

Agencies Start Worrying Deference May No Longer Be Their Just Due

Chevron. It's the name of a multi-billion-dollar company known for its oil and gas production. But for environmental lawyers, *Chevron*, in italics, is no less than environmental law itself. It refers to Justice John Paul Stevens's famous 1984 opinion for the Supreme Court in *Chevron v. Natural Resources Defense Council*, in which the Court upheld EPA's interpretation of the term "stationary source" under the Clean Air Act.

The *Chevron* Court held that where statutory language is unambiguous, that plain meaning controls. But where the Court concludes that the language's meaning is ambiguous, it will defer to the interpretation of that language by the agency charged with its administration so long as the agency's interpretation is "reasonable."

The Court stated several rationales. Most prominent is that Congress implicitly delegated authority to the agency to exercise its policy expertise in resolving any policy matters left unanswered by such statutory ambiguities. Although the Court has since modified the *Chevron* doctrine around its edges, making clear, for instance, that the agency must announce its interpretation pursuant to a legislatively delegated exercise of lawmaking authority, *Chevron* has remained the lodestar of federal environmental litigation for more than three decades.

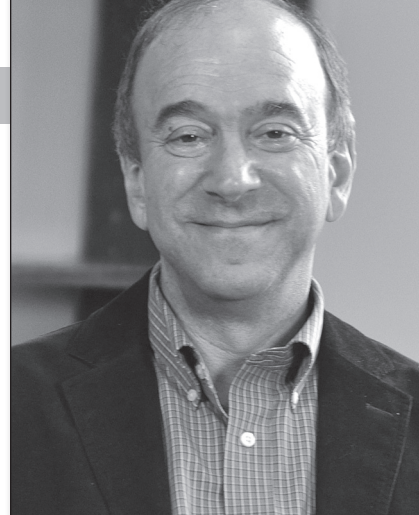
No other case is cited as much. No other case has been as influential. And none has led to more court victories by federal environmental agencies. So long as the language at issue in a case was deemed ambiguous — which, after all, tends to be the norm for environmental statutes, given their complexity and the sausage-like nature of their drafting — the federal government could rely on courts' readily deferring to the "reasonableness" of its agency's interpretation.

That is, until recently. Two back-to-back EPA losses in highly significant Supreme Court cases raised eyebrows about *Chevron's* continuing viability. The Court in both *Utility Air Regulatory Group v. EPA* (2014) and *Michigan v. EPA* (2015) rejected the agency's constructions of portions of the Clean Air Act on the ground that the EPA's construction of the act's ambiguous statutory language was unreasonable. A loss on that ground is far worse than one on the ground that the language has plain meaning. The former, unlike the latter, challenges the federal agency's judgment and policy expertise.

A separate, concurring opinion by Justice Clarence Thomas in the *Michigan* case, moreover, made clear the potential stakes. Thomas took direct aim at *Chevron's* core. He questioned the constitutionality of judicial deference to federal agency interpretation of ambiguous statutory language. According to Thomas, *Chevron* deference based on notions of agency policy expertise raised serious separation-of-powers concerns: it

interfered with Congress's pre-eminent policymaking role and could not be squared with the judiciary's exercise of its independent judgment in deciding cases.

Underscoring the perceived threat to *Chevron*, John Cruden, who heads the Department of Justice's Environment and Natural Resources Division, formally responded last November in a major address to make clear his view, with express reference to Mark Twain, that reports of *Chevron's* death "have been greatly exaggerated." The assistant attorney general made his points forcefully and persuasively. Surveying the field of environmental law, he argued that "*Chevron* is not, in environmental terms, a dead, dying, or threatened species." But, of course, that the nation's



Richard Lazarus is the Howard J. and Katherine W. Aibel Professor of Law at Harvard University. He can be reached at lazarus@law.harvard.edu.

chief environmental litigator felt the need to raise the issue keeps at least one eyebrow raised.

What more have we learned in the federal courts during the past year? The early evidence suggests *Chevron* is intact. But not without significant dissent and with the two biggest data points yet to be entered.

In late August, in a non-environmental case, the Tenth Circuit's Neil Gorsuch, a highly regarded jurist, took the unusual step of filing a separate concurring opinion to his own opinion for the court in *Gutierrez-Brizuela v. Lynch* for the sole purpose of arguing against *Chevron* on constitutional grounds. Proclaiming that "maybe the time has come to face the behemoth," Gorsuch asserted that *Chevron* and its progeny "permit executive branch agencies to swallow huge amounts of core judicial and legislative power and concentrate power in a way that seems difficult to square with the Constitution of the framers' design."

The true tests, however, will come in the cases now pending in the D.C. Circuit and Sixth Circuit challenging the validity of EPA's Clean Power Plan under the Clean Air Act and its definition of "navigable waters" under the Clean Water Act. Neither case is a slam dunk for the agency. But that also is why each is the kind of case in which the added advantage supplied by *Chevron* has proved dispositive in the past.

How those cases turn out may decide whether *Chevron* becomes just the name of a company again.

The case created a standard that has been the lodestar for environmental litigation