**Giles S. Rich and Coke Inns of Court Joint Meeting Handout – Jan. 10, 2019**

Moderator: The Honorable Kathleen O’Malley, U.S. Court of Appeals for the Federal Circuit

Panelists: The Honorable Paul Friedman, U.S. District Court for the District of Columbia

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1. Deference to Interpretations of Administrative Agencies: *Skidmore*, *Chevron*, and *Auer*
	1. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (Jackson, J.): In *Skidmore*, the Court acknowledged that no statutory provision stated what deference courts should apply in reviewing an administrator’s guidance.  Thus the Court developed a new rule that an administrative agency’s interpretative rules deserve deference according to their persuasiveness. The Court adopted a case-by-case test that considers: (1) the thoroughness of the agency’s investigation; (2) the validity of its reasoning; (3) the consistency of its interpretation over time; and (4) other persuasive powers of the agency.
	2. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (Stevens, J.): In *Chevron*, the Court addressed the standard of review for a government agency's reading of a statute that it is charged with administering. Under *Chevron*, a reviewing court evaluates an agency’s interpretation of a statute in two steps: “[1] First, always, is the question 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. [2] If, however, 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 . . . 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.”
	3. *Auer v. Robbins*, 519 U.S. 452, 457, 461 (1997) (Scalia, J.): In *Auer*, the Court addressed an agency’s interpretation of its own regulation. Citing *Chevron*, the Court held that it must sustain the agency’s regulation so long as it is “based on a permissible construction of the statute” because Congress had not “directly spoken to the precise question at issue.” The Court gave deference to the agency in interpreting its own rules and regulatory schemes and reasoned that “because the salary-basis test is a creature of the Secretary’s own regulations, his interpretation of it is . . . controlling unless ‘plainly erroneous or inconsistent with the regulation.’” The Court declined to apply the two-step *Chevron* analysis, and instead applies a single-step analysis. Thus, *Auer* gives agencies the highest level of deference when interpreting their own regulations.
2. Supreme Court Willingness to Reconsider the Scope of Agency Deference?

* 1. Recently, the Supreme Court granted certiorari on the question of whether *Auer* should be overturned. *Kisor v. Wilkie*, --- S.Ct. ----, 2018 WL 6439837 (Mem), 18 Cal. Daily Op. Serv. 11,542 (2018).
		1. *Kisor v. Shulkin*, 869 F.3d 1360 (Fed. Cir. 2017): In *Kisor*, the panel affirmed the Veterans Court’s decision, upholding the Board’s denial of an earlier effective benefits date. Applying *Auer*, the panel explained that deference should be granted to the agency’s interpretation of its regulation “as long as the regulation is ambiguous and the agency’s interpretation is neither plainly erroneous nor inconsistent with the regulation*.*”The panel concluded that the term at issue, “relevant,” was ambiguous, and that the Board’s interpretation was not “erroneous or inconsistent with the VA’s regulatory framework.”

Dissent from Denial of *En Banc* Rehearing: 880 F.3d 1378, 1379 (Fed. Cir. 2018) (O’Malley, J., Newman, J. and Moore, J. joining): “Whatever the logic behind continued adherence to the doctrine espoused in *Auer*—and I see little—there is no logic to its application to regulations promulgated pursuant to statutory schemes that are to be applied liberally for the very benefit of those regulated. When these two doctrines pull in different directions, it is *Auer* deference that must give way. I dissent from the court’s refusal to take the opportunity to finally so hold.”

* 1. Prior to *Kisor*, several Justices indicated a willingness to reconsider *Auer*: Roberts, C.J., in *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013); Thomas, J., in *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1225 (2015); Alito, J., in *id.* at 1210; Scalia, J., in *id.* at 1212-13.
1. Supreme Court Commentary on the Continued Application of *Auer* and *Chevron* Deference
	1. C.J. Roberts
		1. *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) (“The Court touches on a legitimate concern: *Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive. But there is another concern at play, no less firmly rooted in our constitutional structure. That is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well.”).
	2. J. Thomas
		1. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring) (“[T]oday's decision does not rest on *Chevron’s* fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law. In an appropriate case, this Court should reconsider that fiction of *Chevron* and its progeny.”).
		2. *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., dissenting) (“I write separately to note that [the EPA’s] request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes. . . . *Chevron* deference raises serious separation-of-powers questions.”) (internal citations and quotation marks omitted).
		3. *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring) (“[T]hese cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations. That line of precedents . . . giv[es] legal effect to the interpretations rather than the regulations themselves. Because this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.”).
	3. J. Gorsuch
		1. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come to face the behemoth.”).
	4. J. Kavanaugh
		1. “Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions, 92 Notre Dame L. Rev 1907, 1910-11 (2017) (available at [https://scholarship.law.nd.edu/cgi/viewcontent.cgi? article=4733&context=ndlr](https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4733&context=ndlr)) (“Here’s my biggest problem. Several substantive canons of statutory interpretation, such as constitutional avoidance, legislative history, and *Chevron*, depend on an initial determination of whether the text is clear or ambiguous. But how do courts know when a statute is clear or ambiguous? In other words, how much clarity is sufficient to call a statute clear and end the case? Quite simply, there is no good or predictable way for judges to do this. Judges go back and forth. One judge will say it is clear. Another judge will say, ‘No, it’s ambiguous.’ Neither judge can convince the other. Why not? The answer is that there is no right answer. . . . [T]he *Chevron* doctrine encourages agency aggressiveness on a large scale. Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes.”).
	5. J. Scalia
		1. *Perez*,135 S. Ct. at 1213 (Scalia, J., concurring) (“I would therefore restore the balance originally struck by the APA with respect to an agency’s interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written. The agency is free to interpret its own regulations . . . ; but courts will decide—with no deference to the agency—whether that interpretation is correct.”).
		2. *Decker*, 568 U.S. at 621 (Scalia, J., dissenting) (“*Auer* deference has the same beneficial pragmatic effect as *Chevron* deference: The country need not endure the uncertainty produced by divergent views of numerous district courts and courts of appeals as to what is the fairest reading of the regulation, until a definitive answer is finally provided, years later, by this Court. The agency’s view can be relied upon, unless it is, so to speak, beyond the pale. . . . [H]owever great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.”); *see also* *Talk Am., Inc. v. Mich. Bell Telephone Co.*, 564 [U.S.](https://en.wikipedia.org/wiki/United_States_Reports) 50 (2011) (Scalia, J., concurring) (similar).
	6. J. Kennedy
		1. *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (“Given the concerns raised by some Members of this Court, it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.”) (internal citations omitted).
2. Perspectives on *Chevron*
	1. Rationales Supporting *Chevron* Deference:
		1. Congress intends the courts to defer to agencies: where Congress has “explicitly left a [statutory] gap for the agency to fill,” and “[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.” *Chevron*, 467 U.S. at 843.
		2. When agencies issue interpretations of statutes, they are exercising delegated legislative power. *Chevron*, 467 U.S. at 865.
		3. Agencies, as part of the Executive branch, have more political accountability than the judiciary. *Chevron*, 467 U.S. at 864-65.
		4. Agencies have technical expertise that courts may lack. *Chevron*, 467 U.S. at 865.
		5. *De novo* review of agency interpretations itself presents separation of powers issues and “would destabilize the predictable backdrop against which lower courts, Congress, and agencies have operated for more than three decades.” Kathryn M. Baldwin, *Endangered Deference: Separation of Powers and Judicial Review of Agency Interpretations*, 92 St. John’s L. Rev. 91, 94 (2018).
		6. Agencies have more insight into the goals and intentions of the legislation and what political and practical compromises were involved. Christopher J. Walker, *Legislating in The Shadows*, 165 U. Pa. L. Rev. 1377 (2017).
		7. *Chevron*’s scope has already been limited by *United States v. Mead Corp.*, 533 U.S. 218 (2001): *Chevron* is only applicable where the interpretation at issue is made by an agency with the authority to make rules with the “force of law,” and if the interpretation is made in exercise of that authority.
		8. Given the size of the modern administrative state, what could effectively replace *Chevron*?
	2. Rationales for Limiting or Eliminating *Chevron* Deference:
		1. Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 Georgetown J. of Law & Pub. Pol’y 103 (2018), outlines three types of separation of powers concerns:
			1. Article I concerns: perverse incentives for Congress to delegate lawmaking.
			2. Article II concerns: ability of the executive to infiltrate the lawmaking process in order to grant themselves the ability to interpret the ambiguities they created.
			3. Article III concerns: usurpation of judicial power to define the law.
		2. Philip Hamburger,Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016): By engaging in deference, judges are violating their duty to exercise their own independent judgment, and that deference violates the Fifth Amendment’s prohibition against systematic bias, because deference is systematic bias toward the government and against Americans.
	3. For a survey of federal appellate judges’ approaches to statutory interpretation, including their views on *Chevron* deference, *see* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298 (2018).
	4. For a discussion of the applicability of deference under *Chevron*, *Skidmore*, and *Auer* when determining the level of deference to accord informal agency guidance, *see Student Loan Servicing Alliance v. District of Columbia*, No. 18-0640, 2018 WL 6082963, at \*10–13 (D.D.C. Nov. 21, 2018).
	5. For a discussion of the applicability of *Chevron* and *Auer* deference to Patent and Trademark Office regulations directed to motions to amend the claims in an *inter partes* review proceeding, as well as the applicability of these deference doctrines to the Patent Trial and Appeal Board’s interpretation of those regulations, *see* *Aqua Products, Inc. v. Matal*, 872 F.3d 1290 (Fed. Cir. 2017) (en banc).
3. Recent Trends in the Supreme Court’s Application of *Chevron*
	1. No Supreme Court majority has relied on *Chevron* deference since *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016).
		1. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (Gorsuch, J.) (“But whether *Chevron* should remain is a question we may leave for another day. Even under *Chevron,* we owe an agency's interpretation of the law no deference unless, after employing traditional tools of statutory construction, we find ourselves unable to discern Congress’s meaning.”) (internal citations and quotation marks omitted).[[1]](#footnote-2)
		2. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629-30 (2018) (Gorsuch, J.) (“No party to these cases has asked us to reconsider *Chevron* deference. But even under *Chevron*’s terms, no deference is due.”).
		3. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (Kennedy, J.) (“This lack of reasoned explication for a regulation that is inconsistent with the Department’s longstanding earlier position results in a rule that cannot carry the force of law. It follows that this regulation does not receive *Chevron* deference in the interpretation of the relevant statute.”) (internal citations omitted).
	2. Michael Kagan, *Loud and Soft Anti-*Chevron *Decisions*, 53 Wake Forest L. Rev. 37 (2018): Article discusses recent Supreme Court cases that have (1) expressly rejected the application of *Chevron* deference or (2) declined to address whether such deference was owed without even mentioning *Chevron*, even though *Chevron* arguably applied.
1. Other recent decisions finding a statute unambiguous: *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (Gorsuch, J.); *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 781–82 (2018) (Ginsburg, J.); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) (Thomas, J.); *Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S. Ct. 1190, 1198 n.3 (2017) (Ginsburg, J.). [↑](#footnote-ref-2)