By Richard Lazarus

Chevron Front and Center This Term

Three jurisdictional rulings by the Supreme Court this past fall underscore the continuing significance of the Court’s 1984 ruling in *Chevron v. NRDC* — likely the Court’s most influential environmental decision of all time. Cited thousands of times by courts and scholars, *Chevron* has even prompted a YouTube video of a modern dance routine named after the case, “The *Chevron* Two-Step.” Its 30th anniversary warrants some reflection.

The issue decided in *Chevron* was nominally narrow: whether EPA had validly adopted a plant-wide definition of “stationary source” in administering the Clean Air Act. What made the decision so significant was not the Court’s upholding EPA’s interpretation, but the standard of review that the Court established — broadly applicable to all judicial review of federal agency statutory interpretation.

*Chevron* and its progeny established a seemingly simple “two step” test. First, so long as the meaning of the statutory language is plain, that is the “end of the matter.” That plain meaning is controlling and the agency’s interpretation of such unambiguous language is entitled to no judicial deference. But, second, if a plain meaning is lacking, courts should defer to a reasonable interpretation that the agency reaches in exercising its delegated lawmaking authority.

Two recent Court grants of plenary review highlight *Chevron’s* historic sweep. No doubt the most high profile case on the Court’s docket is *King v. Burwell*. At stake is the viability of the Affordable Care Act. Although that law narrowly survived constitutional challenge two years ago it faces a new challenge in *King* because the act’s ability to achieve its objectives depends on whether the Internal Revenue Service may permissibly promulgate regulations to extend tax-credit subsidies to health care coverage purchased through exchanges established by the federal government or instead is limited to coverage purchased through exchanges established by state governments.

The Court’s application of *Chevron* will determine the outcome, in particular whether the relevant statutory language has a plain meaning sufficient to defeat the IRS’s more expansive interpretation. *King* is a classic *Chevron* case. The isolated statutory wording, “Exchange established by the state,” lends initial credence to those challenging the law. But the phrase’s broader statutory context, by using that wording in a manner that makes little sense if not extended to federal exchanges, may well introduce just the kind of ambiguity needed for *Chevron* deference.

The second, more recent, cert grant is closer to home. In *Michigan v. EPA*, the Court has agreed to decide whether EPA unreasonably refused to consider costs in determining whether it is “appropriate” to regulate emissions of mercury and other hazardous pollutants from electric utilities.

All parties acknowledge the enormous significance of the regulations and here too, *Chevron* is front and center. EPA contends that the term “appropriate” is sufficiently ambiguous in its broader statutory context so as to permit the agency to exclude consideration of costs in making the threshold determination whether to regulate. (EPA quickly adds that it does consider costs in the subsequent decisions regarding the extent of regulation.) The challengers contend the plain meaning of “appropriate” naturally includes consideration of cost and its exclusion would, in all events, be unreasonable.

What many Court watchers likely missed was a formal “statement” filed by Justices Antonin Scalia and Clarence Thomas in a third case in which the Court denied certiorari. In *Whitman v. United States*, the two justices did not dissent from denying review, but seized the occasion to express “doubt” about the prevailing view that the courts owe *Chevron* step-two deference “to an executive agency’s interpretation of a law that contemplates both criminal and administrative enforcement.”

They wrote that deferring to agency interpretations of language simultaneously susceptible to civil and criminal enforcement would “upend” the rule of lenity, which “requires interpreters to resolve ambiguities in criminal laws in favor of defendants.” And they dismissed suggestions to the contrary in the Court’s 1990 Endangered Species Act decision in *Babbitt v. Sweet Home Chapter*, characterizing *Babbitt* as a “drive-by ruling” deserving of “little weight.”

Although the votes of two justices are clearly far short of the four needed to grant review, their signaling that they “will be receptive to granting” a future petition that properly presents the issue is quite significant. Scalia has frequently been *Chevron’s* champion, so his interest in reducing its reach cannot be quickly discounted. Because, moreover, federal environmental laws invariably include overlapping criminal and civil enforcement schemes and the justice has not shied away from expressing skepticism of far-reaching environmental regulations, EPA’s longer-term ability to dance the “*Chevron* Two-Step” could even be at risk.

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