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Chevron Deference: Court Treatment of Agency Interpretations of Ambiguous Statutes

Daniel T. Shedd
Legislative Attorney

Todd Garvey
Legislative Attorney

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Summary

An administrative agency may generally only exercise that authority which is provided to it by Congress. Often, however, congressional delegations of authority are imprecise, and, as a result, agencies must construe ambiguous terms and make interpretive decisions in order to implement Congress's delegation. The Supreme Court, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, outlined a limited role for courts in reviewing these types of agency interpretations. The now famous "*Chevron* two-step" test has been arguably the most important pillar of administrative law since the decision was handed down in 1984.

When evaluating whether an agency's interpretation of a statute is valid a court must first look to the language of the statute. If the statutory language is clear, the test stops—the agency must follow, and the court must enforce, the clear and unambiguous commands that Congress provides through statute. However, if a court determines that the statutory language is "silent or ambiguous," then the court may proceed to step two of the *Chevron* test. Step two requires a reviewing court to determine whether the agency's interpretation "is based on a permissible construction of the statute." The Supreme Court noted that a reviewing court should not impose its own construction of a statute in place of a reasonable interpretation provided by the agency, but should grant the agency's interpretation deference under step two of the *Chevron* test.

Recently the Supreme Court ruled on the scope of *Chevron* deference in *City of Arlington v. FCC*. The Court established that a court must provide an agency with *Chevron* deference even when the agency is determining the scope of its own jurisdiction to take regulatory action under a statute.

This report will discuss the *Chevron* decision; explain when *Chevron* deference applies; highlight common agency statutory interpretations that generally do not receive deference under *Chevron*; and review the recent Supreme Court opinion in *City of Arlington v. FCC* which clarified the applicability of *Chevron* deference to circumstances in which an agency is interpreting the scope of its own jurisdiction.

Contents

Contacts

Introduction

An administrative agency may generally only exercise that authority which is provided to it by Congress.[1] Often, however, congressional delegations of authority are imprecise, and, as a result, agencies must construe ambiguous terms and make interpretive decisions in order to implement Congress's delegation.[2] The Supreme Court, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[3] outlined a limited role for courts in reviewing these types of agency interpretations. The *Chevron* test, which has been cited and followed thousands of times by federal courts since 1984,[4] requires courts to enforce the clearly expressed intent of Congress. In the absence of such clarity, *Chevron* instructs reviewing courts to defer to an agency's construction of an ambiguous statute if the agency's interpretation is reasonable.[5] Under *Chevron* then, it is generally left to federal agencies, and not the courts, to resolve ambiguities necessary to interpret and implement authority provided to the agency by Congress. This report will discuss the *Chevron* decision; explain when *Chevron* deference applies; highlight common agency statutory interpretations that generally do not receive deference under *Chevron*; and review the recent Supreme Court opinion in *City of Arlington v. FCC*[6] which clarified the applicability of *Chevron* deference to circumstances in which an agency is interpreting the scope of its own jurisdiction.

Chevron U.S.A., Inc. v. Natural Resources Defense Council

Background

In 1970, amendments to the Clean Air Act (CAA) established a federal-state program to abate air pollution. The statute called for the Environmental Protection Agency (EPA) to promulgate national ambient air quality standards (NAAQS) for certain air pollutants, and required the states to establish state implementation plans (SIPs) that would allow them to attain the air quality requirements established by the NAAQS.[7]

[1] Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act ... unless and until Congress confers power upon it.").

[2] This report discusses agency interpretations of ambiguous statutes; for a report regarding court treatment of agency interpretations of ambiguous regulations, see CRS Report R43153, *Seminole Rock Deference: Court Treatment of Agency Interpretation of Ambiguous Regulations*, by Daniel T. Shedd.

[3] Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[4] Stephen G. Breyer et al., ADMINISTRATIVE LAW AND REGULATORY POLICY 247 (2006) ("In a remarkably short period, *Chevron* ... may have become the most frequently cited case of all time. As of December 2005, *Chevron* had been cited in federal courts nearly 8000 times—far more than three far better known and much older cases, Brown v. Board of Education (1829 cites), Roe v. Wade (1801 cites), and Marbury v. Madison (1559 cites).").

[5] *Chevron*, 467 U.S. at 842-43.

[6] City of Arlington v. FCC, No. 11-1545, slip op. (May 20, 2013).

[7] Clean Air Amendments of 1970, P.L. 91-604, 84 Stat. 1676.

In 1977, Congress amended the CAA in order to impose certain requirements on states that had failed to achieve the national air quality standards promulgated by the EPA.[8] The amendments required states that had not attained the established air standards to implement a permit program that would regulate "new or modified major stationary sources" of air pollution.[9] A permit could not be granted for any new or modified major stationary source unless certain strict conditions were satisfied.[10] A permit would not be necessary, however, if a modification would not result in an increase in air pollutant emissions.[11]

Under regulations promulgated by the EPA, a "stationary source" was not defined as an individual piece of equipment (e.g., a smokestack), but rather as the entire plant where many pollutant-producing structures may be located. The EPA, therefore, treated numerous pollution-creating structures collectively as a single "stationary source," if those structures were part of the same larger facility or complex.[12] This concept was commonly referred to as "bubbling."[13] With this regulation in force, a facility could modify or construct new pollution-emitting structures as long as the stationary source—the facility as a whole—did not increase its pollution emissions. The Natural Resources Defense Council (NRDC), an environmental advocacy group, opposed the EPA's definition of "stationary source" and filed a legal challenge to the agency's regulations.

The NRDC sued the Administrator of the EPA in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), seeking review of the EPA's interpretation of the Clean Air Act Amendments of 1977.[14] The NRDC argued that the EPA's interpretation of "stationary source" was impermissible—that is, that the EPA had to treat all individual pieces of equipment (e.g., each smokestack) as a "stationary source."[15] Chevron U.S.A., Inc., and other industry groups were granted leave to intervene and argue in support of the EPA's position.

In an opinion written by then Circuit Judge Ruth Bader Ginsburg, the D.C. Circuit agreed with the NRDC and set aside the EPA regulations. The D.C. Circuit noted that the CAA "does not explicitly define what Congress envisioned as a 'stationary source,' to which the permit program ... should apply" and found that the issue was not clearly addressed in the legislative history.[16] Without clear text or intent from Congress, the D.C. Circuit determined that "the purposes of the non-attainment program should guide" the court's decision.[17] The court ruled that the purpose of the nonattainment program was to expeditiously improve air quality, and that the "bubbling" concept applied by the EPA merely promoted the maintenance of current air quality standards by

[8] Clean Air Act Amendments of 1977, P.L. 95-95, 91 Stat. 685.

[9] *Id.*

[10] *Chevron*, 467 U.S. at 840.

[11] *See* NRDC v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982).

[12] The EPA's regulations read as follows: "(i) 'Stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act. (ii) 'Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person ..." 40 C.F.R. §§51.18(j)(1)(i) and (ii) (1983).

[13] *See Chevron*, 467 U.S. at 840.

[14] NRDC v. Gorsuch, 685 F.2d 718.

[15] *See id.* at 720 ("The controversy centers on the appropriate definition of the word 'source' for the purpose of implementing the statutory scheme.").

[16] *Id.* at 723.

[17] *Id.* at 726.

allowing the industry to avoid the permit process with offsets when it creates new or modifies existing pollution-emitting equipment.[18] Chevron U.S.A., Inc., an intervenor, petitioned the Supreme Court for certiorari.

The Supreme Court and *Chevron*

The Supreme Court, in an opinion by Justice John Paul Stevens, unanimously reversed the D.C. Circuit decision by a vote of 6-0.[19] The Court noted that "[t]he basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that decision."[20] In so ruling, the Court established that it is not the judiciary's place to establish a controlling interpretation of a statute delegating authority to an agency, but, rather, it is the *agency's* job to "fill any gap left, implicitly or explicitly, by Congress."[21] The Court noted that because Congress has expressly delegated to the administrative agency the authority to interpret the statute through regulation, a judge must not substitute his own interpretation of the statute in question when the agency has provided a permissible construction of the statute.[22]

In reaching its decision, the Supreme Court established a two-part test, commonly referred to as the *Chevron* two-step, to be applied when a court is reviewing an agency's statutory interpretation. The Court announced:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[23]

The Court then proceeded to apply the test to the facts of the immediate case. First, the Court had to determine whether Congress had spoken clearly on the question at issue or if the statutory provisions were ambiguous. During the rulemaking process, the EPA explained that the definition of "source" was not fully addressed in the statute or the legislative history.[24] The Court agreed, stating that "the language of [the statute] simply does not compel any given interpretation of the term 'source.'"[25] Furthermore, the legislative history associated with the CAA amendments was "silent on the precise issue."[26] The Court noted that the statutory language and the legislative history, instead of being clear, evinced the notion that the EPA should balance the objective of

[18] *Id.* at 726-28.

[19] *See Chevron*, 467 U.S. 837. Justices O'Connor, Rehnquist, and Marshall took no part in the decision of the case.

[20] *Id.* at 842.

[21] *Id.* at 843.

[22] *Id.* at 843-44.

[23] *Id.* at 842-43.

[24] *Id.* at 858.

[25] *Id.* at 860.

[26] *Id.* at 862.

allowing continued economic growth in nonattainment areas with the objective of decreasing pollution emissions. Having concluded that the provision in question was sufficiently ambiguous, the Court moved on to step two, evaluating whether the statutory construction provided by the agency was "permissible."

In its proposed and final rulemaking, the EPA noted that adopting an individualized equipment definition of "source" could disincentivize the modernization of plants, if industry had to go through the permitting process to create changes.[27] Therefore, the EPA believed that adopting the plantwide definition of "source" could result in reduced pollution emissions.[28] Considering the statute's competing objectives of permitting economic growth and reducing pollution emissions, the Court stated that "the plantwide definition is fully consistent with one of those concerns—the allowance of reasonable economic growth—and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well."[29] The Court upheld the EPA's definition of the term "stationary source" and reversed the D.C. Circuit's judgment.[30] It noted that "the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."[31]

Judicial Justifications for *Chevron* Deference

The Supreme Court elucidated several reasons for favoring a restrained judicial role while granting deference to an agency interpretation of an ambiguous statute. First, the Court noted that when Congress enacts an ambiguous statutory delegation, it has, in effect, delegated to the agency it has empowered the authority to clarify the ambiguity.[32] Congress made a conscious choice in selecting a specific agency to implement the statutory delegation, and the courts, the Supreme Court reasoned, should respect Congress's decision by granting the agency the ability to interpret the statute Congress has charged it with administering. Moreover, the Court noted that interpreting a statutory ambiguity is akin to making a policy decision on how to implement a statutory program. Agencies and legislators are best suited to balance applicable considerations and to resolve debates regarding competing, acceptable interpretations of an ambiguous delegation.[33]

Second, agencies have technical expertise in the field in which they are acting, and are therefore in a better position to make appropriate policy decisions as part of a large and complex regulatory scheme. Courts, on the other hand, lack such expertise. In *Chevron*, the Court specifically acknowledged that "judges are not experts in the field," and thus "may not substitute [their] own

[27] *Id.* at 858.

[28] *Id.*

[29] *Id.* at 863.

[30] *Id.* at 866.

[31] *Id.* at 865.

[32] *Id.* at 843-44. When Congress leaves "a gap" in a statutory delegation, "there is an express delegation of authority to the agency to elucidate" that provision.

[33] *Id.* at 864 ("Such policy arguments are more properly addressed to legislators or administrators, not to judges.").

construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[34]

Finally, administrative agencies are politically accountable—though not directly—through the democratic process.[35] Although courts are called to reconcile political preferences in certain circumstances, they should not do so when the power to implement the statute has been delegated to an administrative agency. The Court noted that an Administration has the authority to implement its policy judgments through the permissible interpretation of a statute.[36] If the agency's, and by extension the Administration's, permissible construction of a statute is undesirable, the electorate may have its voice heard through the democratic process.

A Closer Look at the *Chevron* Two-Step

The *Chevron* two-step test can be summarized as follows: First, if Congress has spoken clearly on an issue, the express words of the statute must be followed—the agency cannot deviate from the statutory text. However, if the statute is ambiguous or silent, the Court must determine whether the agency's construction of the statute is "permissible." This test is a deferential standard for judicial review. A reviewing court shall not determine whether the agency's construction is the most obvious or the best interpretation of the statute in question, but, instead, must yield to the agency's construction if it is merely a "permissible" reading of the statute. Some scholars have noted that the significance of this decision cannot be underestimated, arguing that it created a "counter-*Marbury* for the administrative state" because "*Chevron* seemed to declare that in the face of ambiguity, it is emphatically the province and duty of the *administrative* department to say what the law is."[37] In order to understand the broad implications of the *Chevron* test, the following sections take a closer look at the application of the test as it has evolved since the *Chevron* decision.

Chevron Step One

As previously mentioned, the first step of the *Chevron* test requires a court to determine whether Congress has clearly spoken on the issue in question. How should courts review statutory language to determine whether Congress has been clear? The Supreme Court, in a footnote, established that courts should use the "traditional tools of statutory construction" in order to ascertain whether "Congress had an intention on the precise question at issue."[38]

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[34] *Id.* at 844, 865.

[35] *Id*. at 865-66.

[36] *Id*. ("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.").

[37] Cass Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 189 (2006).

[38] *Chevron*, 467 U.S. at 843 n. 9. According to the American Bar Association's (ABA's) black letter statement of administrative law, "Step one of *Chevron* does not dictate that courts use any particular method of statutory interpretation. However, the court should use 'the traditional tools of statutory construction' to determine whether the meaning of the statute is clear with respect to the precise issue before it. For most judges, these tools include examination of the text of the statute, dictionary definitions, canons of construction, statutory structure, legislative purpose, and legislative history." Section of Administrative Law & Regulatory Practice, American Bar Ass'n, *A*
(continued...)

Courts will use the structure of a statute to determine whether other sections of an act inform how the statutory provision in question should be evaluated. Courts routinely use dictionaries to help ascertain the meaning of statutory language. The purpose of the legislation (e.g., to reduce air pollution) can also be helpful in determining whether Congress has spoken clearly on an issue.[39] However, it is worth noting that the use of legislative history as a means of statutory interpretation has been a controversial subject.[40] The debate over the use of legislative history in *Chevron* step one stems from a much broader doctrinal debate between judges who believe legislative intent should be used to interpret statutes and judges who believe that the text of a statute is the only reliable means of determining a statute's meaning. However, it is common practice to consider legislative history during the first step of the *Chevron* test.[41]

Some commentators note that because step two of the *Chevron* test provides substantial deference to an agency's interpretation, successful challenges to an agency interpretation are typically won at step one of the *Chevron* test.[42]

Chevron Step Two

If a court determines that the statutory language is ambiguous or silent on the particular issue in question, the court must then consider whether the agency's construction of the statute is a "permissible" one. If the court determines that it is, then it must give controlling effect to the agency's interpretation. In other words, the court must defer to the agency's interpretation unless that interpretation is unreasonable. This deference has led most courts to rule in favor of an agency's interpretation once the analysis of an agency interpretation reaches step two.[43]

It is important to note that a court must defer to the agency's interpretation even if it is not the meaning that the court would give to the statute. The court is not permitted to substitute its own judgment for that of the agency's if the agency's interpretation is allowed by the statute. The Court stated, in *Chevron*, that "the court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[44]

However, the Supreme Court has provided little guidance as to how a court should evaluate whether the agency's interpretation is "permissible" or "reasonable" under *Chevron* step two. Oftentimes, in order to discern whether the agency's interpretation is reasonable, a court will consider whether the agency's position comports with the overall purpose and goal of the statute

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(...continued)

Blackletter Statement of Federal Administrative Law, 54 ADMIN L. REV. 1, 44 (2002).

[39] A complete analysis of the canon of statutory construction is beyond the scope of this report. For a detailed review of statutory interpretation, please see CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig.

[40] For a discussion of the debate over the permissible tools of statutory interpretation in the *Chevron* test, see CRS Report R41260, *The Jurisprudence of Justice John Paul Stevens: The Chevron Doctrine*, by Todd Garvey.

[41] John F. Duffy & Michael Herz, A GUIDE TO POLITICAL AND JUDICIAL REVIEW OF FEDERAL AGENCIES 63 (2005) ("most judges will consider legislative history at step one").

[42] *See, e.g.*, Jeffrey S. Lubbers, A GUIDE TO FEDERAL AGENCY RULEMAKING 494 (2006).

[43] *See* Orrin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998).

[44] *Chevron*, 467 U.S. at 843 n.11.

in question. For example, in *Chevron*, the Supreme Court noted that the agency's interpretation "of the term 'source' is a permissible construction of the statute" in light of the statute's goals "to accommodate progress in reducing air pollution with economic growth."[45] The Seventh Circuit has suggested that because the statute is necessarily ambiguous when a court reaches step two of the *Chevron* test, "about all the court can do is determine whether the agency's action is rationally related to the objectives of the statute containing the delegation."[46]

Many courts take this approach for evaluating whether the agency's interpretation is permissible under the statute. For example, in *Natural Resources Defense Council, Inc. v. EPA*, the D.C. Circuit noted that, under step two of *Chevron*, "the agency's interpretation must be sustained if it is reasonable in light of the language, legislative history, and policies of the statute."[47] In that case, the D.C. Circuit upheld an EPA regulation concerning the Clean Water Act, noting that "[w]e are persuaded that EPA's reading of the statute, while not the only plausible one, is reasonable."[48] First, the court noted that the language of the statute was "confusing."[49] Then, at step two of the *Chevron* test, the court determined that, given the overarching goals of the Clean Water Act, the EPA's regulation "reasonably balances and resolves the competing Congressional goals reflected in the provision."[50] At step two, the court looked at the agency interpretation and compared it with the overarching policy objectives of the statute to determine that the agency's construction was a permissible interpretation of the ambiguous statutory provision.

Kennecott Utah Copper Corp. v. United States Department of the Interior provides another example of this approach to *Chevron* step two.[51] The Department of the Interior promulgated regulations concerning when the statute of limitations for damages for certain oil spills would begin to run.[52] The statute provided that the statute of limitations began on the date that the agency "promulgated" its rules.[53] The court thus had to consider the point at which a rule is considered "promulgated." Does it occur when the agency announces the rule? Or does it occur after the rule has been finalized and all judicial proceedings regarding the rulemaking have been concluded? The agency interpreted the provision to mean the latter of the two competing possibilities, which would allow the agency to extend the time that businesses would be exposed to potential damages.[54] In this case, the court determined at step one that the term "promulgated" was indeed ambiguous.[55] However, at step two, the court determined that the agency's construction was "not a reasonable interpretation of the statute, viewed with an eye to its structure and purposes."[56] The court determined that Congress did not intend to allow the agency to prolong the limitations period for damages because the limitation provision was included to

[45] *Id.* at 866.

[46] Mueller v. Reich, 54 F.3d 438, 442 (7th Cir. 1995).

[47] Natural Resources Defense Council, Inc. v. EPA, 822 F.2d 104, 111 (D.C. Cir. 1987).

[48] *Id.* at 117.

[49] *Id.*

[50] *Id.*

[51] 88 F.3d 1191 (D.C. Cir. 1996).

[52] *Id.* at 1209.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 1211 ("This ambiguity is sufficient to preclude our disposition of this case pursuant to *Chevron* step one.").

[56] *Id.* at 1213.

ensure that industry did not have to worry about being brought to court for actions taken in the past.[57]

Although the Supreme Court has never specifically stated how the test should proceed, many lower courts and scholars note that the second step of *Chevron* tends to conflate with arbitrary and capricious review under the Administrative Procedure Act (APA). The D.C. Circuit, which hears a substantial number of administrative law cases, has noted on numerous occasions that the two tests "overlap at the margins."[58] Indeed, under an arbitrary and capricious review, an agency must show that the agency's policy decision is rationally related to the statute's policy goals, and that the decision comports with the structure of the statute.[59] As noted above, this approach seems helpful for determining whether the agency's interpretation is a reasonable construction of an ambiguous statutory provision. Some courts have thus held that an agency rule fails under *Chevron* step two if it would fail the Supreme Court's arbitrary and capricious test from *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company* (*State Farm*).[60]

Some scholars suggest that courts should universally treat *Chevron* step two as an analysis under the *State Farm* test.[61] However, the two tests are not necessarily identical. Under *State Farm* and its progeny, an agency must show not only that its decision is rationally related to the statute's purpose and objective, but also that it developed a proper record, considered the necessary facts, and considered possible alternatives when reaching its policy decision.[62] The agency must also show that the policy decision is rationally related to the facts established by the record.[63] These portions of the arbitrary and capricious test examine the agency's decision-making process, rather than whether the final decision would be prohibited by the terms of the statute, which is the ultimate goal of the *Chevron* inquiry.

[57] *Id.* at 1211-13.

[58] *See, e.g.*, Animal Legal Defense Fund, Inc. v. Glickman, 204 F.3d 229, 234 (D.C. Cir. 2000); Independent Petroleum Ass'n of Am. v. Babbitt, 92 F.3d 1248, 1258 (D.C. Cir. 1996) ("As we have noted in the past, *Chevron* and arbitrary and capricious review overlap ... we stress that, within the boundaries of this case, a determination that the Assistant Secretary's decision is arbitrary and capricious ... is functionally equivalent to a determination that [the agency's] interpretation ... is unreasonable under *Chevron*.") (internal quotations omitted).

[59] *See, e.g.*, Verizon Communications, Inc. v. FCC, 535 U.S. 467, 542 (2002) (Breyer, J., concurring in part and dissenting in part) (noting that *State Farm* requires agencies "to show a rational connection between the regulations and the statute's purposes") (internal quotations omitted).

[60] 463 U.S. 29 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.").

[61] *See, e.g.*, Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE §3.6 (2010); Ronald M. Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 Chi-Kent L. Rev. 1253 (1997).

[62] *See State Farm*, 463 U.S. at 43, 46-48; *Verizon Communications, Inc.*, 535 U.S. at 542.

[63] *State Farm*, 463 U.S. at 43.

Threshold Limitations on What Interpretations Qualify for *Chevron* Deference

The Supreme Court has imposed a number of important limitations on the *types* of agency interpretations that, as a threshold matter, qualify for *Chevron* deference. Two such limitations are discussed in detail below.[64]

First, the *Chevron* decision made clear that a court need only accord deference to an agency interpretation of a statute the agency "administers."[65] This limitation was due in part to the fact that an agency develops greater expertise with respect to policy areas and statutes that it specifically administers and implements, and because Congress chose to delegate authority in the area to that specific agency.[66] However, these underlying justifications for *Chevron* deference generally do not apply to statutes regarding the federal bureaucracy more broadly. Agency interpretations of statutes that apply to all, or many agencies, and are not administered by any one specific agency, will generally not be accorded deference under *Chevron*.[67] This includes agency interpretations of statutes such as the APA, the Freedom of Information Act, the National Environmental Policy Act, and other widely applicable statutes.

Second, the Court has also held that only interpretations arrived at through certain procedures qualify for *Chevron* deference. In *Christensen v. Harris County*, the Court held that interpretations reached through nonlegislative rules, such as opinion letters, guidance documents, policy statements, interpretive documents, and agency manuals, do not qualify for *Chevron* deference.[68] The Court drew a distinction between interpretations reached in formal adjudications and notice-and-comment rulemaking, which warrant deference, and informal agency interpretations lacking the "force of law," which do not.[69] Thus, the thoroughness of the procedures employed by the agency in reaching its interpretation may determine whether deference is accorded to the agency conclusion.

The Court elaborated on the principle established in *Christensen* in *United States v. Mead Corp*. In *Mead*, the Court held that a U.S. Customs Service letter ruling was not entitled to *Chevron* deference.[70] In reaching that conclusion, the Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the *force of law*, and that the

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[64] The Court has identified other types of statutory interpretations that do not qualify for *Chevron* deference. *See, e.g.*, Miller v. Johnson, 515 U.S. 900 (1995) (interpretations involving significant constitutional issues); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) (agency litigation interpretations).

[65] *Chevron*, 467 U.S. at 842 ("When a court reviews an agency's construction of the statute *which it administers* ...") (emphasis added).

[66] *Id*. at 865 ("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.").

[67] *See, e.g.*, Prof'l Reactor Operator Soc'y v. NRC, 939 F.2d 1047 (D.C. Cir. 1991).

[68] 529 U.S. 576 (2000).

[69] *Id*. at 587 ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

[70] United States v. Mead Corp., 533 U.S. 218 (2001).

agency interpretation claiming deference was *promulgated in the exercise of that authority*."[71] *Mead* established that the applicability of *Chevron* deference would turn not only on the process through which the agency adopted its interpretation, but also the extent to which Congress had intended to delegate authority to the agency to reach definitive interpretations. *Mead* further suggested that an agency interpretation need not necessarily be reached by notice-and-comment rulemaking or formal adjudication in order to receive *Chevron* deference. An agency could show the necessary delegation of authority "in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, *or by some other indication of a comparable congressional intent*."[72]

The "force of law" standard from *Mead* has not been clearly articulated. In *Mead* itself, the majority noted that the determination was not simply whether the interpretation was made via rulemaking, "for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."[73] To further obfuscate the threshold question, the Court has also identified a number of additional factors to be considered in determining whether a specific interpretive process is one that qualifies for *Chevron* deference. In *Barnhart v. Walton*, for example, the Court referenced the importance of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the agency has given the question over a long period of time."[74] Given the confusion associated with the *Mead* standard, Justice Scalia, who has opposed the additional threshold layer imposed by *Mead* and its progeny, has argued in dissent that the Court will be "sorting out the consequence of the *Mead* doctrine ... for years to come."[75]

An Agency's Interpretation of Its Own Jurisdiction: *City of Arlington v. FCC*

The Supreme Court recently clarified a long-running dispute over whether an agency's interpretation of the reach of its own jurisdiction (i.e., its power to act) is a type of interpretation that qualifies for *Chevron* deference. In *City of Arlington v. FCC*, the Court held that agency jurisdictional determinations, like other statutory interpretations, do indeed warrant deference under *Chevron*.[76]

At issue in the case was the Federal Communications Commission's (FCC's) declaratory ruling that clarified a provision from the Telecommunications Act of 1996 (TCA).[77] Although the TCA

[71] *Id*. at 226-27 (emphasis added).

[72] *Id.* at 227. *See also* National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967 (2005) (Breyer, J., concurring) ("It is not surprising that the Court would hold that the existence of a formal rulemaking proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference to an agency's interpretation of a statute. It is not a necessary condition because an agency might arrive at an authoritative interpretation of a congressional enactment in other ways, including ways that Justice Scalia mentions. It is not a sufficient condition because Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation, say, where an unusually basic legal question is at issue.") (citations omitted).

[73] *Mead*, 533 U.S. at 231.

[74] 535 U.S. 212, 222 (2002).

[75] *Mead*, 533 U.S. at 239 (Scalia, J., dissenting).

[76] City of Arlington v. FCC, No. 11-1545, slip op. at 1 (May 20, 2013).

[77] *Id.* at 3.

establishes certain requirements and procedures for submitting applications for the siting of wireless service facilities, most of the authority over siting remains with state and local governments.[78] However, the act provides that a state or local government must act on a siting application "within a reasonable period of time after the request is duly filed."[79] In order to clarify this provision, the FCC, after notice and comment, promulgated a declaratory ruling that specified the number of days that is presumptively "reasonable" for a state or local government to make a determination on a siting application.[80] The city of Arlington sued the FCC, challenging the agency's authority to establish a specific and binding interpretation of the TCA provision. The issue before the Supreme Court was not whether the established deadline is reasonable, but whether the agency has the authority under the statute to issue the declaratory ruling at all.[81]

The city of Arlington argued that *Chevron* should not apply when an agency is determining the scope of its authority to take an action under a statute, noting that this is a "pure legal issue" that "does not touch on the agency's specialized or technical expertise."[82] For example, in *Chevron*, there was no question that the EPA had the authority to create rules pertaining to stationary sources; the only question was whether the agency's interpretation of what "source" meant was acceptable under the statute. In *City of Arlington*, the question was whether the FCC had the authority to interpret the phrase "reasonable period of time" at all, or whether this issue was supposed to be in the purview of the states that act on the siting permits. The city of Arlington called for the Court to review the question *de novo*, because providing an agency with deference for jurisdictional questions could invite an agency to assume more power than Congress intended to delegate.[83]

However, the Court did not agree. Justice Scalia, writing for five Justices, declared that the "distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage."[84] Instead, Justice Scalia noted that whenever a court faces a case concerning an agency's interpretation of a statute it administers, the question is "always, simply, *whether the agency has stayed within the bounds of its statutory authority*."[85] According to the Court, the appropriate way to answer this question is by applying the now famous "*Chevron* two-step" test.[86] If the statute is ambiguous, and the agency's interpretation is permissible, the agency's interpretation must stand.[87] Courts, according to Justice Scalia, "should not waste their time in the mental acrobatics needed to decide whether an agency's interpretation of a statutory provision is 'jurisdictional' or 'nonjurisdictional.'"[88] The opinion also noted that all questions of agency interpretation could be framed as jurisdictional questions, and that allowing such a distinction would permit "[s]avvy

[78] *Id.* at 2-3.

[79] *Id.* at 2.

[80] Federal Communication Commission, Declaratory Ruling, WT Docket No. 08-165, November 18, 2009, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-99A1.pdf.

[81] *See City of Arlington*, No. 11-1545, slip op.

[82] Brief for Petitioner at 17 City of Arlington v. FCC, 569 U.S. __ (2013) (No. 11-545).

[83] *Id.* at 17 ("Perhaps above all else, independent review ensures that Congress's judgments about the scope of an agency's authority will be honored: Just as foxes should not guard henhouses, agencies should not be entrusted to police the limits on their own regulatory authority.") (internal citations omitted).

[84] *City of Arlington*, No. 11-1545, slip op. at 5.

[85] *Id.* (emphasis in original).

[86] *Id.* at 16-17.

[87] *Id.*

[88] *Id.* at 9.

challengers of agency action [to] play the jurisdictional card in every case" in order to avoid the application of *Chevron*.[89] In sum, even if an agency is interpreting a statute with regard to its statutory jurisdiction to act on a particular matter, that agency shall receive *Chevron* deference.

In a dissent, Chief Justice Roberts, joined by Justices Kennedy and Alito, argued that the courts should determine whether Congress gave an agency the authority to interpret the statute in question before *Chevron* could be applied.[90] The dissent argued that *Chevron* should not be used when determining whether the agency had the authority to act in the first place, but only after a court is independently satisfied of the agency's statutory powers to interpret the statute in question.

What If *Chevron* Deference Does Not Apply?

Even if an agency interpretation does not qualify for deference under *Chevron*, a reviewing court may still accord the agency construction of a statute significant weight pursuant to reasoning established in *Skidmore v. Swift*.[91] *Skidmore* involved a claim by a group of employees for recovery of overtime pay under the Fair Labor Standards Act (FLSA).[92] The case turned on whether "waiting time"—or time that an employee spends on the employer's premises in the case of an emergency—constituted "working time" for purposes of the FLSA. The Administrator of the Department of Labor Wage and Hour Division had determined, through an interpretive bulletin and a series of informal rulings, that whether periods of inactivity constituted working time depended on "the degree to which the employee is free to engage in personal activities ... and the number of consecutive hours that the employee is subject to call ..."[93] Thus, the Court was left with the question of "what, if any deference courts should pay to the Administrator's conclusion?"

The Supreme Court determined that these types of agency determinations had significant value. While acknowledging that the Administrator's determinations were neither conclusive nor binding, the Court also noted that respect was due to agency policies that are "made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[94] The court explained its holding as follows:

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[89] *Id.* at 13.

[90] *City of Arlington*, No. 11-1545, slip op. (Roberts, J., dissenting).

[91] 323 U.S. 134 (1944). Justice Scalia does not see *Skidmore* as applicable where an agency interpretation does not qualify for *Chevron* deference. *Christensen*, 529 U.S. at 589-91. ("*Chevron*-type deference can be inapplicable for only three reasons: (1) the statute is unambiguous, so there is no room for administrative interpretation; (2) no interpretation has been made by personnel of the agency responsible for administering the statute; or (3) the interpretation made by such personnel was not authoritative, in the sense that it does not represent the official position of the expert agency. All of these reasons preclude *Skidmore* deference as well."). Rather, Justice Scalia argues that *Skidmore* deference is an "anachronism" that was replaced by the standards established by the Court in *Chevron*. *Id*. ("*Skidmore* deference to authoritative agency views is an anachronism, dating from an era in which we declined to give agency interpretations (including interpretive regulations, as opposed to 'legislative rules') ... That era came to an end with our watershed decision in *Chevron* ...").

[92] *Id*. at 135.

[93] *Id*. at 138.

[94] *Id.* at 139.

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[95]

The *Skidmore* holding was grounded in a respect for agency expertise. But *Skidmore* deference does not require that a court simply defer to an agency's interpretive choice. Rather, the degree of deference accorded by a reviewing court directly correlates to the strength of the agency's reasoning. Under *Skidmore*, evaluating the strength of an agency's interpretive choice involves an assessment of the "thoroughness," "validity," and "consistency" of the agency's decision making. Later in *Mead*, the Supreme Court suggested that courts may also consider factors such as the "agency's care" and "formality" in reaching the interpretation, "consistency" with past interpretations, and the agency's "relative expertness."[96]

Skidmore deference, then, represents a general acknowledgement by the courts that an agency's interpretive choice, due in large part to the agency's expertise, should be accorded respect by a reviewing court and may influence a court's review to the degree that the interpretation is well reasoned. The deference received under *Skidmore*, however, as opposed to that accorded under *Chevron*, is clearly of a lesser degree.[97]

Author Contact Information

Daniel T. Shedd
Legislative Attorney

Todd Garvey
Legislative Attorney

[95] *Id.* at 140. *See also Mead*, 533 U.S. at 228 ("But whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered.").

[96] *Id*.

[97] *See* Fed. Express Corp. v. Holowecki, 552 U.S. 389, 399 (2008) (characterizing *Skidmore* as "less deferential" in comparison to *Chevron*).