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Chevron Doctrine Is Opposed to Administrative Procedure Act's Text and Legislative History

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Countless times each year, federal courts are called upon to review whether a federal agency's interpretation of a statute Congress has empowered it to implement is legally appropriate. The court applies the familiar two-step analysis of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). If the statute at issue does not clearly reveal Congress' intent, courts are to defer to the agency's judgment when its interpretation of the ambiguous statutory provision is based on a "permissible construction." *Id*. at 842-43. Such judicial deference has come under fire recently from some United States Supreme Court justices. *See*, *e.g.*, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211 (Scalia, J., concurring in the judgment) ("Heedless of the original design of the APA [Administrative Procedure Act], we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations."); *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring). Motivated by these concerns, the U.S. House of Representatives recently adopted legislation, H.R. 4768, that would essentially overrule *Chevron* by requiring courts to review agency regulations *de novo*.

The perceived need for such legislation ironically arose from the Supreme Court's failure in *Chevron* itself to heed the very instructions that the Court delivered to the lower courts in that decision—*i.e.,* to conform to Congress' clear words, considering deference as a fallback option only when Congress' intent could not be determined by "employing traditional tools of statutory interpretation." *Chevron*, 467 U.S. at 843 n.9. For Congress spoke quite clearly when passing § 706 of the APA in providing that the judiciary—not the federal agencies themselves—should resolve ambiguities in statutory interpretation in cases challenging agency action.

The *Chevron* doctrine has long been on shaky conceptual ground for two basic reasons: First, there is no support in the APA's text for a highly deferential test that requires Congress to speak clearly or else cede, in effect, its lawmaking authority in broadly written statutes to the Executive Branch. Section 706 reads: "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." 5 U.S.C. § 706 (emphasis added). "[S]hall" means shall. [A]ll" means all.

Second, given Chief Justice Marshall's injunction in *Marbury v. Madison* that it is emphatically the province and duty of the courts to say what the law is—with the Supreme Court having the last word—it has never been explained how *Chevron* comports with the separation of powers. How could the judiciary decide, consistent with the Constitution, that its function has been delegated by Congress to the Executive Branch? For the essence of the judicial function is to interpret legal provisions and apply them to the facts of particular cases and controversies.

Consider as well the structure of the APA as it is currently codified. Section 701 makes clear that Congress anticipated that delegation would occur explicitly. *See* 5 U.S.C. § 701(a) (emphasis added) ("*This chapter applies*, according to the provisions there, except to the extent that—(1) statutes preclude judicial review [which is equivalent to saying that the courts have been instructed to stay out of a particular type of matter]; or (2) agency

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action is committed to agency discretion by law [which is just the flip side of saying that there has been an express and exclusive delegation to an agency])." Nothing in § 701 or anywhere in Chapter 7 of the APA provides that agencies are to be deemed the arbiters of the meaning of statutory text when they have not been expressly delegated that power.

This conclusion is also buttressed by consulting the Attorney General of the United States' MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) (hereinafter *Manual on the APA*) as a species of "legislative history." *See Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 546 (1978) (the *Manual* is "a contemporaneous interpretation previously given some deference by this Court because of the role played by the Department of Justice in drafting the legislation"). The *Manual* states that § 10(e) in the session law that was the APA, now codified at § 706, "[o]bviously … does not purport to empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties. In fact, with respect to constitutional courts, it could not do so." *Manual on the APA* at 107 (1947).

The first example the Attorney General used to explain the point about § 10(e) is *Keller v. Potomac Electric Power Co.*, 261 U.S. 428 (1923). There, the Supreme Court held that Congress could not constitutionally confer on the courts the power to raise or lower utility rates. As the opinion makes clear, the *Keller* Court understood interpreting provisions of law to be the judicial function whereas rate-setting was a quintessential legislative function:

> What is the nature of the power thus conferred on the District Supreme Court. Is it judicial or is it legislative? *Is the court to pass solely on questions of law, and look to the facts only to decide what are the questions of law really arising, or to consider whether there was any showing of facts before the commission upon which, as a matter of law, its finding can be justified?* Or has it the power, in this equitable proceeding, to review the exercise of discretion by the commission and itself raise or lower valuations, rates, or restrict or expand orders as to service? … If it has, then the court is to exercise legislative power, in that it will be laying down new rules, to change present conditions and to guide future action, *and is not confined to definition and protection of existing rights*.

Keller, 261 U.S. at 440 (emphasis added). *Keller* is not about authorizing congressional delegations of interpretive/judicial powers to agencies but about ensuring that the courts do not exercise the functions of other branches.

Chevron untethered judicial review of federal agency regulations from the explicit statutory language Congress adopted in the APA. As a result, for the past three decades, federal courts have consistently ceded law-making authority to unelected regulators. That state of affairs, Justice Thomas wrote in his *Michigan v. EPA* concurrence, "raises serious separation-of-powers questions." 135 S. Ct. at 2712 (Thomas, J., concurring). He added, "*Chevron* deference precludes judges from exercising [independent] judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction. … It thus wrests from Courts the ultimate interpretative authority to "say what the law is." *Ibid* (internal citations omitted).

Newfound attention by Congress to whether the courts obeyed the Legislative Branch's clear prior instructions, as issued many decades ago in the APA, is welcome as a matter of statutory adherence. But it is vitally important as a constitutional matter—to ensure that Congress continues to make the laws, the courts keep interpreting them, and that neither Congress nor the Judiciary abdicate their respective constitutional roles to the Executive Branch.

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