The Chevron Doctrine: Running out of Gas

By James V. DeLong

THE SUPREME COURT MADE HEADLINES AT THE end of its last term with decisions on abortion, the Boy Scouts, and Miranda. But not all judicial enterprises of pith and moment attract press coverage, and one important matter got barely a whisper of attention.

The case was *Christensen v. Harris County*, decided 6 to 3 on May 1, 2000. In it, one of the parties relied on an interpretation of a federal law contained in an opinion letter written by the acting administrator of a subdivision of the U.S. Department of Labor (DOL). The plaintiff asserted that under existing legal doctrine the courts were bound to defer to this letter, not to assess the meaning of the statute for themselves. A majority of the Supreme Court rejected the argument, saying, "[I]nterpretations…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."

That terse statement represents a potentially seismic shift in the balance of power within the administrative state.

EMPOWERING THE ADMINISTRATIVE STATE

IT IS A TRUISM TO SAY THAT LEGISLATION IS NOT ALWAYS comprehensive or complete. Crucial terms are undefined, contingencies unthought of, and new circumstances unanticipated. For many laws, the uncertainties are resolved by courts in the course of litigation. But many other laws delegate power to administrative agencies. So, what are the roles of the administering agency and the reviewing court in deciding the correct interpretation of an ambiguous statute?

Since the beginning of the administrative state, courts have said that an agency's expertise in its areas of responsibility (expertise is, after all, why Congress creates agencies) extends to interpreting the meaning of the statutes governing its own authority and activities. Until 1984, however, the Supreme Court held that such interpretation was, in the end, a legal question, which meant that ultimate responsibility lay with the judges. A typical statement, circa 1968, said:

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law." . . . But the courts are the final authorities on issues of statutory construction, . . . and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." (*Volkswagen Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 267, 273 [1968])

In 1984, the Court radically shifted this allocation of power. *Chevron U.S.A. v. Natural Resources Defense Council* (467 U.S. 387 [1984]) said that when a statute is ambiguous, and it is difficult to find one that is not if examined hard enough, then a court should go through what is now called "the Chevron Two-Step." First, the court determines whether Congress had an intent on the specific point at issue. If so, that intent governs, no matter what the agency says. However, if Congress did not have such a specific intent, then the agency's interpretation is binding on the courts, as long as the agency stays within the outer limits of possible interpretations of the law.

Furthermore, although the cases have not been unanimous, judges often applied *Chevron* to agency interpretations that were issued through such vehicles as interpretive rules, opinion letters, guidance documents, legal briefs, and administrative law judges' opinions, however casual those interpretations or low in the agency food chain their issuers. People have gone to jail on the basis of a sub-branch chief's views of a statute's meaning.

Chevron makes sense when judged by the benign theories of administrative agencies that characterized the New Deal. In that world, agencies neutrally apply the will of Congress; they are devoted to the public interest, and they never subordinate it to the interests of their staffs or constituents. They are Olympian in their ability to discern and apply the concept of "the public interest," and can be confidently entrusted with boundless discretion.

This smiley-face view dominates administrative law

James V. DeLong is a senior fellow at the Competitive Enterprise Institute, where he works on the Project on Technology & Innovation. This article is an expanded version of an article that appeared in the June 2000 issue of the *Judicial/Legislative Watch Report* of the National Legal Center for the Public Interest.

doctrine and Supreme Court jurisprudence to this day. Thus we see sonorous references to the "expert" Environmental Protection Agency (EPA) or Equal Employment Opportunity Commission (EEOC) or Occupational Safety and Health Administration (OSHA). But all who deal with those agencies know the actual slightness of their expertise, and know that those agencies have no expertise at all when it comes to the proper tradeoffs between their missions and other societal interests. EPA is hardly "expert" at weighing environmental benefits against economic considerations. EEOC is "expert" only in its ruthless dedication to expanding the scope of its statutes and the income of its constituency groups. OSHA's pending rule on ergonomics is built on a foundation of preconception, junk science, and worthless data, not on any "expertise" about a complex health question. (See Eugene Scalia's "OSHA's Ergonomics Litigation Record: Three Strikes and It's Out," *Policy Analysis* 370, The Cato Institute, May 15, 2000.)

THE COURT COMES TO ITS SENSES

A MORE REALISTIC VIEW OF THE WORLD RECOGNIZES THAT a mixture of interests motivates an agency. Those interests sometimes include the public interest, but they also encompass pressures from an agency's constituency and the interests of its staff in preserving or improving its quality of life and future employment prospects, advancing its political ideology, and fulfilling the ubiquitous human desire to be part of the action.

Federal Communications Commissioner Harold Furchtgott-Roth, speaking recently on *The Realpolitik of Regulation (www.fcc.gov/Speeches/Furchtgott_Roth/2000/sphfr005.html)*, noted that agencies seek to maximize their power and discretion. To that end, they expand their jurisdiction; keep their procedures and decision processes opaque; avoid collecting, analyzing, and disseminating information on costs and benefits; make decisions as complex as possible; trumpet their benefits and hide their harms; and treat similarly situated parties differently, often by emphasizing multiactor tests in which everything is relevant and nothing determinative.

Those facts are inconsistent with the premises underlying *Chevron*, though every denizen of Washington knows them to be reality. That reality—slowly and by razor-thin margins—is percolating into the opinions of the Supreme Court. *Christensen* is the most recent and important example, but in other recent cases the Court:

- Decided (7 to 2) that the Americans with Disabilities Act does not cover people who need glasses. That decision rested on the conclusion that the meaning of the law was clear; thus, a court had no obligation to give *Chevron* deference to the contrary interpretations of the administering agencies. However, three agencies and eight of nine courts of appeal had come to the opposite conclusion, which makes the Court's "plain meaning" conclusion silly. (*Sutton v. United Airlines* [June 1999])

- Rejected (5 to 4) an assertion by the Food and Drug Administration (FDA) of its authority to regulate tobacco products. The Court restated the *Chevron* standard, but it went on to hold that the meaning of the statute is clear and contrary to that adopted by the agency. But in reaching this conclusion, the Court considered not just the immediate language of the law but "the statutory context," the need to interpret the law "as a symmetrical and coherent regulatory scheme," the impact of other statutes "to the topic at hand," and—most tellingly—"common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." None of this is very *Chevron*-like. (*FDA v. Brown & Williamson Tobacco Co.* [March 2000])

> Perhaps the fictional assumptions underlying *Chevron* will be recognized explicitly.

- Reviewed a Department of Transportation (DOT) argument that its rules did not preempt states' safety regulations governing railroad crossings. The Court rejected DOT's position (7 to 2) on two grounds: (1) the regulation was clear on its face, so the judges should not defer even though it was the agency's own rule; (2) the agency was changing an earlier construction of the statute that had already been endorsed by the Court. (*Norfolk Southern Railway Co. v. Shanklin* [April 2000])

The next installment may be written in *American Trucking Associations v. EPA*, decided by the D.C. Circuit a year ago and now accepted by the Supreme Court on *certiorari*. *ATA* is being argued as a delegation case, but its crux is pure *Chevron*—to what extent must a court stand idle as an agency "interprets" its authorizing statute to remove all limits on its jurisdiction and to promote its own mission at the expense of all conflicting values? (See James V. DeLong, "Annals of the Administrative State: Is ATA a Rising or Setting Sun?" in *Regulation* 22, no. 3 [1999]: 3.)

The Court is delicately balanced on the issue. Justice Scalia rejected FDA's view of its authority in the tobacco case, but in *Christensen* he thought that the solicitor of DOL's endorsement of DOL's opinion letter in the course of the litigation was sufficient to trigger the requirement of deference. Justices Stevens, Ginsburg, and Breyer are supporters of untrammeled agency power under all circumstances.

Nonetheless, reform seems to be in the air, and perhaps the fictional character of the assumptions underlying *Chevron* will soon be recognized explicitly. That would be a giant step for administrative law as a legal discipline. It is also long overdue. The legal profession is like a pack of dowager socialites who cannot bring themselves to realize that the golden days of the New Deal and the 1930s are over, and who stubbornly insist on living there. Unfortunately, given the power of the legal system, they are forcing the rest of us to live there, too. ■