Legal Backgrounder

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VOLKS v. SECRETARY OF LABOR: AGENCIES' STATUTES OF LIMITATIONS AND A NEW STEP IN *CHEVRON* DEFERENCE?

by
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A recent concurring opinion by Judge Janice Rogers Brown of the U.S. Court of Appeals for the District of Columbia Circuit discusses in detail a question that has split some federal appellate courts: Must a federal court afford deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), to an agency's construction of a statute of limitations embedded in its organic statute?

In *AKM LLC dba Volks Constructors v. Secretary of Labor*, 675 F.3d 752 (D.C. Cir. 2012) ("*Volks*"), the D.C. Circuit rejected under both *Chevron* Steps One and Two an interpretation by the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) of the statute of limitations in the Occupational Safety and Health Act (OSH Act). Although Judge Brown's lead opinion touched on *Chevron* deference, her concurring opinion discusses in detail the broader deference question mentioned above.

The question had previously been noted but not decided by the D.C. Circuit in *Intermountain Ins. Serv. of Vail v. Comm'r*, 650 F.3d 691, 707 (D.C. Cir. 2011), where the IRS had interpreted a statute of limitations in the Internal Revenue Code. Noting that the D.C. Circuit "has yet to decide whether or under what circumstances to give *Chevron* deference to agency interpretations of statutes of limitations," the court stated that it would defer to the agency there without ruling on the broader issue because the limitations period was embedded in a "complex administrative system for assessing tax deficiencies" and involved the agency's "expert interpretation of technical statutory language."

In *Volks*, the D.C. Circuit again found it unnecessary to decide the broader question because it found the statutory language to be clear. Judge Brown wrote in her concurrence, however, that, where no "intricacies" of the kind presented in *Intermountain* were present, "I would find any ambiguities to be ours to resolve and not the agency's." The reasons for this conclusion are the main subject of this LEGAL BACKGROUNDER.

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Judge Brown's Lead Opinion in *Volks*: A New *Chevron* Step?

Before discussing Judge Brown's concurrence, however, it is worth noting a curious feature of Judge Brown's *lead* opinion in *Volks*: Its sequence of *Chevron* deference analysis implicitly recognized a new step, situated between what some have called *Chevron* Step Zero and *Chevron* Step One – what one might call *Chevron* Step 0.5.

At *Chevron* Step Zero, the *Volks* opinion noted, courts ask whether "the *method* by which the [agency]'s interpretation has been articulated" is sufficiently formal to warrant *Chevron* deference. (Emphasis in the original); *see also United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000), which require that, to deserve *Chevron* deference, as opposed to "weight" under *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944), the agency's interpretation be made in, for example, a notice-and-comment rulemaking or a formal adjudication.

After stating that OSHA's interpretation met that formality requirement, the lead opinion turned to "the next question." That question was not, however, the question posed by *Chevron* Step One (whether the statute is clear), but yet another threshold question – "whether the interpretation of a statute of limitations is the *type* of question which triggers our deference." (Emphasis in the original.) The D.C. Circuit's implicit recognition of what might be called a *Chevron* Step 0.5 illustrates what commentators have noted to be *Chevron*'s multiplying complexities. *E.g.*, Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 784, 828-829 (2010) (noting complexities of Step Zero).

Judge Brown's Concurrence Raises Some Good Questions

The *Volks* case raised this question: If *Chevron* deference is principally based not on agency expertise but on a congressional delegation to agencies of authority to construe statutes they administer,[1] what should a court do with a statutory provision that (a) has as its sole purpose the imposition of a limit on the agency's prosecuting authority; (b) gives no sign that it delegates authority to the agency; and (c) is administered by courts, not agencies, except as prosecutors? And to the extent deference is based on agency expertise, what should a court do with a simple statute of limitations in a comparatively simple statute, and involving an issue lacking a policy dimension on which agency expertise might be brought to bear – what courts once called a "pure question of law"?

Volks argued that there should be no *Chevron* deference when a statute of limitations is involved. It first noted greater judicial expertise, citing the Third Circuit's holding that statutes of limitations are "not a matter within the particular expertise of the [agency]" and pose "clearly legal issue[s] that courts are better equipped to handle." *Bamidele v. INS*, 99 F.3d 557, 561 (3d Cir. 1996).[2]

Volks then argued that *Chevron*'s principal basis – a delegation of authority to the agency to construe a statute – was inapplicable: "Unlike nearly all other provisions of regulatory statutes, a specialized statute of limitations is intended only to constrain an agency, not delegate authority to

[1] *See generally* Note, *The Two Faces of* Chevron, 120 HARV. L. REV. 1562 (2007) (discussing whether *Chevron* based on separation of powers (delegation) or agency expertise).
[2] *Contra* (according to Judge Brown), *Asika v. Ashcroft*, 362 F.3d 264, 271 n.8 (4th Cir. 2004) (rejecting *Bamidele*); *Interamericas Investments v. Bd. of Governors*, 111 F.3d 376, 382 (5th Cir. 1997); *Capital Tel. Co. v. FCC*, 777 F.2d 868, 871 (2d Cir. 1985) (per curiam).

it." Volks observed that the principal difference between the OSH Act's statute of limitations and that in a general statute of limitations like 28 U.S.C. § 2462 is just "a different time period." In any event, Volks argued, returning to expertise, "Inasmuch as … the comparatively simple OSH Act is far closer in its lack of complexity to the statute in *Bamidele* than that in *Intermountain*, there should be no *Chevron*-level deference here."

Judge Brown essentially agreed, quoting *Chevron*: "If the interpretive question neither requires an agency's expertise nor 'involve[s] reconciling conflicting policies,' we may conclude that Congress has delegated nothing to the agency." If a case lacks regulatory "intricacies" like that in *Intermountain*, she wrote, "I would find any ambiguities to be ours to resolve and not the agency's."

Judge Brown explained that courts can "infer delegation or its absence by asking if 'the particular question [is] one that the agency or the court is more likely to answer correctly,' or whether the question 'concern[s] … matters of agency administration, or whether 'the agency can be trusted to give a properly balanced answer' rather than use the interpretive opportunity to 'expand [its] power beyond the authority that Congress gave [it],'" quoting an article by Justice Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370–71 (1986).

Judge Brown gave as an example courts' refusal to afford *Chevron* deference to agency interpretations of statutory provisions affecting a court's jurisdiction, citing with approval the Ninth Circuit's view that "that deference does not extend to the question of judicial review, a matter within the peculiar expertise of the courts." She then extended the analogy to statutory provisions affecting the *agency's* jurisdiction: Although both her court and at least one Justice of the Supreme Court have deferred to such agency interpretations, Judge Brown stated that that "does not make it right as a rule" and "only shows how far we have strayed from our role."

The Rule for Most Statutes of Limitations?

Judge Brown then turned to statutes of limitations: "Agency interpretations of statutes of limitations … are … poor candidates for deference. In general, statutes of limitations are not the sort of technical provisions requiring or even benefiting from an agency's special expertise. Rather, much like many jurisdictional provisions, these are texts with which courts are intimately familiar, as we interpret and apply them every day. Nor do statutes of limitations generally suggest any policies that have been left by Congress for an agency to reconcile. … Surely some may, … but many do not."

Judge Brown then hammered the point home: "[P]erhaps most compellingly, statutes of limitations are designed to constrain the government's enforcement authority and to promote finality, repose, and the efficient and prompt administration of justice." They are thus "qualitatively different than grants of plenary power," for they "uniquely limit[] when an agency may act – *even within* otherwise lawful bounds." She explained that agencies have so great a "self-interest" in "escap[ing]" these constraints that they "cannot 'be trusted to give a properly balanced answer,'" again quoting Justice Breyer.

Looking to the future, Judge Brown urged her colleagues that, "When we do finally decide th[is] question, I urge us to pay closer attention to first principles." The court should, she urged, "carefully consider why and when we are meant to defer before we endow an agency's mere invocation of *Chevron* with talismanic authority." Judge Brown closed on this ringing note: "We must steadfastly guard our prerogative to 'say what the law is,' *Marbury v. Madison* …, and resist

the reflex of deference."

One might read this last remark as more than a call to fellow judges to be cautious in applying *Chevron*. It can be read to imply, with respectful and commendable restraint, what others have more openly said – that, because *Chevron* permits courts to say only whether an agency's interpretation is "reasonable," it does not permit them to say what the law is, and thus contravenes *Marbury*.[3] Judge Brown has often been mentioned as a possible Supreme Court nominee. Interesting times may lie ahead.

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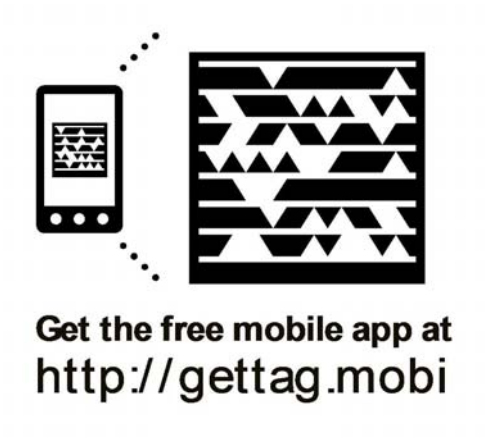

[3] Beerman, 42 CONN. L. REV. at 795 n. 57 (collecting opinions and comments to this effect); *see* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006) (*Chevron* a "counter-*Marbury* for the administrative state").