

VITTEK QUESTIONS

1. In *Marbury v. Madison*, the Supreme Court held that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Although cases like *United States v. Mead Corp.* softened some of the blow from the decision in *Chevron v. NRDC* by increasing the formality standards for statutory interpretations by Federal agencies, the so-called "Chevron deference" created by the case still gives great authority to these agencies that should rest in the hands of the judicial branch regarding statutory interpretation. What are some of the more egregious examples that you can recall of this judicial power being abused by Federal agencies?

Under the current system, federal agencies are blurring the lines of separation of powers if they are able to write legislative regulations and then take on the role of the judiciary by interpreting those rules without adequate procedural safeguards. When this occurs there is little check on agency power. The following cases are representative of examples of the abusive exercise of agency power under *Chevron* deference:

Perez v. Mortgage Bankers Association, No. 13-1041 (U.S. Mar. 9, 2015)

In *Perez v. Mortgage Bankers Association*, the United States Supreme Court upheld a Department of Labor (DOL) interpretative rule, which did not undergo notice-and-comment, relating to employees exempted from hourly wages. The substance of the rule at issue departed significantly from previous DOL interpretive rules. Challenges were made to the interpretive rule based on *Paralyzed Veterans of America v. D.C. Arena, L.*,¹ which stood for the proposition that agencies must use the APA's notice-and-comment rulemaking if they wish to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation. The Court overturned *Paralyzed Veterans* and concluded that the APA did not require adherence to notice-and-comment rulemaking for interpretive rules.

Although the Court found for DOL on APA grounds, Justice Thomas in his concurring opinion held that the Court should address the issue of whether agencies generally have the power to interpret their own rules, a power in the purview of the judicial branch. Justice Thomas took issue with the Court's granting of deference to agencies to interpret their own rules which essentially have the force of law. Justice Scalia also weighed in on the issue by asserting that "there are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means."² Without reining in broad judicial deference to agency interpretative rules, Scalia noted that "the agency need only write substantive rules more broadly

¹ "Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586-87 (D.C. Cir. 1997); See also *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (guidance must go through notice-and-comment rulemaking if it is to have legal effect)."

² *Perez v. Mortgage Bankers Association*, No. 13-1041 (U.S. Mar. 9, 2015) (J. Scalia dissenting).

and vaguely, leaving plenty of gaps to be filled in later, using interpretative rules unchecked by notice and comment. The APA does not remotely contemplate this regime.”

White Stallion Energy Center, LLC v. EPA, 748 F.3d .(D.C. Cir. April 15, 2014)

In *White Stallion*, the Court of Appeals found that Congress had left a “gap” in one provision of the Clean Air Act by not specifying what public health risks should be deemed a “hazard” to be regulated by the Environmental Protection Agency (EPA) under the hazardous air pollution program. The court found that “Congress delegated to EPA the authority to give reasonable meaning to the term,” and that EPA’s finding that it is “appropriate and necessary” to regulate electric utility units under section 112 of the Clean Air Act is entitled to *Chevron* deference. The court further gave *Chevron* deference to EPA’s decision not to consider costs as part of the “appropriate and necessary” determination, finding that “we hold that EPA reasonably concluded that it need not consider costs in making its “appropriate and necessary” determination.”

Throughout the *White Stallion* case, the majority found gaps in the Clean Air Act, and that agency interpretations meant to fill those gaps were reasonable and permissible under the *Chevron* doctrine. By contrast the dissenting judge found that the majority ignored the legislative history of the Clean Air Act, and relied on *Chevron* to uphold an impermissibly costly and unnecessary regulatory action: “EPA’s reading of the statute replaces its authority to regulate electric utilities if “appropriate” with a command to regulate electric utilities under the MACT program regardless of costs. That is not what Congress intended or permitted and thus is beyond EPA’s authority. *See Chevron*, 467 U.S. at 843 n. 9.”

City of Arlington v. Federal Communications Commission, 133 S. Ct. 1863, No. 11-1545 (May 20, 2013).

In *City of Arlington v. FCC*, The United States Supreme Court applied *Chevron* deference to the FCC’s interpretation of its own jurisdiction. The case arose from a dispute between local governments and the FCC about the agency’s authority to regulate state and local land-use decisions regarding the placement of wireless communications facilities. The Chamber’s Litigation Center argued that *de novo* judicial review of agency assertions of jurisdiction have served as an essential check against agency aggrandizement of power. That safeguard protects not only regulated entities, but also helps preserve the proper allocation of authority within the federal government and the relationship between the federal government and the states.

2. Chief Justice Marshall in *McCulloch v. Maryland* proclaimed that our federal government is one of enumerated powers and, “this principle is now universally admitted.” Does the “substantial effect test” laid out in *Wickard v. Filburn* comport with this principle?

In *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), the U.S. Supreme Court found that Congress had delegated broad legislative authority to an agency—the EPA—and that the agency’s exercise of that authority was constitutional. The Supreme Court reversed an earlier Court of Appeals ruling that the agency’s 1997 rulemaking to establish national air quality standards for ozone and fine particulate matter was, in the absence of an “intelligible principle” guiding the stringency of the standards, an unconstitutional delegation of Congress’s legislative authority. The *Whitman* decision, together with cases granting broad *Chevron* deference to agency interpretations meant to fill perceived gaps in statutory provisions, have cumulatively given agencies substantial authority to exercise legislative power in the absence of any directives or clear expressions of intent on the part of Congress.

If Congress desires to reclaim some portion of its legislative authority, it must find ways to establish boundaries for the courts in their interpretation of *Chevron* deference. Congress must also be careful when it enacts new statutes that it does not unknowingly delegate legislative power to agencies by creating obvious gaps that agencies will have to attempt to fill. The limits of an agency’s legislative powers should be clearly delineated to the extent possible when statutes are written. Effective congressional oversight of the degree to which agencies have exercised legislative authority is also essential.

3. You mentioned “sue and settle” practices in your testimony, where rather than allowing the entire rulemaking process to play out, the Federal agency being sued settles the lawsuit by agreeing to move forward with the requested action they and the litigants both want. Besides the fact that other parties, as you mentioned, are routinely denied standing in these situations, taxpayers, including those impacted regulatory victims, are put on the hook for legal fees of both colluding parties. Please explain the full economic burden of this practice on the economy and the Federal debt.

The integrity of the rulemaking process generally is negatively impacted by rules instituted through sue-and-settle practices. Chamber research shows that between 2009 and 2012, a total of 71 lawsuits were settled under circumstances that can be categorized as sue-and-settle cases.³ These cases include EPA settlements under the Clean Air Act and the Clean Water Act, along with Fish and Wildlife Service settlements under the Endangered Species Act. These settlements directly resulted in more than 100 new federal rules, all of which are major rules

³ U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) available at <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREREPORT-Final.pdf>.

estimated to cost more than \$ 100 million annually in terms of compliance. Below is a short list of certain rules.

Sue and Settle Agreements Create Costly Federal Rules

1. Utility MACT rule - up to **\$9.6 billion** annual costs⁴
2. Lead Repair, Renovation & Painting rule - up to **\$500 million** in first-year costs⁵
3. Oil and Natural Gas MACT rule - up to **\$738 million** annual costs⁶
4. Florida Nutrient Standards for Estuaries and Flowing Waters - up to **\$632 million** annual costs⁷
5. Regional Haze Implementation rules: **\$2.16 billion** cost⁸
6. Chesapeake Bay Clean Water Act rules - up to **\$18 billion** cost to comply⁹
7. Boiler MACT rule - up to **\$3 billion** cost to comply¹⁰
8. Standards for Cooling Water Intake Structures - up to **\$384 million** annual costs¹¹
9. Revision to the Particulate Matter (PM_{2.5}) NAAQS - up to **\$350 million** annual costs¹²
10. Reconsideration of 2008 Ozone NAAQS - up to **\$90 billion** cost¹³

In addition, attorneys representing advocacy groups can obtain attorney fees by way of the Equal Access to Justice Act (EAJA). The EAJA enables prevailing parties in cases brought by or against the federal government to be awarded fees and other expenses unless a court finds the position of the United States to be substantially justified, but in a sue-and-settle case the government admits that it is wrong, so fees are automatically awarded.¹⁴ The fees awarded under EAJA include reasonable attorney fees which “shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a *special factor*, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.”¹⁵ EAJA parties in order to recover costs may not have a net worth of over \$2 million for individuals and over \$7 million for entities.¹⁶ 501(c)(3) entities, such as environmental groups, are exempted from net worth limits under the EAJA.¹⁷ Attorneys for environmental groups engaging in citizen suits typically are awarded substantially higher hourly rates than for other

⁴ Letter from President Obama to Speaker Boehner, *supra* note 9.

⁵ 75 Fed. Reg. 24,802, 24,812 (May 6, 2010).

⁶ Fall 2011 Regulatory Plan and Regulatory Agenda, “Oil and Natural Gas Sector-NSPS and NESHAPS,” RIN: 2060-AP76.

⁷ EPA, Proposed Nutrient Standards for Florida’s Coastal, Estuarine & South Florida Flowing Waters (Nov. 2012).

⁸ William Yeatman, *EPA’s New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012).

⁹ Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans on Key Maryland Industries* (April 2011); *Chesapeake Bay Journal* (Jan. 2011).

¹⁰ Letter from President Obama to Speaker Boehner, *supra* note 9.

¹¹ 2012 Regulatory Plan and Unified Agenda, “Standards for Cooling Water Intake Structures,” RIN: 2040-AE95.

¹² EPA, “Overview of EPA’s Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter) (2012).

¹³ Letter from President Obama to Speaker Boehner, *supra* note 9.

¹⁴ 28 U.S.C. § 2412(d)(1)(A).

¹⁵ *Id.* at § 2412(d)(2)(A)(emphasis added).

¹⁶ *Id.* at § 2412(d)(2)(B).

¹⁷ *Id.*

specialties such as veterans and social security benefits counsel, because courts have found that environmental attorneys engage in a practice that requires distinct knowledge where counsel is not available at the statutory rate.¹⁸

¹⁸ *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991).