

Proposals to Rollback *Chevron* Deference: Implications for Environmental Law Practitioners

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During his nomination hearing, then-Judge Neil Gorsuch was grilled by Democratic senators on a hot-button environmental issue, pledging that, if confirmed, he “would try to come at [the issue] with as open a mind as a man could muster.” *Gorsuch Confirmation Day 2, Part 1*, C-SPAN, <https://www.c-span.org/video/?425138-1/supreme-court-nominee-stresses-independence-calls-criticism-judges-disheartening&start=17018> (Mar. 21, 2017, 05:01:30). What was that hot-button issue? It was the *Chevron* deference doctrine—the long-standing principle of administrative law that requires judges to “defer” to an executive branch agency’s interpretation of an ambiguous statute so long as that interpretation is “reasonable.” In his opinions for the U.S. Court of Appeals for the Tenth Circuit, Judge Gorsuch had questioned the wisdom and validity of that doctrine. The confirmation of Justice Gorsuch to the Supreme Court (on April 7, 2017) now sets the stage for possible reconsideration of a doctrine that has been a mainstay of environmental law.

Meanwhile, the *Chevron* doctrine has been making headlines on the legislative side of the Hill, too. On January 11, 2017, the U.S. House of Representatives passed a regulatory reform bill that would eliminate the *Chevron* doctrine altogether.

What is all the fuss about *Chevron*? What would rolling it back mean? This article examines the implications for environmental law practitioners.

***Chevron*’s Importance to Environmental Law**

Chevron deference was born in the context of an environmental dispute, specifically, a 1984 Clean Air Act case (ironically one that arose when Justice Gorsuch’s mother was administrator of the Environmental Protection Agency (EPA)). *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* has since become a bedrock principle of administrative law, key to many environmental cases, the most-cited administrative law case of all time, and central to D.C. Circuit cases reviewing EPA regulations.

On the other hand, the *Chevron* doctrine is not monolithic—courts have recognized exceptions and

identified hard cases where it carries less weight. An interpretation is only entitled to *Chevron* deference, for example, if (1) Congress has granted the agency authority to issue interpretations with the “force of law” and (2) the interpretation was issued in the exercise of that authority. *U.S. v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). Further, deference may not be appropriate if the statute at issue is not one that the agency is charged with administering. See *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (no *Chevron* deference to the Director of the Office of Workers’ Compensation’s interpretation of the Administrative Procedure Act (APA) because “the APA is not a statute that the Director is charged with administering.”).

Criticism of *Chevron* and the Rationale for Rolling It Back

What is the objection to *Chevron*? In *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016), then-Judge Gorsuch’s concurrence described *Chevron* as “more than a little difficult to square with the Constitution,” and opined that it “permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power.” *Id.* at 1149. “*Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law. Under its terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive).” *Id.* at 1155. He concluded: “We managed to live with the administrative state before *Chevron*. We could do it again.” *Id.* at 1158.

The debate continued at the Gorsuch hearing. Some senators attacked *Chevron*. Sen. Orrin Hatch (R-Utah) explained, “Reexamining *Chevron* is not about being anti- or pro-regulation. It’s about restoring constitutional separation of powers. It’s about ensuring that bureaucracy abides by the law no matter what its policy goals.” *Gorsuch Confirmation Hearing, Day 2, Part 1* at 01:18:08. Other senators defended *Chevron*. Sen. Al Franken (D-Minn.) warned that Gorsuch’s views on *Chevron* could upend the “landmark administrative law” principle that says courts should be wary of

overruling decisions by scientific experts without good legal reasons. *Id.* at 6:10:42.

Meanwhile, the regulatory reform House bill would amend APA to clarify that courts will “decide *de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies.” The rationale for the legislation: (1) costs of overregulation (“The annual cost of federal regulation adds up to approximately \$1.86 trillion ... each year.”); (2) application of *Chevron* deference is beset with ambiguity (“court decisions have tried to evolve and clarify the doctrine, but this has in turn evolved into a complex area of case law and an evolving set of legal doctrines for review of agencies’ statutory interpretations”); (3) the end result is too much power for agencies (“This complex series of case law decisions has increased the power of the Federal administrative agencies, giving them power as they seek ‘permissible’ interpretations of statutory provisions.”)

The debate will likely resound in the executive branch as well: President Trump has picked Neomi Rao, a professor at George Mason University’s Antonin Scalia Law School, to lead the White House Office of Information and Regulatory Affairs, which is an important gatekeeper on regulatory initiatives from all agencies, including EPA. Rao has been critical of *Chevron* deference in her testimony before Congress.

What Does All This Mean for Environmental Law Practitioners?

A complete jettison of *Chevron* may be a long shot. Even with Justice Gorsuch on the Supreme Court, a majority of justices may be reluctant to upend long-standing precedent, especially where Congress has legislated for decades against the backdrop of that precedent. Although there is at least one member of the Court, Justice Thomas, who has questioned the constitutional validity of the doctrine, it may be easier for justices sympathetic with some of Gorsuch’s criticisms to limit its reach rather than overturn it. Justice Gorsuch himself recognized that the issue of judicial deference is a nuanced one, acknowledging that scientific and technical experts are entitled to “great deference” from the courts: “No one is suggesting that scientists shouldn’t get deference.” *Gorsuch Confirmation Hearing, Day 2, Part 1* at 06:13:19. But courts should be the final arbiters of what “the law” means, he testified. Meanwhile, although a Senate version of the regulatory reform bill has been reported out of the Senate Committee on Homeland Security & Government Affairs with bipartisan support, the Senate bill does not contain the House bill provision overriding *Chevron* deference.

In any event, the implications of rolling back *Chevron* are not clear. At first blush, reversing a precedent that is so frequently cited would seem to have major implications, but some commentators have questioned how much difference *Chevron* deference really makes, as a practical matter, in deciding actual cases. As noted above, courts are already willing to find exceptions and/or to rule against agencies when they find their interpretations contrary to law (step one) or unreasonable (step two). And, as Justice Gorsuch himself noted, the country managed to function under a prior legal doctrine holding that an agency interpretation deserves deference if it is persuasive (*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

Environmental Counsel Should Keep a Few Points in Mind

First, the validity of *Chevron* deference will continue to be a hot topic in environmental litigation for the foreseeable future, especially given Justice Gorsuch’s past statements. Parties will be looking for test cases to find new or more expansive exceptions to *Chevron* deference and to tee up the doctrine itself. As just one example, the lawyers and judges in the September 2016 D.C. Circuit argument over EPA’s Clean Power Plan devoted nearly as much attention to whether the case fell within the *Chevron* rubric as they did to interpretation of the Clean Air Act itself. Parties will need to devote ever more space in their briefs to address these arguments, and the lower courts will need to grapple with these issues in their opinions.

Second, practitioners will want to monitor these developments so that they can counsel their clients on compliance and litigation strategy. Counsel for both private parties and federal agencies may want to consider alternative arguments that do not rely excessively on judicial deference doctrines, given that they may be in flux for a while. Further, in a world in which agency interpretations are given less deference, the regulated community may find less clarity about the meaning of laws and regulations as individual judges come to different conclusions.

Third, and most significantly, rolling back *Chevron* deference could add a layer of complication for the Trump administration as it pursues new regulatory and deregulatory initiatives. The Supreme Court has made clear that changes in agency positions on legal issues may be entitled to *Chevron* deference, so long as the agency provides a reasoned explanation and the new interpretation is itself permissible and supported by the record. But if *Chevron* is judicially or legislatively overruled or narrowed, government

lawyers will have a more difficult task in defending these changes. Justice Gorsuch himself posited that *Chevron* is not a conservative or a liberal issue; rather, it “advantage[s] whoever has their hands on the brakes or the administrative state at a particular time.”

Counsel for nonfederal parties who were busy defending Obama-era EPA regulations frequently argued for extensive judicial deference; counsel on the other side, seeking to challenge those regulations, argued the opposite. The former group may now find themselves on the side challenging EPA, as the new administration changes course, and a reverse dynamic may be at play for the latter group. Now that the “shoe is on the other foot,” counsel in these cases may need to recalibrate their deference arguments.

It will also be interesting to see how this issue unfolds in the Trump administration’s Department of Justice. DOJ has a longstanding institutional interest in its ability to defend the legal interpretations of its client agencies, regardless of administration, and has traditionally been a staunch supporter of *Chevron* and related deference doctrines. We will see whether and how DOJ’s positions evolve in the new administration, as DOJ seeks to defend the administration’s regulatory initiatives in court.

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