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Climate Fight Shows Vintage Chevron Ruling Still Packs Punch

By **Keith Goldberg**

Law360, New York (July 03, 2014, 6:29 PM ET) -- Thirty years after the U.S. Supreme Court mapped out judicial deference to the decision making of federal agencies inChevron v. Natural Resources Defense Council, the landmark ruling looms larger than ever as courts weigh the government's ability to regulate emerging issues such as climate change.

The high court's ruling in the 1984 case, which celebrated its 30th anniversary on June 25, outlines a two-part test for courts to review an agency's interpretation of a federal statute. First, they must determine if Congress has spoken directly to the precise question at issue, and if they determine that the statute is silent or ambiguous on the issue, they then must decide whether the agency's interpretation is based on a permissible construction of the statute.

"It's a doctrine about presumptive congressional intent," said Peter Keisler, a former acting U.S. attorney general who co-chairs Sidley Austin LLP's appellate practice. "The crux of Chevron is an understanding of how Congress is presumed to want agencies to handle ambiguities in the statutes Congress enacts — which is to resolve those ambiguities by employing their expertise and, to some extent, through policy judgments."

And it's a core principle of U.S. administrative law, experts say.

"Chevron has become one of the most important cases that the Supreme Court has ever issued for government lawyers," said Pratik Shah, a former assistant U.S. solicitor general who now heads Akin Gump Strauss Hauer & Feld LLP's Supreme Court practice. "It is a foundational case for government law and defending agency actions. It's not only a bedrock principle for Supreme Court jurisdiction, but it's also necessary to the sound function of our administrative state."

How courts use Chevron has evolved over time, most notably in determining which agency actions even qualify for the two-part test, according to Robert Long, a former assistant U.S. solicitor general who chairs Covington & Burling LLP's appellate and Supreme Court litigation group and teaches administrative law at the Georgetown University Law Center.

Long cites the high court's decision in the 2001 case U.S. v. Mead Corp., in which it concluded that informal agency pronouncements weren't entitled to Chevron deference, and its decision in City of Arlington v. Federal Communications Commission last year, which held that Chevron deference can apply to agency determinations of their own jurisdiction.

“The Mead decision tended to limit Chevron, but the Arlington decision tended to expand it and give the agency the benefits of Chevron deference,” Long said.

Still, Chevron’s basic principles have remained relatively static; what’s really changed in the doctrine’s 30 years on the books is how agencies have applied the standard in justifying their regulations, experts say.

“It is somewhat of a malleable doctrine,” Shah said. “I don’t think this is an evolution of Chevron doctrine; it’s an evolution of an administrative state. The administrative state has grown and will continue to grow.”

But Keisler says federal agencies have often taken Chevron as a green light to search for any ambiguity in a statute and use it to justify significant expansions of their regulatory authority not contemplated by Congress.

"Chevron recognizes that agencies generally have authority to resolve specific ambiguities in statutes in a reasonable way; it’s not a grant of authority for an agency to take a statute and go in a broadly new direction that Congress never authorized or intended,” Keisler said. “The line between the two is not always going to be clear and obvious, but the difference is a real one, and the courts will determine in any particular case whether that boundary has been crossed."

Nowhere has that boundary been more hotly contested than in recent battles over the U.S. Environmental Protection Agency’s authority under the Clean Air Act to clamp down air pollution, especially since the Supreme Court’s landmark 2007 decision in Massachusetts v. EPA , which held that greenhouse gases were air pollutants under the statute.

Just this year, the Supreme Court accepted the EPA’s claim that it had Chevron deference in reviving the agency’s Cross-State Air Pollution Rule, but the justices refused to defer to the agency when it rejected greenhouse gas emissions rules for stationary sources.

The Chevron standard has played such a central role in the EPA’s rule making and ensuing disputes because the government is attempting to address a relatively new concern — climate change — using a law that hasn’t been updated in nearly a quarter-century, according to Gibson Dunn environmental partner and former EPA general counsel Ray Ludwiszewski.

“The agency is trying to deal with 2014 problems with a statute that was reauthorized in 1990,” Ludwiszewski said. “And it’s putting forth interpretations of the law to make a 20th century law work in the 21st century. The courts are finding a number of problems with that.”

While agencies may believe they have additional room to be creative in interpreting statutes they don’t feel adequately address issues they’re currently dealing with, the Supreme Court threw cold water on that notion in rejecting the GHG rules, said Keisler, who argued both the CSAPR and GHG cases before the Supreme Court.

“Ultimately, if a statute is not sufficiently ‘current’ in an agency’s view, it’s Congress, not the agency, that’s supposed to update it because it’s up to Congress to set national policy," Keisler said.

That’s easier said than done, given the continued existence of a polarized Congress seemingly unable to pass any significant piece of legislation. For now, the ball remains in the court of the executive and judicial branches, which means the Chevron doctrine will still play a starring role in future policy battles,

experts say.

For one, in its legal justification for its controversial rule that would cap GHG emissions from existing power plants, the EPA argues that the conflicting language in the 1990 CAA amendments creates enough ambiguity about Section 111(d) of the law to allow the agency to make a "reasonable interpretation" of the provision and be given deference by courts under the Chevron standard.

“I think the next frontier for Chevron is going to be the courts watching agencies, particularly the EPA, deal with a Congress that’s in a prolonged gridlock and an agency trying to be responsive to constituencies and deal with current problems with old statutes,” Ludwiszewski said. “That’s the tension that’s going to play out over the next five years.”

--Editing by Jeremy Barker and Christine Chun.
