Legal Backgrounder

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With *En Banc* Review, Tenth Circuit Foreshadows Potential Split with D.C. Circuit on *Chevron* Waiver

by Jeremy J. Broggi

Federal administrative agencies often must interpret statutes they administer to determine how those statutes apply to new situations. Out of respect for Executive Branch policy judgments and expertise, reviewing courts afford varying levels of deference to these interpretations. Courts sometimes must resolve the appropriateness of such deference where the Government does not affirmatively seek it—or, particularly in more recent cases, where the Government affirmatively disclaims it.

Earlier this month, the U.S. Court of Appeals for the Tenth Circuit granted rehearing *en banc* in *Aposhian v. Barr*, to decide whether the Government can affirmatively waive *Chevron* deference. No. 19-4036 (10th Cir. Sept. 4, 2020) (order granting rehearing *en banc*). The court's decision to rehear the case sets up a potential split with the U.S. Court of Appeals for the D.C. Circuit, which last year held that the Government cannot waive or forfeit *Chevron*. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1 (D.C. Cir. 2019) (per curiam), *cert. denied*, 140 S. Ct. 789 (2020). Rehearing in *Aposhian* also provides the full Tenth Circuit an opportunity to account for the U.S. Supreme Court's recent decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). That decision, which came too late for panel consideration, suggests that *Skidmore* deference may be appropriate where the Government does not invoke *Chevron*.

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The Tenth Circuit and D.C. Circuit cases both arose from a decision by the Bureau of Alcohol, Tobacco, Firearms, and Explosives to classify bump stocks as machineguns under the National Firearms Act, 26 U.S.C. § 5845(b). Specifically, the Bureau determined in a regulation promulgated after notice and comment that the statutory phrase "single function of the trigger" means a "single pull of the trigger" and that the term "machinegun" includes a bump stock that "allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed." Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66553–54 (Dec. 26, 2018).

Under longstanding Supreme Court precedent, agencies are entitled to varying levels of judicial deference for statutory interpretations. The most deferential review takes its name from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Chevron*, the Court held that "[w]hen a court reviews an agency's construction of the statute which it administers" the reviewing court must begin by determining whether the statute is "silent or ambiguous with respect to the specific issue." *Id.* at 842–43. If it is, then the agency's interpretation will be upheld so long as it is "reasonable." *Id.* at 845.

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Chevron is not the only form of deference. Another standard originates in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under *Skidmore*, the "weight" a court affords to an agency's interpretation "depend[s] 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." *Id.* at 140. *Skidmore* is much less deferential than *Chevron*, and the choice between the two depends upon various factors including the procedural formalities observed by the agency. *See generally United States v. Mead Corp.*, 533 U.S. 218 (2001).

Not surprisingly, federal agencies typically invoke the more deferential *Chevron* standard. But in the bump stock cases, the Government affirmatively disclaimed *Chevron* and asserted that the Bureau's interpretation should be upheld as the "best" reading of the statute—advocating, in essence, for *de novo* review. Indeed, at oral argument in *Guedes*, the Government went so far as to indicate that it would prefer that the court set aside the Bureau's regulation rather than uphold it under *Chevron*. Recording of Oral Argument at 42:38–43:45, *available at* https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/28827D2069E65262852583C500581006/$file/19-5042.mp3.

The Government did not explain fully its reasons for disclaiming *Chevron*. There are, however, at least two potential consequences where a court accepts waiver. One is that the agency action is less likely to be upheld. Accordingly, a circumstance where the Government might be inclined to waive *Chevron* is where it felt compelled to take a particular administrative action (perhaps for political reasons) but does not actually prefer the result.

A second consequence of waving *Chevron* is that the reviewing court is more likely to find that the underlying statute is clear. Courts generally do not see themselves as exercising interpretive discretion in statutory cases. Thus, when forced to decide the best interpretation, a judge may describe his or her own decision as following unambiguously from the statutory text, thus effectively "locking in" the result. *See generally Natl. Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). Accordingly, the Government might be inclined to seek this result where it wants to take an issue off the table for itself or for future administrations.

Whatever the Government's motivation in the bump stock cases, the D.C. Circuit held that the Government could not waive or forfeit *Chevron* because *Chevron* is "a doctrine about statutory meaning" "not a 'right' or 'privilege' belonging to a litigant." *Guedes*, 920 F.3d at 22. The majority distinguished contrary circuit precedent that held the doctrine waived by characterizing those cases as involving waiver by the agency, not its lawyers. On the merits, the court found that the Bureau's rule was a reasonable interpretation of the National Firearms Act. (Judge Henderson dissented, arguing that *Chevron* should not apply because the National Firearms Act imposes criminal and civil penalties; she noted in passing the tension between the majority's decision and circuit precedent permitting waiver.)

The Tenth Circuit also applied *Chevron* to uphold the bump stock rule. Curiously, the panel majority found that the plaintiff's arguments *against Chevron* were an "invitation" to apply the doctrine. *Aposhian v. Barr*, 958 F.3d 969, 982 (10th Cir. 2020), *reh'g en banc granted, judgment vacated*, 19-4036 (10th Cir. Sept. 4, 2020). The majority touched on the waiver issue in a footnote, remarking that "[t]o the extent that *Chevron* is a standard of review, we would need no invitation to apply it." *Id.* at n.6.

Judge Carson dissented. On the issue of waiver, he quoted a recent statement by Justice Gorsuch arguing that "[i]f the justification for *Chevron* is that 'policy choices' should be left to executive branch officials 'directly accountable to the people,' then courts must equally respect the Executive's decision not to make policy choices in the interpretation of Congress's handiwork." *Id.* at 998 (citation omitted).

Under this view, the court should "supply its best independent judgment about what the law means" when the Government waives *Chevron*. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J., respecting denial of certiorari)).

* * *

The Tenth Circuit's grant of rehearing *en banc* signals the full court's intent to take up these issues. The grant directs the parties to file supplemental briefs addressing five questions, four of which specifically relate to the applicability of the *Chevron* doctrine, including whether it can be waived by the Government.

1. Did the Supreme Court intend for the *Chevron* framework to operate as a standard of review, a tool of statutory interpretation, or an analytical framework that applies where a government agency has interpreted an ambiguous statute?

2. Does *Chevron* step-two deference depend on one or both parties invoking it, i.e., can it be waived; and, if it must be invoked by one or both parties in order for the court to apply it, did either party adequately do so here?

3. Is *Chevron* step-two deference applicable where the government interprets a statute that imposes both civil and criminal penalties?

4. ***

5. Is the bump stock policy determination made by the Bureau of Alcohol, Tobacco and Firearms peculiarly dependent upon facts within the congressionally vested expertise of that agency?

Aposhian v. Barr, No. 19-4036 (10th Cir. Sept. 4, 2020) (order granting rehearing *en banc*)

In addition to setting up a potential split with the D.C. Circuit on waiver, the grant provides an opportunity for the Tenth Circuit to account for the Supreme Court's recent decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), which came too late for the panel's consideration. There, the Court considered an interpretation of the Clean Water Act issued by the Environmental Protection Agency after notice and comment. Observing that "[n]either the Solicitor General nor any party has asked us to give what the Court has referred to as *Chevron* deference to EPA's interpretation of the statute," Justice Breyer's 6-3 majority opinion cited *Skidmore* for the proposition that "[e]ven so, we often pay particular attention to an agency's views in light of the agency's expertise in a given area, its knowledge gained through practical experience, and its familiarity with the interpretive demands of administrative need." *Id.* at 1474.

Because the Supreme Court went on to find that that the EPA's interpretation was not persuasive, *Maui*'s dictum does not definitively resolve the question of what should happen when the Government waives or forfeits *Chevron*. Still, it may be telling that no member of the Court disagreed with the majority's suggestion that *Skidmore* establishes the default level of deference where the Government does not invoke *Chevron*. Moreover, unlike the Tenth and D.C. Circuits, the Supreme Court declined to analyze whether the EPA's interpretation was of the type that could have otherwise received *Chevron* deference—providing yet another clue about its view on the permissibility of waiver.

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Substantively, the *Maui* decision opens a potentially interesting middle ground between *Chevron* and *de novo* review. If the *en banc* Tenth Circuit were to follow *Maui* and conclude that *Skidmore* applies where the Government declines to invoke *Chevron*, it could potentially preserve some of the perceived benefits of deference—benefits that are often important to regulated entities, such as uniformity in administrative and judicial understanding of what federal law requires, and appropriate consideration of an agency's information-gathering functions and technical expertise. Moreover, under *Skidmore*'s weaker deference, those benefits could be achieved without sanctioning the kinds of blatant agency flip flops that have become too common under *Chevron*.

Applying *Skidmore* where the Government is permitted to waive *Chevron* would also arguably be consistent with the theoretical underpinnings of both doctrines. Unlike *Chevron*, *Skidmore* does not rest on a theory of implicit delegation of interpretive authority from Congress to the Executive Branch. Rather, *Skidmore* acknowledges that agency decisions "constitute a body of experience and informed judgment" that result from pursuance of the functions authorized by Congress. 323 U.S. at 140. Thus, even where the Government disclaims any intent to bind the courts to its interpretation of a federal statute, the reviewing court may nevertheless afford that decision an appropriate weight that gives at least some consideration to persuasive agency views.

Rehearing by the full Tenth Circuit provides an opportunity for briefing and consideration of these important issues. However that court resolves them, the question of *Chevron* waiver appears to ultimately be headed to the Supreme Court for definitive resolution.

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