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Is *Chevron* Deference Really a Big Deal?

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Chevron v. Natural Resource Defense Council (1984)

- EPA promulgated Clean Air Act regulations in October 1981 governing "stationary sources" in nonattainment areas.
  - NRDC challenged the rule, arguing it was contrary to Section 113 of the CAA because it narrowly interpreted the word "source."
- The D.C. Circuit set aside the regulations after determining that the CAA "does not explicitly define what Congress envisioned as a stationary source" for permitting purposes.
- EPA appealed and the Supreme Court developed a two-part test for evaluating agency construction of statutes:
  - Step one: The Court examines the wording and the context of the statute to see if Congress' intent is clear. If it is, then the matter is settled: The agency is obliged to follow the letter of the law.
  - Step 2: If the statutory language is ambiguous — i.e., has two or more reasonable interpretations — the Court must defer to the agency's choice in how to carry out the law.

Chevron v. Natural Resource Defense Council (1984)

- “Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. 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 -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”
- “We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.”

Key Impacts of *Chevron*

- Rulemaking
  - Empowered federal agencies to issue rules consistent with their interpretations of federal statutes
- Informal adjudications (w/o notice and comment)
- Strategy of regulated community

Key Impacts of *Chevron*

- Did it matter?
  - During last 40 years, *Chevron* has been applied in more than 15,000 cases nationwide
  - Analysis of cases from 2003 to 2013 found agencies won almost 80% of cases where *Chevon* was applied
    - 70% of the cases where *Chevron* was applied went to Step 2
  - Percentage of wins went down to 53% when other precedent is applied (*Skidmore)*
  - Percentage of wins even lower (to 38.5%) when de novo review was undertaken
  - The analysis in EPA cases varied slightly from overall trends: *Chevron* was applied in almost 90% of cases, but the win rate was 67% when applied

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Loper Bright et al. v. Dept. of Commerce (2024)

- Two consolidated cases: Loper Bright (D.C. Circuit) and Relentless Inc. (1st Cir), both challenging the Dept. of Commerce's authority under the Magnuson-Stevens Fishery Conservation and Management Act (MSA)
  - In *Loper*, the petitioners operate family businesses in the Atlantic herring fishery.
    - The lower court found that the MSA authorized the rule, but even if it did not, deference would be warranted under *Chevron*.
    - On appeal, the D.C. Circuit Court of Appeals affirmed this holding, though it found that the statute was not wholly ambiguous, so it moved to step 2 and deferred to the agency's interpretation.
  - In *Relentless Inc.,* the petitioners operate a vessel in the Atlantic herring fishery.
    - The lower court utilized *Chevron* deference in upholding the agency's position.
    - The First Circuit Court of Appeals affirmed, again using *Chevron* deference.
- Supreme Court holding: "The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and ***courts may not defer to an agency interpretation of the law simply because a statute is ambiguous***; Chevron is overruled."

Loper Bright et al. v. Dept. of Commerce (2024)

- "Congress expects courts to handle technical statutory questions" – and courts have the benefit of briefing from the parties and "friends of the court."
- *Skidmore v. Swift & Co.* (1944): allowed interpretations and opinions of relevant agencies made in pursuance of official duty and based on their specialized experience to be used *as guidance*, noting that the weight of such guidance is dependent upon the thoroughness of the agency's consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements.
- In addition, the Court appeared cognizant that Chevron has been the basis for hundreds of court decisions at many levels and on many issues. It explicitly held that its Opinion does not call into question cases that relied on the Chevron doctrine. The Court is clear that those cases, including Chevron itself, are lawful and are not hereby overturned despite the change in interpretative methodology.

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Is *Loper Bright* Really that Different?

Chevron	*Loper Bright*
Judges are not experts in the field, and are not part of either political branch of the Government.	Congress expects courts to handle technical statutory questions
An agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. 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	Chevron's presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment.
We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer	The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous

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Now What – Missouri

- Impact in Missouri
  - Never adopted *Chevron*, but has said *Chevron*-ish things over time
  - Ambiguous statutes (and rules) still exist

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Now What – Federal

- Significant CWA rules in litigation
  - WOTUS definition
  - CWA Section 401 Certification
  - (CERCLA PFAS rule)
- Impact on pending federal cases
  - D.C. Circuit has reopened multiple EPA cases
  - 28j letters pending in multiple others
  - Permitting cases (TMDL implementation, use of narrative permit limits)

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Now What – Federal

- Practical impacts
  - Uncertainty
  - Delay
  - Forum shopping
  - Litigation:
    - Government response – government considers litigation differently than most private parties
    - Burden of proof in litigation

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What Can Regulated Entities Do?

What can you do?
Encourage precise legislation :)
Participate in rulemakings (and raise statutory construction issues)
Request a rule
Keep in contact with regulators
Keep apprised of litigation
Litigation
Plan (but not that planning – expectation setting)
Patience
Buckle up

Any Questions

Thank You

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