regulation under the Magnuson-Stevens Act
 - Requires fishing industry to pay for the costs of observers
 - Typical cost is around \$710 a day
 - The statute is silent on who pays for the cost of observers
- U.S. Courts of Appeals upheld the regulation
 - D.C. Circuit and First Circuit
 - Regulation is a reasonable interpretation of a federal statute under *Chevron*

Arguments

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Arguments

- Petitioners argue that *stare decisis* does not apply because *Chevron* deference is a rule of interpretation rather than a substantive holding.
- Petitioners argue that the Constitution provides that the judiciary determines what the law is, citing *Marbury v. Madison*.
- APA Section 706 provides that “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” *Chevron* did not even cite the APA.
- The Government argues that *Chevron* gives weight to the expertise of federal agencies and promotes national uniformity and greater political accountability.
- The Government emphasizes *stare decisis*.

Oral Arguments – January 17, 2024

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Oral Arguments – January 17, 2024

- Three justices defend Chevron doctrine: Sotomayor, Kagan, Jackson
- Three justices indicate hostility to the doctrine: Thomas, Gorsuch, Kavanaugh
- Three justices' views not clearly expressed: Roberts, Alito, Barrett



Potential Outcomes

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Potential Outcome: Discarding *Chevron*

- Eliminating *Chevron* Doctrine
 - Revert to rule set forth in *Skidmore v. Swift & Co.*
 - Credits agency's interpretation of statute only if it has power to persuade
 - Court exercises independent judgment in interpreting federal statute
 - May consider agency's interpretation as one potential interpretation
 - No deference to agency's reading required
 - Could open floodgates of litigation challenging previously issued regulations

Potential Outcome: Adopting the *Kisor* Approach

- Adopting the *Kisor* Approach
 - *Auer* deference is used to defer to an agency's interpretation of its own regulations
 - In *Kisor*, the Court cut back on *Auer* deference but did not overrule it entirely.
- Limiting *Chevron*'s Reach
 - Implement a more rigorous approach to *Chevron* "Step One"
 - Strengthen *Chevron* "Step Two"
 - Limit application to statutes with express authorization
 - Withhold application where Congress did not intend it

Potential Outcome: Keeping *Chevron* Intact

- Possibility of Keeping *Chevron* Intact
 - Only four justices needed to grant *certiorari*
 - The Court may apply *Chevron* Step One to resolve the cases
 - Issue of *Chevron's* viability may be left for another day

Impact on Litigation

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Impacted Litigation

- Civil Enforcement Actions

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- Administrative Procedure Act Rulemaking Challenges

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- Affirmative Lawsuits
 - Declaratory Judgment Actions
 - Breach of Contract Claims

Industry Specific Examples

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Maritime

- The Oil Pollution Act and the Comprehensive Environmental Response, Compensation, and Liability Act have different remedies available to address an oil spill.
- OPA provides a private cause of action for economic losses; CERCLA only permits recovery of clean-up costs.
- The US Court of Appeals for the Fifth Circuit recently gave deference under *Chevron* to the US Coast Guard's determination of which statute applies, eliminating the private right of action permitted by OPA.

Aviation

- The Department of Transportation’s authority to define what constitutes an “unfair and deceptive practice.” There is a petition for review pending before the U.S. Court of Appeals for the Fifth Circuit.
- National Transportation Safety Board has established its processes for handling investigations and claims it has sole authority to establish those processes. Plaintiffs may seek to challenge.

Education

- US Department of Education issued new Title IX regulations
 - Effective August 1, 2024
- Addresses protections against sex-based harassment and discrimination, the process to be followed for complaints, and protections against retaliation
- In April 2024, three separate lawsuits were filed
 - Primarily an APA rulemaking challenge

Infrastructure

- Numerous questions under the Federal Power Act, Natural Gas Act, and National Environmental Policy Act
- Federal Energy Regulatory Commission procedures such as for environmental reviews and cost allocation for regional transmission grid expansions
- What the agency considers “just and reasonable” or in the “public interest”

Environmental

- Council on Environmental Quality has issued Phase 2 regulations under National Environmental Policy Act (NEPA) require the analysis of “reasonably foreseeable environmental trends, including anticipated climate-related changes to the environment.” May be more likely to be changed.
- EPA’s new greenhouse gas power plant rule may be challenged.
- Section 410 of the Clean Water Act provides parameters on water quality before permits or licenses can be issued for activities that would result in discharge into the waters. Altered between administrations and has been challenged in the past.

Real Estate

- U.S. Department of Housing and Urban Development issues guidance espousing its interpretation of the Fair Housing Act on issues including marketing, screening, and design and construction issues
 - Files lawsuits based on that guidance
- Local zoning ordinances often grant deference to the officials in a manner similar to *Chevron* deference.
- Privacy laws, telecommunication regulations, and environmental statutory changes could be implicated.

Financial Services

- Consumer Financial Protection Bureau
- Federal Trade Commission
- Fair Lending laws (Equal Credit Opportunity Act and Fair Housing Act)
- Use of consumer data (such as what constitutes a credit report under the Fair Credit Reporting Act)
- Regulations regarding Deceptive, Junk, or Recurring Fees

Healthcare

- What coding by Centers for Medicare & Medicaid Services (CMS) is appropriate for reimbursement under the Medicare Act
- Whether a product would be considered to be a medical device by the US Food and Drug Administration
- What studies and testing would be required for a particular product in order to receive FDA approval
- Interagency authority issues such as DEA, HHS, FDA and DOJ stance regarding the rescheduling of cannabis

Legislative and Regulatory Impact

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Political

- Chevron's history as Deregulatory and Regulatory
- Shift in Conservative Support since Chevron's inception
- The impacts of Chevron in a Trump vs Biden Administration

Congressional Considerations

- Changes in the drafting process
- Need for more expertise and assistance
- Adding new challenges to already difficult negotiations
- Increased importance of findings, policy, and intent

Regulatory Agencies

- Agencies will need to tie authorities closer to statutory text
- Agencies will have to change their approach with Congress
- Interested parties will have to ensure understanding of the new landscape

States Taking Action

- Changes to Chevron can fuel Washington dysfunction
- States fill the void when Washington doesn't act
- Red State vs Blue State regulatory divide

Questions?

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