

CHAPTER 12

CHEVRON DEFERENCE

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The Administrative Framework

Every statute contains ambiguities, and immigration law includes its fair share. For example, the Immigration and Nationality Act (INA)¹ requires adjudicators to determine whether deportation would result in “extreme hardship”² or “exceptional and extremely unusual hardship;”³ whether a crime involves “moral turpitude;”⁴ or whether it constitutes a “particularly serious crime.”⁵ None of these terms is defined in the statute, nor are dozens of other ambiguities in the statute explained. These ambiguities instead are resolved either by the agency charged with implementing the statute, or by courts reviewing the agency action. The *Chevron*⁶ deference doctrine addresses the question of which institution—the agency or the courts—has the final or most authoritative say in interpreting the statute.

In 1984, the U.S. Supreme Court’s decision in *Chevron USA v. Natural Resources Defense Council* resolved what had been two different, and not entirely consistent, lines of cases regarding the relationship between the federal courts and executive administrative agencies. One line of cases indicates that the courts should give great deference to the agency in determining how the statute is to be interpreted and implemented. Cases siding with the agency often cited the agency’s greater expertise on the subject matter as a reason for deference. The only role for the courts, it follows, is to ensure that the choice made by the agency is reasonably within the confines of the enabling act. For example, in *NLRB v. Hearst Publications, Inc.*,⁷ the Supreme Court stated:

[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it ini-

¹ Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163, (codified as amended at 8 USC §§1101 *et seq.*).

² See INA §212(h).

³ See INA §240A(b).

⁴ See INA §§212(a)(2) and 237(a)(2).

⁵ See INA §§208(b)(2)(A)(ii) and 231(b)(3)(B).

⁶ *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

⁷ *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

tially, the reviewing court’s function is limited. . . . [The agency’s interpretation] is to be accepted if it has “warrant in the record” and a reasonable basis in law.⁸

The second line of cases, by contrast, instructs that courts must review the agency’s interpretation independently, to ensure that it is consistent with the enabling act. The Court’s decision in *Skidmore v. Swift & Co.*⁹ often is regarded as illustrative of this “independent analysis” approach. The Court explained that the agency does have the power to persuade courts as to the correct interpretation of the statute. Ultimately, however, it is up to the courts to accept or reject the agency interpretation:

The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.¹⁰

This line of cases, grounded in the view that the courts are the final arbiters of ambiguous statutory language, has its roots in *Marbury v. Madison*¹¹:

It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each.¹²

According to this second line of cases, agencies may implement a statute or give interpretations to ambiguous statutory terms in a variety of ways—*e.g.*, notice and comment rulemaking, adjudication, interpretive rules, policy statements, agency manuals and guidelines, to name a few. The issue of whether deference should be given to the agency interpretation can arise in any of these settings. In 1984, the Supreme Court decision in *Chevron*¹³ established a new framework for determining

⁸ *Id.* at 131. See also *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 98, n.8 (1983) (“[A]n agency acting within its authority to make policy choices consistent with the congressional mandate should receive considerable deference from the courts”).

⁹ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

¹⁰ *Id.* at 140. See also *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947) (“If we were obliged to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board’s decisions would leave us in the dark”); *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1954) (“An agency may not finally decide the limits of its statutory power. That is a judicial function”); *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31–32 (1981) (“The interpretation put on the statute by the agency charged with administering is entitled to deference. They must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to be implemented”).

¹¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹² *Id.* at 177. See also *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) (the words of a statute “must get their final meaning from judicial construction”).

¹³ *Chevron*, *supra* note 6.

when, and to what degree, a court should give deference to an agency's interpretation of the statute.¹⁴

***Chevron* Deference**

In general, Congress intends for courts to have the ultimate say with respect to how the statute should be interpreted. According to the Administrative Procedure Act (APA):¹⁵

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.¹⁶

Under the *Chevron*¹⁷ deference doctrine, the court under some circumstances should give deference to an agency's interpretation of the statute. However, this doctrine must be understood against the more general principle that Congress intends the courts, not the agencies, to interpret the statute.

The *Chevron* decision is based on the recognition that in some cases, Congress has delegated to the administrative agency authority to resolve ambiguities and fill in the gaps in a statute. Sometimes Congress is unable or unwilling to flesh out all of the details—perhaps the political will is lacking; perhaps Congress feels that the agency has better expertise; or perhaps Congress simply does not have the time to study the problem completely. The theory is that, in some circumstances, Congress intends for the agency, not the courts, to resolve the ambiguities in the statute. In these circumstances, when the agency fills in the gaps it does not so much interpret the statute as “make law.” Congress could have “made the law,” but for whatever reason decided not to and left it to the agency to do so. According to *Chevron*, when Congress delegates to the agency the power to fill in the gaps, and when the agency exercises this power that Congress has delegated, the courts should defer to the agency's decision.

When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, how-

¹⁴ *Chevron* establishes a framework for judicial review of an agency's interpretation of statutes, not judicial review of an agency's interpretation of regulations. An agency's interpretation of its own regulations is controlling “unless plainly erroneous or inconsistent with the regulation.” See *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

¹⁵ Administrative Procedure Act (APA), Pub. L. 79-404, 60 Stat. 237, 238; (codified at 5 USC §§551–59, 701–06, 1305, 3105, 3344, 5372, 7521).

¹⁶ 5 USC §706.

¹⁷ *Chevron*, *supra* note 6.

ever, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹⁸

Chevron frequently is cited for creating a two-step inquiry. At step one, the court must determine if the statute is clear, for if Congress has spoken unambiguously about its intent, then that intent must be enforced. At step two, if the statute is ambiguous, then the court must determine if the interpretation proffered by the agency is reasonable. In light of case law that has developed since *Chevron*'s publication, there are now four glosses on the *Chevron* two-step inquiry.

First, the initial question is whether there actually are "gaps" or "ambiguities" left open that need to be resolved. This is a question for the courts, not the agency. As the Court explained:

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. ... If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.¹⁹

Second, deference to the agency is appropriate only if Congress intends that the agency have the authority to fill in the gaps left in the statute. It is Congress that delegates such authority to the agency, and the courts must determine that Congress did, in fact, intend for the agency to fill in the gaps in the statute. Congress may delegate authority to the agency explicitly or implicitly.

The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. ... If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. ... Sometimes the legislative delegation to any agency on a particular question is implicit rather than explicit.²⁰

Before *Chevron* deference is appropriate, it must be the case that Congress intended to delegate the authority to "make law" to the agency; it is the courts, not the agencies, who decide whether Congress has intended such delegation.

¹⁸ 467 U.S. at 842–43.

¹⁹ 467 U.S. at 843, n.9.

²⁰ 467 U.S. at 843–44.

Third, courts should defer not to just any decision made by the agency in implementing the statute, but only those decisions or agency actions that actually “make law.” The Court indicated that deference is appropriate only where the agency’s decision is sufficiently formal and where it involves full consideration of the competing interests at stake:

[T]he principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depend upon more than ordinary knowledge respecting the matters subjected to agency regulations.²¹

Fourth, *Chevron* recognizes that in some circumstances, the court may defer to an agency interpretation even if this is not the interpretation that the court would have chosen.

The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.²²

However, even where the agency has authority to act within a range of possibilities, the court still has a reviewing function. The rules that the agency adopts must be within the range permitted by the enabling act.

If [the agency’s] choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.²³

Four-Pronged Test Established by *Chevron*

Thus, under the framework established by *Chevron*,²⁴ there are four questions to be considered in determining whether and to what extent the court should defer to an agency’s interpretation of the statute:

- (1) Is the statutory provision at issue ambiguous?
- (2) Has Congress delegated to the agency the authority to interpret the statutory provision at issue?
- (3) Has the agency properly exercised its authority to “make new law?”
- (4) Is the agency’s interpretation of the statute permissible?

²¹ 467 U.S. at 844.

²² 467 U.S. at 843, n.11.

²³ 467 U.S. at 845.

²⁴ *Chevron*, *supra* note 6.

Statutory Ambiguity

At the first step, the court must determine whether there are any gaps in the statute to be filled. If the court can discern congressional intent on the issue under consideration, then that intention is the law and must be followed even if the agency has come to a different conclusion. In determining what Congress intended in enacting the statute, courts use “traditional tools of statutory construction,”²⁵ including an analysis of the words used, contextual analysis, consideration of the legislative history, and use of canons of statutory construction.

📖 *Quick Cites*²⁶

- *General Dynamics Land Systems, Inc.*, 540 U.S. 581, 600 (2004) (“Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent”)
- *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (giving no *Chevron* deference to the agency’s interpretation, and rejecting the agency’s interpretation in light of the “cardinal principle” of statutory interpretation that the statute should be construed to avoid constitutional difficulties)²⁷
- *INS v. St. Cyr*, 533 U.S. 289, 314–26 (2001) (giving no *Chevron* deference to agency’s interpretation where the statute is interpreted based on principles of retroactivity)
- *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 449 (1987) (no *Chevron* deference where Congress’ intention is discerned using the “traditional tools of statutory construction,” including “the plain language of the Act” and “its legislative history” and “the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien”)

²⁵ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

²⁶ *Quick Cites* are editorially vetted cases that the author considers to be particularly useful for providing reliable cites for brief writing. These select cases can be cited quickly to illustrate a principle or support a given argument.

²⁷ The doctrine of constitutional avoidance is one of the traditional tools of statutory construction. This doctrine is “a means of giving effect to congressional intent, not of subverting it.” *Clark v. Martinez*, 543 U.S. 371, 382 (2005). There is an “assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of constitutional authority.” *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172–73 (2001). Thus, “Congress does not typically intend to authorize agencies to fill in statutory gaps in a manner raising substantial constitutional doubts.” *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1250 (10th Cir. 2008). *But see Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007) (“When Congress has explicitly or implicitly left a gap for an agency to fill, and the agency has filled it, we have no authority to re-construe the statute, even to avoid potential constitutional problems; we can only decide whether the agency’s interpretation reflects a plausible reading of the statutory text. *Clark v. Martinez*, and the constitutional avoidance doctrine it embodies, plays no role in the second *Chevron* inquiry.”).