Keeping *Chevron* Pure

Robert A. Anthony

TWO SENTENCES in *Barnhart v. Walton*[1] could sow the seeds of grievous confusion in the law of *Chevron* deference to agencies' interpretations of the statutes they administer.[2]

The 2000 *Christensen* case[3] and the 2001 *Mead* case[4] clarified the foundation of *Chevron* deference: The agency, when expressing its interpretation, must exercise congressionally delegated authority to act with the force of law. Agencies normally exercise such force-of-law authority by acting through notice-and-comment rulemaking or formal adjudication, though circumstances may disclose a delegation of authority to interpret with the force of law in other formats as well.[5] Now, *Barnhart* presents two brief passages of troublesome language – both unnecessary to the decision – that might be misapplied in a way that could undercut *Chevron*'s force-of-law foundations.

The interpretive position in *Barnhart* had been expressed in informal formats for many years before the agency, through notice-and-comment, adopted a regulation on the subject.[6] Justice Breyer's opinion for the Court emphasized that the pre-existing position, as republished after issuance of the regulation,

Robert Anthony is GMU Foundation Professor of Law at George Mason University. He was Chairman of the Administrative Conference of the United States from 1974 to 1979.

1 122 S. Ct. 1265 (Mar. 27, 2002).

2 Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (holding that a court, in reviewing an agency's interpretation of a statute it administers, must give effect to the congressional intent if it is clear on the precise question at issue (Step 1), but, if the statute is silent or ambiguous on that point, must sustain the agency's interpretation if it is "permissible" [reasonable] (Step 2)).

3 Christensen v. Harris County, 529 U.S. 576 (2000).

4 United States v. Mead Corp., 533 U.S. 218 (2001).

5 *See id*. at 226-27, quoted at note 11 below.

6 The interpretive position discussed here disqualified a Social Security disability claimant whose inability to engage in any substantial gainful activity lasted less than 12 months, even if his physical or mental impairment lasted more than 12 months.

"properly interpreted" the newer regulation.[7] Thus that interpretive position became engrafted onto the regulation, making it eligible to be evaluated under *Chevron*'s analysis. Under Step 1 the Court found that the statute did not forbid the agency's interpretation, and under Step 2 the Court found the position reasonable in view of its compatibility with the statute's objectives, the frequent reenactment of relevant statutory provisions without change, and the interpretation's longstandingness.

Then the opinion turned to the claimant's argument that the Court should disregard the longstanding informally-expressed interpretation because the regulation now embodying it was so recently adopted. After summarily rejecting that argument, the Court remarked that "the fact that the Agency previously reached its interpretation through means less formal than 'notice and comment rulemaking' … does not automatically deprive that interpretation of the judicial deference otherwise its due,"[8] and said that *Mead* denied any suggestion in *Christensen* to the contrary. It noted that *Mead* had cited an instance of *Chevron* deference where the interpretation did not emerge from notice-and-comment rulemaking.[9]

So far, so good. But then the Court stated (troublesome sentence #1):

> [*Mead*] indicated that whether a court should give such deference depends in significant part upon the interpretive method used and the nature of the question at issue. 533 U.S., at 229-231.[10]

There are two big problems with this sentence: First, *Mead* said no such thing, either in the cited pages or elsewhere. The *Mead* Court clearly stated its approach and its holding concerning the criteria for *Chevron* deference:

> We granted certiorari … in order to consider the *limits of Chevron deference* owed to administrative practice in applying a statute. *We hold* that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the *force of law*, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. *Delegation of such authority* may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a *comparable congressional intent*.[11]

The Court mentioned "force of law" – or variants such as "effect of law" and "legal force" – as a decisional touchstone nine times throughout the *Mead* opinion. The sentence quoted above from *Barnhart* ignores and seems even to disparage the determinative importance that *Mead* gave to delegation of force-of-law authority. It might be read as a subtle abandonment of the bedrock force-of-law standard.

Second, the *Barnhart* Court's use of the vacuous terms "interpretive method" and "nature of the question" may suggest that deciding whether to apply *Chevron* deference ought to become an open-ended (and unavoidably subjective) exercise in every case, where the reviewing judges would infuse those terms with whatever criteria they deemed fitting. Again, such a suggestion is antithetical to *Mead*'s affirmance of the force-of-law standard, as quoted above. Although it does not offer a bright litmus to answer every situation, the *Mead* force-of-law standard is a singular criterion, vastly easier to apply than some free-ranging stir of "interpretive methods" and

---

7 *Barnhart*, 122 S. Ct. at 1269.

8 *Id*. at 1271.

9 *Id*. at 1271-72.

10 *Id*. at 1272.

11 *Mead*, 533 U.S. at 226-27 (emphasis added).

"natures of questions," and eminently faithful to the theoretical justification for placing interpretive powers in the agencies in the first place.

There is further ground for concern that dicta in *Barnhart* might point toward allowing lower court judges substantial discretion to decide in each case whether they think *Chevron* should apply. The *Barnhart* opinion concluded (troublesome sentence #2):

> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time *all indicate that* Chevron *provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.*[12]

The italicized clause is little short of astounding. The Court had already plainly set forth that the legal question was whether the Agency's interpretation of the statute was lawful under *Chevron*,[13] and had proceeded to conduct a standard canvass under Steps 1 and 2. Now, in the concluding paragraph just quoted, it suggests that it had been sorting and weighing factors like interstitial nature, expertise, importance, and complexity in order to decide (all over again) the threshold question of whether *Chevron*'s is "the appropriate legal lens."

If that suggestion is to be taken seriously, its implicit decisional model projects a loosely-cabined juggle of multiple and indeterminate factors for determining in each case whether *Chevron* governs. Reviewing courts, emancipated from *Mead*'s mandate to test for delegation of force-of-law authority, would enjoy considerable freedom to decide *Chevron*'s applicability *vel non*. The entire *Chevron* enterprise would be cut loose from its delegation/force-of-law theoretical foundations, and would as well lose its practical virtue of furnishing reasonable certainty in most cases about when the agencies' interpretations will stand.

It is hard to accept that such a result was intended. Conceivably the quoted sentence was meant as a conclusion to the Step 2 analysis and the italicized clause was a drafting error. Its evaluation of the cited factors would plausibly bear upon a judgment about the reasonableness of the interpretation at bar (though one might wonder whether the rather simple interpretive issue implicated much in the way of agency expertise and complexity, and whether the assertedly interstitial nature of the question was at odds with its importance). The quoted sentence has nothing to do with discerning a delegation of lawmaking authority, even if one were to take the strained view that the Court here was shifting from its earlier emphasis on the regulation and now was evaluating the interpretation as expressed in the previous informal formats.

The benign Step 2 explanation may not be very persuasive, however, in light of then-Judge Breyer's well-known essay in which he suggested that judges decide whether *Chevron* applies by weighing sundry factors drawn from pre-*Chevron* case law – such as the practical facts surrounding administration, the agency's expertise, the importance or interstitial quality of the issue, and whether the agency can be trusted to give a properly balanced answer.[14] From considerations like those, Judge Breyer thought, a court could infer an implicit congressional intention that

12 *Barnhart*, 122 S. Ct. at 1272 (emphasis added).

13 *Id.* at 1269.

14 *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370-71, 381 (1986).

the agency interpretation be accorded a certain (higher or lower) degree of deference.[15] But such an implied congressional intention does not amount to a delegation to act with the force of law, even an implied one. At most, it would counsel a court applying the *Skidmore*[16] standard to give particularly careful attention to the agency's view.

The paramount command of *Chevron* and *Mead* remains that of applying the force-of-law razor. The two sentences in *Barnhart* that might be read otherwise are unnecessary to the decision. Both should be disregarded when that case is looked to as precedent. GB

15 *See* Mayburg v. Sec'y of HHS, 740 F.2d 100, 106 (1st Cir. 1984) (Breyer, J.) ("[I]f Congress is silent, courts may still infer from the particular statutory circumstances an *implicit* congressional instruction about the degree of respect or deference they owe the agency on a question of law. See *Chevron* … . They might do so by asking what a sensible legislator would have expected given the statutory circumstances. The less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative or substantive expertise, the less likely it is that Congress (would have) 'wished' or 'expected' the courts to remain indifferent to the agency's views.").

16 *See* Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944) (holding that courts interpreting statutes should extend respect to agency interpretive views and give those views weight according to their power to persuade).