By James V. DeLong

Annals of the Administrative State: Is *ATA* a Rising or Setting Sun?

Delegation and deference become a battleground (again)

THE DEPARTMENT OF JUSTICE (DOJ) HAS ASKED the entire District of Columbia Circuit Court of Appeals to rehear and overrule the two-to-one decision in *American Trucking Associations v. U.S. Environmental Protection Agency* (ATA), which threw out two new EPA national ambient air quality standards. More than 250 environmental groups had urged DOJ to appeal the decision, and Carol Browner, EPA administrator, reacted to the appeal by saying: "I'm pleased that ... Justice will formally appeal one of the most bizarre and extreme decisions ever rendered in the annals of environmental jurisprudence."

Browner's language is extraordinary, given the usually genteel tone of discourse surrounding the judicial review of administrative decisions. Only high stakes trigger such vituperation, and the stakes in ATA are indeed worthy. They are: Who legislates, Congress or agencies? Will the courts force Congress to face responsibilities it seems determined to duck?

THE *ATA* DECISION

THE CLEAN AIR ACT CHARGES EPA WITH ESTABLISHING standards for selected pollutants, including ozone and particulate matter. Standards are to be set at a level "to protect the public health with an adequate margin of safety." Both ozone and particulate matter are regarded as "nonthreshold pollutants," which means that there is no level below which exposure is guaranteed to cause no harm—less exposure is always healthier.

So how should EPA decide where to stop in its effort to make us ever safer? Congress did not say, because it failed to define the crucial terms. "Protect the public health" could be interpreted as requiring anything from "zero incidence of any effects" to "no catastrophes." And when can a "margin of safety" be called "adequate"?

In EPA's view, such vagueness means that Congress delegated to the agency the power to set standards at any level it chooses, right down to zero. The D.C. Circuit panel ruled that such an open-ended mandate would be an unconstitutional delegation of legislative power. Therefore, it struck down the EPA standards and remanded the case to EPA. The agency itself is to define the limits of its pursuit of the impossible goal of perfect safety and then show the court that those limits are within reason.

THE NONDELEGATION DOCTRINE

THE COURT'S RELIANCE ON THE DOCTRINE THAT CONGRESS cannot delegate legislative power was a considerable surprise to the legal community.

Although the principle of nondelegation was first articulated in 1892, the Supreme Court has used it only in 1935, when the Court invalidated two New Deal statutes as unconstitutional delegations of Congress's legislative power. (As law professor Cass Sunstein said, "The nondelegation doctrine had only one good year.")

Courts since then have retained the shell of the principle but drained it of content. In theory, Congress can delegate to an agency only if the delegation is constrained by an intelligible principle that guides the agency. In practice, courts have upheld delegations of epic scope and given approval to such standards as "public convenience, interest, and necessity"; "fair and equitable" prices; "just and reasonable" rates; "excessive" profits; and "compelling public interest."

Most administrative lawyers have assumed that the nondelegation doctrine was on life support and that the plug would eventually be pulled. On reflection, though, the resuscitation of nondelegation as a principle for controlling rampant regulatory agencies makes sense because of events in 1984 and since.

ENTER *CHEVRON*

SETTLED LEGAL DOCTRINE UNTIL 1984 TOOK THE INTERpretation of statutes as a job for the courts. Agencies' opinions about the laws they administered were entitled to heavy weight, but in the end the reviewing court bore the respon-

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sibility of dissecting the mysterious beast called "congressional intent" and reaching a conclusion on "the law."

The Supreme Court upended that relationship with its 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which instituted a new system called "the *Chevron* two-step": The reviewing court decides, first, whether Congress had an intent on the precise point at issue. If it did, that interpretation governs, and an agency's contradictory view will be put aside. If congressional intent is ambiguous, however, the agency's interpretation stands; the court cannot overturn it.

Chevron was a big case. In 15 years, it has been cited by the Supreme Court in 120 cases and by appellate courts in 2,610 cases.

Chevron was also a mistake. It applies a legal model of the administrative process called "the transmission belt theory." It sees agencies as neutral experts carrying out the wishes of legislators who bear a strong resemblance to platonic guardians.

But everyone outside the legal profession who ponders government regards the transmission belt theory as so poor a representation of reality as to be a joke. Agencies are not transmission belts, they are battlegrounds for rent-seeking interests and ideological combat. And Congress is far from platonic. Applying *Chevron* in the messy real world has had a number of unfortunate effects.

Chevron greatly diluted the courts' important role as enforcers of the political bargains reached in Congress. Granted, interpreting legislative history and intent is often more divination than law. But good judges understood the importance of their role and developed a sense of the compromises that had gone into legislation to ensure that the wishes of the political players were honored.

The "benzene" case (*Industrial Union Department v. American Petroleum Institute*), decided by the Supreme Court four years before *Chevron*, exemplifies the role of the courts as enforcers of congressional intent. The Occupational Safety and Health Administration asserted a claim exactly like EPA's claim in ATA—that the statute gave it authority to set the level of exposure anywhere it chose, regardless of risk or benefit. The Supreme Court said "no," Congress could not have intended to delegate such sweeping economic power to an agency. The Court interpreted the law as requiring the existence of a "significant risk" before OSHA could act.

Because of *Chevron*, the option of reasonably interpreting the law was not open to the D.C. Circuit in ATA. Hence the remand, with the instruction that the agency itself reasonably interpret the law. To give that instruction force, the court seized on the nondelegation doctrine as its club. It would be folly to believe that Congress intended the phrase "protect the public health" in the Clean Air Act to allow EPA to decide that the incidence of every type of effect must be reduced to zero, whatever the impact on the U.S. economy and society. But neither should we expect EPA to define its power as anything less than that, absent compulsion.

The *Chevron* doctrine also encourages sloppy legislative habits, especially in the environmental field. The iron triangle of agency, congressional staff, and environmental interest groups has a strong interest in making open-ended and vague feel-good laws. The effect of such laws is to mute the opposition that might coalesce if the public knew the true costs of monitoring and enforcing the laws. And, because the laws *are* open-ended and vague, agencies are able to impose those costs on the public. Since conservatives have learned to their sorrow that opposing vague, feel-good laws is a losing game, such legislation sails through Congress.

The real issue is the distribution of power in the regulatory state, and EPA and its minions are determined not to return power to Congress.

By forcing EPA to develop standards if Congress does not, ATA will encourage congressional review of EPA's actions. Perhaps Congress will be forced to confront—and answer—these questions: Is this what you meant? If not, what did you mean? Perhaps Congress can even be persuaded to address limits when it first passes legislation, though this hope may be utopian.

BEYOND *CHEVRON*?

AT FIRST BLUSH, THE FEROCIOUS ENVIRONMENTALIST and EPA reaction to ATA, which actually tells the agency only to "go back and find a limit on your power," seems seriously out of proportion. Nothing in the case prevents EPA from protecting the public against health risks when it finds real ones.

But the real issue is the distribution of power in the regulatory state, and EPA and its minions are determined not to return power to Congress. Hence the campaign of vilification, which is designed to panic the D.C. Circuit *en banc* into summarily reversing the panel's decision without thinking through the need for the courts to address the changes wrought by *Chevron*.

If ATA goes up to the Supreme Court, the Court might well agree with the D.C. Circuit panel. When the Supreme Court interpreted the OSHA statute in the benzene case, it noted: "If the Government were correct in arguing [that the law does not require] that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional." ■