Legal Backgrounder

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# Judicial Review of Informal Agency Pronouncements: Any Clearer After *Young v. UPS* and *Perez v. MBA*?

by Gregory F. Jacob and Lynsey Ramos

The famed "*Chevron* two-step," which governs judicial deference to formally adopted agency legislative rules, is fairly well-understood.[1] Jurisprudence concerning judicial deference to informal agency pronouncements, by contrast, is a bit of a mess. The Supreme Court's most recent pronouncement on the matter in *Young v. United Parcel Service, Inc.*,[2] makes it clear that the Court has become increasingly skeptical of late-breaking and flip-flopping agency positions, particularly where those positions are not adequately explained.

For skeptics who doubt that agency pronouncements under such circumstances are the product of expertise, rather than political ideology, that is welcome news. But *Young* also raises a question about the coherence of the Court's deference jurisprudence concerning agency guidance: is *Skidmore* "power to persuade" deference a doctrine, or just a license for a judicial smell test?[3]

***Young v. United Parcel Service***

In *Young*, the Court declined to defer to Equal Employment Opportunity Commission (EEOC) guidance that was promulgated in July 2014—*after* the Court granted *certiorari* in *Young*—because of concerns about its "timing, consistency, and thoroughness of consideration."[4] The guidance purported to interpret a provision of the Pregnancy Discrimination Act,[5] but was not adopted pursuant to the Administrative Procedure Act as a legislative rule. The guidance went substantially beyond prior EEOC pronouncements on the subject, contradicted positions previously taken by the United States in other cases, and even used a factual example that could have doubled as a statement of facts for the government's brief in *Young*.

*Skidmore* supplied the applicable deference framework because the EEOC's pronouncement was neither a legislative rule nor an interpretation of a legislative rule that the EEOC itself had promulgated. Writing for the Court, Justice Breyer noted that *Skidmore* deference has always been bounded by significant caveats: the "weight [given to agency guidance] in a particular case will depend upon the

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[1] *Chevron USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[2] 575 U.S. ___, 135 S.Ct. 1338 (2015).
[3] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
[4] *Young*, 135 S.Ct. at 1352 (quotation marks omitted).
[5] 42 U.S.C. § 2000e(k).

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thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control."[6]

The EEOC guidance flunked all of *Skidmore*'s enunciated "power to persuade" factors—it was a flip-flop, it was promulgated after a *cert* grant, and the Court determined that the EEOC failed to "explain the basis of its latest guidance."[7] Under such conditions, the Court held that it "cannot rely significantly on the EEOC's determination."[8]

**The Bigger Picture, and the Bigger Muddle**

Those factors make sense. But the *Young* decision itself was something of a flip-flop on the part of the Court. In a long line of cases predating *Young*, the Supreme Court deferred to agency positions even when they were issued for the first time in the midst of litigation, and even if they constituted flip-flops.

In *Auer v. Robbins*,[9] the Court deferred to an interpretive position that the Department of Labor (DOL) had announced for the first time in an *amicus* brief. And in *Long Island Care at Home, Ltd. v. Coke*[10]—an opinion that, like *Young*, was authored by Justice Breyer—the Court reversed the Second Circuit not once, but twice, on the basis of an internal "advisory memorandum" that DOL published *after the Second Circuit had issued its decision in the case*, and even though the agency had flip-flopped at least twice on the issue in question.[11] How can these outcomes be reconciled?

One possible answer would be that in both *Auer* and *Coke*, the agency guidance under review was interpreting the agency's own legislative rule, whereas in *Skidmore* and *Young*, the agency guidance was directly interpreting a statute. Beginning with *Bowles v. Seminole Rock & Sand Co.*,[12] the Court has generally taken the position that an agency's interpretation of ambiguous language in its own legislative regulations is entitled to controlling deference.[13]

Because both *Auer* and *Coke* relied on *Seminole Rock*, the apparently operative rule might be stated as follows: agencies are entitled to controlling deference when interpreting their own ambiguous legislative rules *even if* they are flip-flopping and/or taking late-breaking litigating positions, but are unlikely to be accorded deference under those circumstances when directly interpreting statutes.

That view is complicated, however, by another pair of recent deference cases, both of which (like *Auer* and *Coke*) involve guidance positions issued by DOL. In *Christopher v. SmithKline Beecham Co.*,[14] the Court refused to defer to agency guidance that purported to interpret the agency's own ambiguous legislative rule concerning the exempt status of outside salespeople, which DOL had announced for the first time in a recent series of *amicus* briefs. The Court explained that although DOL had not precisely flip-flopped when it announced its interpretive position in 2009, it had not previously taken *any* enforcement action consistent

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[6] *Young*, 135 S.Ct. at 1352, *quoting Skidmore*, 323 U.S. at 1040.
[7] *Ibid.*
[8] *Ibid*.
[9] 519 U.S. 452, 462 (1997).
[10] 551 U.S. 158, 171 (2007).
[11] One of the authors of this LEGAL BACKGROUNDER wrote that advisory memorandum, but there should be more to divine in the Court's jurisprudence than just assuming it found the memo extremely persuasive.
[12] 325 U.S. 410 (1945).
[13] *Id*. at 414 (holding that where a legislative rule is ambiguous, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.").
[14] 132 S.Ct. 2156 (2012).

with that position during the more than 60 years the underlying regulation had been in effect. Under those circumstances, the Court explained, deference to the interpretive position would constitute "unfair surprise" to the regulated industry.

The Court noted that its deference doctrines were not intended to "require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference."[15] And the Court further questioned whether the new interpretive position actually represented DOL's "fair and considered judgment" on the matter, since the agency had substantially shifted the reasoning it advanced to support the position as it filed *amicus* briefs in successive cases.[16] For those reasons, the Court refused to afford the interpretive position controlling deference under the *Seminole Rock*/*Auer*/*Coke* line of cases, and instead limited it to *Skidmore* "power to persuade" deference.[17]

***Perez v. Mortgage Bankers Association***

The Court also confronted the issue of agency flip-flopping this past term in *Perez v. Mortgage Bankers Association.*[18] In 2004, DOL had promulgated a legislative rule under the Fair Labor Standards Act (FLSA) dictating that overtime pay was owed to any "employee whose primary duty is selling financial products." In 2006, DOL had then issued an administrative interpretation of that prior legislative rule, determining that mortgage-loan officers are not owed overtime and are exempt from the FLSA requirement because their primary duty is not selling financial products. That administrative interpretation fit mortgage-loan officers under the statutory exemption for "employee[s] employed in a *bona fide* executive, administrative, or professional capacity."

Then, in 2010, DOL reversed its 2006 position, issuing a new administrative interpretation (based on a new reading of the same 2004 legislative rule) to the effect that mortgage-loan officers are entitled to overtime pay after all. The MBA objected that the agency needed to go through notice-and-comment rulemaking in order to flip-flop its policy position via such an administrative interpretation. Although MBA prevailed in the D.C. Circuit, the Supreme Court did not agree.

It held that an agency is not required to go through notice-and-comment rulemaking to alter its interpretive positions, even where an alteration amounts to an outright policy position reversal that could impose millions of dollars of liability on a regulated industry. The Court did not specify precisely how much deference DOL's flip-flopped interpretive position should ultimately be accorded on remand, but it strongly implied that it was *Seminole Rock*/*Auer*/*Coke* deference that applied—while helpfully clarifying in a footnote, citing *Christopher*, that "*Auer* deference is not an inexorable command in all cases."[19]

**Conclusions: Clarity from the Muddle?**

So where do these varying outcomes and rationales leave the doctrine of judicial deference to informal agency guidance and interpretive positions? Muddled, surely. Below, however, are some conclusions that regulated entities should consider when attempting to make sense of the current state of deference law.

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[15] *Id*. at 2168.
[16] *Id*. at 2166.
[17] *Ibid*.
[18] 575 U.S. ___, 135 S. Ct. 1199 (2015). (Ed.: Washington Legal Foundation filed an *amicus curiae* brief in the *Perez* case, which can be found at http://www.wlf.org/litigating/case_detail.asp?id=790).
[19] *Id*. at 1208 n. 4.


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- If an agency is directly interpreting a statute, the best it can expect is *Skidmore* deference. (per *Skidmore*, *Young*)
    - When assessing the power of such guidance to persuade, the Court will count flip-flops and late-breaking positions as substantially negative factors. (*Young*)
    - The absence of strong and well-explained reasoning supporting a change in interpretive position is particularly likely to result in a refusal to defer. (*Young*)
- When an agency is interpreting its own ambiguous legislative rules, by contrast, *Seminole Rock*/*Auer*/*Coke* deference presumptively applies.
    - This is generally true even for flip-flops and late-breaking positions. (*Perez*)
    - But where special circumstances lead the Court to question the fairness of deferring to the agency's late-breaking position, or the agency's good faith in adopting the position, the Court may choose to apply only *Skidmore* deference instead (*Christopher*, *Perez*). And if the Court opts out of *Seminole Rock*/*Auer*/*Coke* deference based on one or more of these factors, it is unlikely to find the interpretive position in question particularly persuasive when applying *Skidmore*. (*Christopher*)
- For all kinds of deference, flip-flops, perceived unfair surprise, and late-breaking positions will be viewed as negative factors. (*Young*, *Christopher*). To a substantial extent, this amounts to a judicial "smell test"—and courts at all levels have been increasingly likely to detect a whiff of something rotten in Denmark in recent years.
- But strong reasoning by an agency may really be the overarching key; a thoughtful, well-grounded, and well-explained position is much more likely to be persuasive, and thus to pass muster under whatever standard the Court applies. (*Coke*)



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