In June, the Supreme Court decided two cases that could have significant implications for environmental law. The two cases may shed some light on the Court's current thinking about the *Chevron* doctrine. The opinions suggest that the Court may be heading in the direction of more rigorous review of interpretations of statutes by agencies like EPA and the SEC. That could be important as Trump's deregulatory actions start hitting the judicial docket. Thus, in the short-run, limiting *Chevron* could help check an out-of-control presidency. In the long run, however, it could also hinder progressive regulatory efforts.

As my wife reminds me from time to time, not everyone in the world spends their time on Administrative Law. So, before I get to that, I'll start with a quick review of the *Chevron* doctrine, partly drawn from earlier posts. If you don't need that, just skip that section.

***Chevron* basics.**

Agencies often stretch their statutory authority as far as they can, whether it is in pursuit of more regulation or, as in the case of Trump, eliminating regulations. It's the *Chevron* doctrine that determines how far courts will let them go.

The *Chevron* doctrine is a rule about court review of agency actions that many scholars consider central to modern administrative law. That doctrine calls for judges to accept reasonable interpretations of a statute by an administrative agency, even if the judges might have favored a different interpretation themselves. The Supreme Court has cited two reasons to give agencies the power to interpret ambiguous statutes passed by Congress: (1) agencies are more democratically accountable than courts, and (2) Congress has given the agencies the main responsibility for implementing statutes.

The application of *Chevron* was later limited by *United States v. Mead Corp*. The *Mead* Court held that *Chevron* deference should apply only where "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."

After *Mead*, the *Chevron* test had three steps:

> ***Step Zero*** Does the agency have authority to issue binding legal rules? If the answer is "no," *Chevron* does not apply, but the agency may still receive some lesser degree of deference because of its expertise. If the answer is "yes," the analysis moves to Step One. (Why the funny numbering? This step was added by Mead, after Steps One and Two had already been named. Since the step logically comes before those two, it got named "zero.")

> ***Step One.*** Is the statute ambiguous? If not, the Court simply decides the interpretation of the statute by itself. Otherwise, the analysis moves to Step Two.
>
> ***Step Two.*** Is the agency's interpretation reasonable (even if the court itself would have chosen a different interpretation)?

Things have gotten even more complicated since *Mead*, but that's all you really need to know to understand these two recent cases.

Two New Chevron Cases.

Wisconsin Central v. United States. The issue in this case was whether employee stock-options count as a form of monetary remuneration for purposes of a tax on railroads to fund retirement benefits. In a 5-4 ruling, the Court said the options weren't taxable. The Court's analysis stopped at *Chevron* Step One, concluding that "in light of all the textual and structural clues before us, we think it's clear enough that the term 'money' excludes "stock," leaving no ambiguity for the agency to fill." Yes, I know that it's peculiar to say a statute is unambiguous when almost half the Court thinks another meaning is reasonable – but that's the way these things seem to work.) What's notable is that it took the majority several pages to decide the statute was clear, taking into account the dictionary meaning of the word money, structural arguments made by both sides, and some administrative rulings in 1938 and 1939, soon after the statute was passed. So the unambiguous nature of the state wasn't that obvious. Reading the majority opinions and the dissent, the alternative interpretation does not seem completely unreasonable. But the majority felt confident that its interpretation was correct.

Pereira v. Sessions. This was an immigration case. The statute was complicated, but in the end the question was whether a government notice of a hearing was sufficient under the statute to terminate certain statutory rights. The Court ruled that the notice was insufficient, because it failed to give the date and location of the hearing. As in *Pereira* though with a different configuration of Justices, the Court concluded that the statute was clear only after the Court had gone through a detailed statutory analysis. In *Pereira*, the most interesting implications come from concurring opinions by Kennedy and Alito.

Justice Kennedy's concurrence describes cases in which he considered the lower court's examination of a statute too cursory and deferential to the agency. After this review, he concludes:

> "The type of reflexive deference exhibited in some of these cases is troubling. And when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still. 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. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary." [citations omitted]

Perhaps Justice Kennedy was hinting that he would have been prepared to overrule *Chevron* if he had remained on the Court. But clearly, he was at least demanding that the Court be much more careful and discriminating in applying the doctrine. Although he is leaving the Court, his views may well be reflective of a shift in opinion among others on the Court.

Justice Alito accused the Court of having silently ditched *Chevron*:

> "Here, a straightforward application of Chevron requires us to accept the Government's construction of the provision at issue. But the Court rejects the Government's interpretation in favor of one that it regards as the best reading of the statute. I can only conclude that the Court, for whatever reason, is simply ignoring Chevron."

Justice Alito may have had a point, in that the majority found it necessary to conduct a very searching analysis of the statute to uphold its meaning. Thus, it's not implausible to think that reasonable minds might have differed about which meaning was correct.

What's next?

Between them, these cases may be signs that a more rigorous approach to *Chevron* is emerging, providing less deference to agencies than at least some lower courts have shown. The more rigorous approach is different from the path taken in some earlier cases, which was much more forgiving of agencies. It may, however, be closer to the original *Chevron* decision itself.

Assuming the Court does more toward a more stringent form of review in future cases, the result should be beneficial to environmentalists and states challenging Trump's policies.

Judging from these two cases, courts may be poised to give agencies less leeway than they had in the past to "slice and dice" statutes in pursuit of their policy goals. Of course, this assumes a certain degree of consistency, which might or might not actually occur.

As to what might happen further down the road: Who knows? Justice Kennedy's replacement will probably move the Court further toward rigorous review. And there's a chance that the Court will ultimately overrule *Chevron* entirely, since that's currently the orthodox conservative view. I think it's much more likely that the Court will keep *Chevron* but make the *Chevron* analysis more rigorous and demand more cogent justifications from agencies, decreasing the amount of deference to agencies closer to pre-*Chevron* levels.

In the long run, the Court could end up over-reacting, giving agencies too little authority to achieve their missions. But in the short run, while Trump is in office, more rigorous statutory review of his rollback efforts could be the only thing to save us from his disastrous policy initiatives. In particular, EPA's Pruitt is trying to reinterpret statutes willy-nilly in his campaign to gut regulation. It just might be good for courts to exercise some skepticism about such efforts.