Chevron Deference in the Courts of Appeals

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Chevron U.S.A. v. Natural Resources Defense Council is one of the most important cases in administrative law. Decided in 1984, it was the genesis of a legal framework for federal courts to apply when deciding whether to defer to a federal agency's interpretation of a statute. It has, however, become an increasingly controversial precedent that the Supreme Court has applied less and less frequently over the last decade. The Court is now poised to revisit *Chevron* in the upcoming case *Loper Bright Enterprises v. Raimondo.*

The courts of appeals decide many more *Chevron* cases than the Supreme Court, and they play an important role in shaping the *Chevron* framework. In general, the courts of appeals apply *Chevron* more often than the Supreme Court and application of the *Chevron* framework in the courts of appeals has a greater bearing on the outcome of the case than at the Supreme Court. An examination of federal courts of appeals practices applying the *Chevron* framework therefore sheds light on how the *Chevron* framework operates in the vast majority of cases where it is at issue.

A handful of studies have evaluated how the courts of appeals apply *Chevron*, and the picture that emerges is markedly different from the way the Supreme Court applies it. Furthermore, a close examination of the courts of appeals practices themselves reveals significant variations in how *Chevron* is applied. Studies have identified large variations in how courts apply *Chevron* depending on which court heard the appeal, the agency party to the case, and the subject matter of the appeal, among other factors. Given this patchwork application of the *Chevron* framework it can be difficult for agencies and Congress to reliably predict which agency's statutory interpretation will receive deference under the *Chevron* framework. Regardless of the Supreme Court's consideration of *Loper Bright Enterprises*, Congress likely has the authority to codify, modify, or eliminate *Chevron* deference, and therefore can shape through legislation how the federal courts review agency interpretations of federal statutes.

Background

The *Chevron* framework is one of a suite of related doctrines that sets out the circumstances under which courts must defer to an executive agency's interpretation of a federal statute that it administers. Under the *Chevron* framework, a court must defer to an executive agency's interpretation of an ambiguous statute that it administers so long as the agency's interpretation is reasonable. The framework takes its name from a 1984 Supreme Court case, *Chevron U.S.A. v. Natural Resources Defense Council*, which sets out a two-step process for determining whether a court must defer to an agency's statutory interpretation.

The *Chevron* framework of review usually applies if Congress has given an agency the general authority to make rules with the force of law. If a court determines that *Chevron* applies, at step one it will use the traditional tools of statutory construction to determine whether Congress directly addressed the precise issue before the court. If the statute is clear on its face with respect to the issue before the court, the court must implement Congress's stated intent. If the court concludes instead that a statute is silent or ambiguous with respect to the specific issue, the court then proceeds to *Chevron*'s second step. At step two, courts must defer to an agency's reasonable interpretation of the statute. The *Chevron* framework rests on several related assumptions, including that statutory ambiguity indicates congressional delegation of interpretive authority; agencies have more expertise interpreting the statutes they administer; and agencies are politically accountable and therefore have more claim to make policy than courts.

Chevron is unquestionably one of the foundational decisions in administrative law. A search of the Westlaw electronic database indicates that, at the time of this writing, the Supreme Court and lower federal courts have cited the *Chevron* decision more than 18,000 times. In the last decade or so, however, the *Chevron* framework has come under increasing fire from various corners of legal academia, the courts, and the political branches. Over that same period, the Supreme Court has relied on the *Chevron* framework less and less. It is difficult to identify a single cause for the Court's recent silence on *Chevron*, but changes in the Court's personnel as well as increasing attacks from some corners of academia may account for some of the Court's reluctance to rely on the doctrine. In the Court's most recent full term, *Chevron* went unmentioned in three cases where an agency interpretation of federal law was at issue, leading some to speculate that the Court might soon overrule or at least curtail the *Chevron* framework. Supreme Court litigators have been equally unwilling to invoke *Chevron* before the Court. In a notable exchange in a 2019 oral argument, a prominent Supreme Court advocate concluded by admitting "I hate to cite it, but I will end with *Chevron*."

Adding to the speculation about the fate of *Chevron*, in late 2022, the Court declined to hear *Buffington v. McDonough*—a case that presented the Court the opportunity to revisit *Chevron* and possibly provide clarity to the lower courts. Justice Gorsuch issued a dissent calling attention to the growing differences between the Court's application of *Chevron* and the courts of appeals, noting that while the Supreme Court appears content to ignore *Chevron*, the lower courts do not have that luxury. (Supreme Court decisions are binding on all lower courts.) The Court, he argued, owes the lower courts clarity by explicitly overruling *Chevron*.

The Court may ultimately provide clarity to the lower courts when it decides *Loper Bright*, which it is scheduled to hear in its October 2023 term. In agreeing to hear *Loper Bright*, the Court explicitly confined its consideration to the question whether it should overrule or clarify *Chevron*.

Chevron in the Courts of Appeals

Differences Between the Supreme Court and Courts of Appeals

Although the Supreme Court may have reduced its application of *Chevron* over the last decade, the courts of appeals have not. Because Supreme Court decisions bind lower federal courts, they generally must apply the *Chevron* framework when reviewing agency interpretations of statutes that the agency administers.

Differences between the way the Supreme Court applies *Chevron* and the way the courts of appeals apply it are nothing new. A 2017 study that evaluated over 1,300 courts of appeals cases from 2003 to 2013—the largest study of courts of appeals decisions that refer to *Chevron*—found that the courts of appeals on average applied *Chevron* in close to three-quarters of cases addressing agency interpretations. From roughly the mid-1980s to the mid-2000s, studies found that the Supreme Court applied *Chevron* to about

one-quarter to one-third of cases where an agency interpretation is at issue. That number dropped to zero in the Court's most recent full term, continuing a decade-long trend of referring less and less to *Chevron*. A subsequent study that surveyed courts of appeals cases from 2020 to 2021, however, revealed that courts of appeals still apply *Chevron* at similar rates as those founds in the 2017 study. In the more recent study, courts of appeals applied *Chevron* in close to 85% of cases where an agency interpretation was at issue.

Further, agencies were significantly more likely to prevail when a court applied the *Chevron* framework (77.4%)—even if the court decided that the statute was unambiguous and did not defer to the agency's interpretation—than when a court applied no deference regime whatsoever (38.5%). Conversely, at the Supreme Court, various studies have found that the application of *Chevron* has little effect on the outcome of the case. At the Supreme Court, a 2006 study found that agencies prevailed about 76% of the time when the Court applied *Chevron*—similar to agencies' win rate in cases where the Court did not apply *Chevron*. This difference has led some to claim that there is a "*Chevron* Supreme and a *Chevron* Regular." Given the Supreme Court's recent silence on *Chevron*, the gap between the Supreme Court and the courts of appeals has only widened.

Differences Between Resolution at Step One and Step Two

Whether the court resolved the appeal at step one of *Chevron* or step two had a significant impact on the likelihood the agency would prevail. Drawing from the 2017 survey that studied over 1,300 cases decided from 2003 through 2013, the courts of appeals resolved 30% of cases at step one (i.e., the step where courts ask if the statute is clear), but of those cases, the agency prevailed only 39% of the time. These rates have largely been consistent over multiple decades. In the survey of cases from 2020 and 2021, the proportion of cases decided at step one increased to roughly 40% and the agency win rate at step one fell to approximately 33%, indicating that courts of appeals may be becoming less deferential.

In the same 2017 study, 70% of agency interpretation cases make it to step two, in which courts ask if the agency's interpretation is reasonable. Nearly all agency interpretations are found to be reasonable at step two (93.8%). Over the course of the eleven-year study period of the 2017 study (2003-2013), agencies lost 51 cases out the 817 that made it to step two. Interestingly, the Fourth Circuit did not invalidate a single agency interpretation at step two in the eleven-year study period. The 2020-2021 study again indicated that the courts of appeals may be becoming less deferential. Some 59% of cases made it to step two and agencies won 78% of those cases. Even assuming the more recent survey accurately depicts a less deferential federal appellate judiciary, the scholars responsible for the survey observed that "[t]he conventional wisdom is certainly [still] true: Once a court decides to apply the *Chevron* framework, the critical litigation battleground takes place at step one."

Different Circuits Apply *Chevron* Differently

Breaking down the data by circuit reveals significant variation between the various courts of appeals. In the 2017 study referenced above, the D.C. Circuit led the way in applying *Chevron*, relying on it in approximately 89% of cases that concerned agency interpretations of a statute. The Sixth Circuit applied *Chevron* in 61% of cases involving an agency interpretation.

Once a court of appeals applied *Chevron*, they are highly deferential to agencies. The overall agency win rate across all courts of appeals in the 2017 study was approximately 77%. The most deferential circuit was the First Circuit, where agencies prevailed in almost 83% of cases. The Ninth Circuit, conversely, was the least deferential circuit in the study, ruling for the agency in approximately 66% of the cases. The D.C. Circuit—the circuit often seen as having the most administrative law experience—was in the middle of the pack (73%). Although the Sixth Circuit applied *Chevron* less often than every other circuit, when it

did apply *Chevron*, agencies won 88% of cases. The Second and Seventh Circuits had similar differentials between applying *Chevron* and win rates after *Chevron* was applied.

Ultimately, the study authors could not identify a discrete factor that could account for the differences across circuits. The study authors found that variations in subject matter could account for some of the variation between circuits. For example, the Ninth Circuit hears a large number of immigration appeals. Removing those appeals from the 2017 study's data set, the agency win rate at the Ninth Circuit rose to 74%—roughly in line with the average. Other factors, such as the composition of the panel of judges hearing the appeal, also accounted for some of the differences.

Agency and Subject Matter are Important

The subject matter of the case and the agency advancing the interpretation was correlated with *Chevron* outcomes in the 2017 study. Courts of appeals applied *Chevron* at high rates (75%-100%) to cases involving telecommunications, Indian affairs, and pensions, and courts deferred to agencies under *Chevron* at similar rates (83%-92%) in those same subject matter areas. Conversely, courts applied *Chevron* less frequently (52%-67%) in cases involving housing, tax law, and employment. Furthermore, even when the courts applied *Chevron* in this latter group of cases, win rates for agencies were comparatively low (69%-81%). Cases involving energy issues displayed a different pattern: While courts applied *Chevron* in almost every case (96%), the relevant agency won 60% of the time when *Chevron* was applied.

There was a significant overlap in case outcomes between subject matter and agency. Nonetheless, there were some outliers to this trend. Courts deferred under *Chevron* to the Surface Transportation Board (including its predecessor agency, the Interstate Commerce Commission) in all 16 cases involving the agency in the study (100%) even though courts deferred under *Chevron* in cases involving transportation issues 81% of the time.

Finally, a handful of agencies prevailed more often when courts did *not* apply *Chevron*. For instance, the Federal Trade Commission had a 91% overall win rate, but a 75% win rate after courts applied *Chevron*. Similarly, the Bureau of Prisons had a 74% overall win rate, but won 62% of its cases after courts applied *Chevron*.

What Courts of Appeals Judges Think of *Chevron*

A 2018 study of 42 federal appellate judges surveyed their views on the *Chevron* framework, among other topics. The survey revealed that, with some notable exceptions, most judges surveyed do not favor the *Chevron* framework. For example, some question its key underlying assumptions that ambiguity in statutory text indicates congressional delegation and that agencies have special expertise interpreting the statutes that they administer. All judges surveyed, however, believe they are bound by Supreme Court precedent to apply the *Chevron* framework.

Judges' views about *Chevron*'s fundamental assumptions appear to be reflected in the absence of discussion of those assumptions in judicial opinions applying *Chevron*. Returning to the 2017 study of over 1,300 courts of appeals cases, the study found that judges rarely invoked agency expertise as a justification for the application of *Chevron*, while less than 20% of cases examined whether Congress granted the agency rulemaking authority.

The study also revealed what it dubbed the "D.C. Circuit effect." Unlike their counterparts on other courts of appeals, judges on the D.C. Circuit are "generally comfortable" with the *Chevron* framework and see it as a "part of the basic wiring" of evaluating agency statutory interpretations. They also appear to be more comfortable with some of *Chevron*'s core assumptions about agency expertise in interpreting the statutes that they administer and the political accountability of agencies.

Considerations for Congress

The Supreme Court applies *Chevron* differently from the court of appeals, the courts of appeals apply *Chevron* differently from one another, and the courts of appeals treat different agencies differently in applying *Chevron*. Congress likely has the authority to address this patchwork application of *Chevron* if it found it appropriate, or even to eliminate *Chevron* altogether. Article III of the Constitution has been interpreted to provide Congress the authority to create standards of review for the federal courts and direct which courts hear certain cases. The House of Representatives in the 114th and 115th Congresses passed the Separation of Powers Restoration Act (SoPRA) that would eliminate the *Chevron* framework if enacted. SoPRA has also been introduced in the 118th Congress. Eliminating *Chevron* may not produce uniform interpretations of federal statutes across the federal courts, however. If the lower courts were no longer required by *Chevron* to defer to some agency interpretations, they would be more likely to rely on their own interpretations of federal law, and different courts may end up differing on their interpretations of the same provisions.

Congress also likely has the authority to require courts to apply the *Chevron* framework, although some have argued that *Chevron* violates Article III by transferring interpretive authority from the courts to the executive branch. If Congress were to require the application of the *Chevron* framework, it could do so in a number of different ways. For instance, it could require courts to apply *Chevron* in all cases of agency statutory interpretation. It could attempt to prescribe additional standards for the application of *Chevron* as a way to bring consistency to the practices of the courts. It could also require courts to apply *Chevron* in some cases of agency statutory interpretation, but not others. Finally, an additional way to reduce the patchwork application of *Chevron* might be for Congress to direct certain courts to hear cases arising from particular agencies, as the D.C. Circuit already does for some kinds of agency actions.

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