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202.588.0302 wlf.org

What Happened in Vagueness Stayed in Deference: A Note on Leaving *Chevron*

by Gary C. Marfin and Christopher H. Marraro

It is not every day that Congress expressly considers intervening to counter a perceived diminution in the power of another branch of government. Yet, this is now occurring. On January 11, 2017, the US House of Representatives, as part of an overall effort to curb the growth of the administrative state, voted to bolster the judicial branch's power to review regulatory agency decisions. Title II of H.R. 5, known as the Regulatory Accountability Act (RAA), would amend the Administrative Procedure Act to require that courts reviewing agency actions conduct *de novo* review—an approach that would relieve federal courts from conferring what has become known as *Chevron* deference on the decisions of federal regulatory agencies. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

It is not at all obvious that the RAA's supporters are serving their near-term strategic interests by bolstering judicial review of federal agency actions. Courts' faithful application of *Chevron* deference when reviewing legal challenges would undoubtedly facilitate deregulation as federal agencies will seek to interpret and re-interpret statutes they administer in an effort to reduce regulatory burden. The success of such deregulatory thrust will depend, in part, on whether administrative actions taken in pursuit of regulatory reform will survive the legal challenges they will invariably incur from external parties.

Chevron emerged in a deregulatory climate not unlike the present. As Justice Stevens, author of the Court's opinion in *Chevron* observed, with the election of President Reagan, "a new Administration took office and initiated a government-wide reexamination of regulatory burdens and complexities." One outcome of that examination was the idea, then novel, of allowing the Environmental Protection Agency to consider net pollution changes in an entire facility, as though it were encased in a bubble, instead of focusing on individual emission sources within the facility when granting air permits under the Clean Air Act. Specifically, Justice Stevens held in *Chevron* that courts should show deference to federal agency interpretations of ambiguous or undefined statutory provisions, provided (a) Congress had not already addressed the specific provision at issue and (b) that the agency's interpretation was reasonable or plausible under the statute.

So why at this precise moment are some in Congress seeking to eliminate *Chevron* deference to regulatory agencies? The opposite question can be asked of politicians who support the administrative

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Gary C. Marfin was Associate Dean of the School of Engineering at Rice University and Manager of Government Relations with Conoco. **Christopher H. Marraro** is a Partner with BakerHostetler in the firm's Washington, DC office.

state. If their goal is to prevent deregulation, one effective way to do that is to encourage the demise of *Chevron* deference.

What became Title II of the RAA began life as the "Separation of Powers Restoration Act of 2016" (SOPRA), a stand-alone bill in the House of Representatives. As its title suggests, SOPRA, through its *de novo* review requirement, is designed *to restore* the ability of the judiciary to review federal agency actions without showing deference to the agency.

Sharp ideological preferences anathema to near-term strategic advantages have been displayed on both occasions in which *Chevron*'s status was put to a vote. When the House first considered SOPRA last July, the vote count[1] reflected the polarization of views between the pro- and anti-administrative-state camps. The vote on RAA amendments split equally along ideological lines. Those opposed to SOPRA viewed the bill as "yet another thinly-veiled attack on regulations," rules which, they maintain, provide benefits to the economy that "consistently exceed the costs." Those in favor of SOPRA, on the other hand, claim that *Chevron* "leaves administrative agencies relatively free in a wide range of circumstances to define the meaning of the statutes they administer, and even their own jurisdictional limits."[2] Hence, each side may be attempting to secure a separation-of-powers jurisprudence consistent with its long-term ideological aspirations as opposed to any short-term strategic advantage or disadvantage.

What remains unexplained is how *Chevron* became associated with bureaucratic growth. *Chevron* itself is indifferent as to the kind of action an agency takes; whether it expands or contracts its regulatory scope, *Chevron*'s two-prong test remains the same. The test is biased toward deference to the agency in the absence of unambiguous congressional intent, but the provision of deference *per se* is unrelated to whether an agency is seeking to expand or contract its regulatory scope.

If *Chevron*, as both sides of the debate appear to recognize, has over time contributed to the growth of the administrative state, it may well be the result of an abundance of deference opportunities coupled with agency proclivities. More precisely, *Chevron*'s contribution to the expansion of the administrative state could be directly related to the level of vagueness or ambiguity in congressional legislation and the tendency of agencies to take advantage of that vagueness, all while recognizing that they will receive judicial deference in any challenge.

Passage of the RAA, which would require courts to review agency action *de novo*, might reduce administrative state sprawl. Whether the legislation is constitutionally permissible, however, should not be taken for granted. With SOPRA and Title II of the RAA, Congress is attempting to restore the status of the judiciary by requiring that courts rely on one line of jurisprudence and refrain from relying on another. The late Justice Antonin Scalia, himself an ardent champion of *Chevron*, noted in *City of Arlington, Texas v. FCC*:

> Congress has the power (within limits) to tell the courts what classes of cases they may decide, see *Trainmen v. Toledo, P. & W.R. Co*., 321 U.S. 50-64 (1944); *Lauf v. E.G. Shinner & Co*., 303, U.S. 323, 330 (1938), but not to prescribe or superintend how they decide those cases, see *Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211-219 (1995).

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[1] US House, Committee on the Judiciary, Separation of Powers Restoration Act of 2016 (to accompany H.R. 4768) together with Dissenting Views. (114 H. Rept. 622). Text from: Committee Reports, available from Congress.Gov; Accessed Nov. 27, 2016.
[2] *Ibid*.

133 S. Ct. 1863, 1868-69 (2013). Title II of the RAA might be viewed as a congressional attempt to "restore" judicial review at the expense of meddling in it, an odd way to fortify the separation of powers.

Given the uncertain nature of a specific legislative solution such as the RAA, a much more straightforward path to moving out from under *Chevron*'s long shadow should be considered. *Chevron*'s two-prong test first asks that courts examine whether, in fact, Congress has been vague, ambiguous, or silent with respect to the issue at hand. Only after an affirmative answer does a court take the next step and determine if an agency's attempt to fill the void is plausible under the statute. Hence, a surefire way to prevent courts from utilizing *Chevron* deference is to remove the ambiguity that creates the opportunity for agency interpretations. Article I accords Congress the sole power to legislate, which at its base requires balancing competing social values. With that enormous power should come the responsibility for Congress to specifically and unambiguously articulate the social policy it sets and not defer to the Executive branch the task of equilibrating competing social values.

A quintessential example of Congress's failing is § 109 of the Clean Air Act, where Congress abdicated to EPA the responsibility for determining what is an acceptable risk to citizens from exposure to air pollution and for balancing the competing social values of health, economics, and international-trade impacts. Thus, Congress set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator …[,] allowing an adequate margin of safety, are requisite to protect the public health."

In no other area has *Chevron* deference been more impactful, but this is due more to Congress's failure in legislating than to *Chevron*'s holding. After all, if Congress had balanced those competing values and set an acceptable risk level, there likely would be much less litigation over those standards, barring the agency's possible mathematical errors in computing the standard or over the agency's technical judgment as to what particular scientific studies meant—two areas where the agency's role is more on the justifiable ground of technical expertise.

Minimizing ambiguity is far easier to promote than to realize. In some instances, for example, Congress may find itself under intense pressure, actual or perceived, as it did during the financial crisis of 2008, to legislate a "solution" that will prevent a recurrence of a disruptive event before the causes of that event are understood. Hence, ambiguity can allow Congress to act relatively quickly, and to appear responsive, even if, in fact, it is simply passing the problem, like the proverbial "hot potato," into agency hands.

Any number of factors may motivate congressional ambiguity. The central point is that ambiguous statutory construction has strategic value, if only because it allows Congress to move more quickly than might otherwise be possible if higher levels of statutory precision were pursued, since more precision can require spending more time on coalition-building. The costs incurred because ambiguous legislation creates opportunities for regulatory expansion—indeed, regulatory explosion—however, offset the value of ambiguity over time.

One option that would allow for relatively quick congressional action, at least initially, with minimal reliance on ambiguity is to legislate incrementally. Congress, operating under such an approach, would focus during some number of incremental steps on enacting legislation in those areas of any given public issue where sufficient bipartisan support permits a relatively high degree of legislative precision.

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In today's fractious Congress, a bipartisan, incremental approach to legislation may, as an objective, be a bridge too far. That said, there is no escaping the over-arching point that Congress itself must be part of any solution designed to restore the separation of powers and curb the growth of the administrative state.

Justice Clarence Thomas's observation in a 2015 concurring opinion—"We have come to a strange place in our separation of powers jurisprudence"[3]—is painfully accurate today. Moreover, we have arrived at a place where the separation of powers is perceived as being threatened by a Supreme Court opinion that quite intentionally sought to keep the judiciary in its proper place. *Chevron*, as Justice Scalia once observed, rested on "an across-the-board presumption that, in the case of ambiguity, agency discretion is meant."[4] Looking backward, such a presumption may have been more convenient than accurate, but Justice Scalia was not just discussing the past; he was arguing that *Chevron* provided a signal to Congress about the future:

> Congress [after *Chevron*] now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.[5]

As noted above, the elimination of *Chevron* through Title II of the RAA, if constitutionally permissible, may help curb administrative-state sprawl. However, eliminating *Chevron* might promote judicial activism and its attendant risk that courts will take it upon themselves to resolve legislative ambiguities. That risk, in the absence of *Chevron*, can only be mitigated by eliminating statutory ambiguities. Congress's ability and willingness to legislate with minimal vagueness thus plays a pivotal role in placing boundaries around the administrative state, with or without *Chevron* as precedent.

[3] *Dept. of Transportation v. Assoc. of Am. Railroads*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring).
[4] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 516.
[5] *Id*. at 517.

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