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Gorsuch Says "Chevron Doctrine" is Dead Even Though the US Supreme Court Refuses to Say So

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Administrative deference" is a key component to the modern regulatory state. The "Chevron doctrine," i.e., the concept that the courts should defer to relevant agencies' interpretations of ambiguous statutes they are tasked to administer, has been viewed as a key underpinning of the modern regulatory state.

But is it really? At least one US Supreme Court Justice says "no." Justice Neil Gorsuch responded to the Court's recent denial of certiorari in *Buffington v. McDonough* with a lengthy dissent, ending with the request to give the "whole" *Chevron* doctrine "project . . . a tombstone no one can miss."

Justice Gorsuch's dissent in this case — stemming from a dispute on the retroactivity of disability benefits payable by the US Department of Veterans Affairs (VA) — emphasizes an observation we made earlier this year regarding *American Hospital Association v. Becerra*, which is that the *Chevron* doctrine often does not show up meaningfully in cases where one would reasonably expect for it to have traction. To be sure, the doctrine is fundamental to modern administrative law, and we have long chronicled disputes over the viability of the *Chevron* doctrine and related questions of regulatory deference:

- Earlier this year, we wrote about *American Hospital Association v. Becerra*. *Becerra* stemmed from a health-care-related reimbursement dispute. Despite the appellate court below relying on *Chevron* and various parties asking the Supreme Court to reconsider the viability of the doctrine, the Supreme Court decided the case without a single mention of the decision.

- In 2019, we wrote about the Supreme Court's *Kisor v. Wilkie*, which stemmed from a dispute over VA disability benefits, and involved questions of when courts should defer to agency interpretations of their own regulations; and

- In 2017, we blogged about the DC Circuit's decision in an environmental case styled *Waterkeeper Alliance v. EPA*, which relied on a Tenth Circuit decision authored by Justice Gorsuch during his time on that court.

“Who decides” is the question that ties together these cases with origins in the far-flung areas of the law, which are often tied together by the federal Administrative Procedure Act (APA). In his dissent, Justice Gorsuch contends that a broad reading of Chevron results in courts “outsourc[ing]” their “interpretive responsibilities” so that “we tell those who come before us to go ask a bureaucrat.” In his view, this process introduces “into judicial proceedings a ‘systematic bias toward one of the parties” where courts “place a finger on the scales in favor of the most powerful of litigants, the federal government, and against everyone else.”

Beyond the philosophical question of “who decides,” Gorsuch argues that, in practice, the *Chevron* doctrine has proved unworkable and incoherent. Instead of providing a clear analytical rule, *Chevron* has been muddled by multiple competing interpretations and is subject to numerous carve-outs, including — Gorsuch notes — one for cases “of vast economic and political significance” (*i.e.,* the “Major Questions doctrine”), and another following *United States v. Mead* for cases where Congress failed to delegate authority to agencies “to make rules with force of law.” While sophisticated entities can follow the Federal Register to “plan for and predict future regulatory changes” or “lobby agencies for new rules that match their preferences[,] . . . ordinary individuals” can be “unexpectedly caught in the whipsaw of all the rule changes a broad reading of *Chevron* invites.”

Case Background

Buffington stems from the denial of VA benefits to a former member of the military. After serving in the Air Force throughout the 1990s, in 2000, Thomas Buffington was assessed as partially disabled and awarded compensation under the VA program. The statutory language related to this program states that “the United States will pay” compensation “[f]or disability resulting from personal injury suffered or disease contracted in line of duty” but allows the VA to withhold benefits for periods when the service member “receives active service pay.” Buffington was recalled to active-duty service twice in the years following. When Buffington was recalled to duty, his VA benefits appropriately ended.

This dispute stems from the final time Buffington left active duty in 2005. Buffington’s benefits never resumed until he asked the VA to resume payment in 2009. While the VA was willing to pay benefits retroactively through part of 2008 under agency regulations which limit retroactive payment to “1 year prior to the date of a veteran’s reinstatement request,” it was unwilling to pay benefits retroactively to the date. Buffington sued, seeking full retroactive benefits, and argued that the statutory language quoted above required it. Both the Court of Appeals for Veterans Claims and the Federal Circuit rejected his challenge on the grounds that the agency’s current regulations are “reasonable” and that the *Chevron* doctrine accordingly required courts to defer to them.

What’s Next?

When we first wrote about the *Chevron* doctrine, we had no reasonable expectation that the doctrine could withstand so many sustained and varied challenges. That it has, in Gorsuch’s view, stems from its zombie-like status where courts generally pay it no heed:

> The aggressive reading of Chevron has more or less fallen into desuetude — the government rarely invokes it, and courts even more rarely rely upon it. The . . . decision at issue here is thus something of an outlier. And maybe that is a reason to deny review of this case. Maybe Chevron maximalism has died of its own weight and is already effectively buried.

Zombie or not, the possibility that the *Chevron* doctrine could affect any case necessitates the regulated community keeping an eye on it.

Stay tuned for further updates.

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