Consumer Finance Monitor (Season 7, Episode 3): Will Chevron Deference Survive in the U.S. Supreme Court? An Important Discussion to Hear in Advance of the January 17th Oral Argument

Speakers: Alan Kaplinsky and Kent Barnett

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly podcast show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm, and I'm your host, Alan Kaplinsky. I'm the former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'll be moderating today's program. For those of you who want more information about the topic that we'll be covering today or any of the other topics that we cover on our weekly show, don't forget to subscribe to our blog, which also goes by the name of consumerfinancemonitor.com. We've posted our blog since 2011, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry.

So to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com. And if you like our podcast, please let us know about it. Leave us a review on Apple Podcasts, Google Play, or wherever you obtain your podcasts. Our podcasts are available on all the major podcast platforms. Also, please let us know if you have any ideas for other topics that we should consider covering or speakers that we should consider inviting as guests on our show. Well, today I am joined by a very special guest who I'm about to introduce to you right now. His name is Kent Barnett and he is the associate dean for Academic Affairs and the J. Alton Hosh professor at the University of Georgia School of Law, where he teaches administrative law, contracts, and consumer law. He's very much focused on the separation of powers and administrative law.

His scholarship has been published in among other places, New York University, Michigan, Duke, Vanderbilt, and Notre Dame Law Reviews. As more relevant for today's discussion, so I'm giving you a little sneak preview of what we're going to be covering today, he's written numerous articles on judicial deference and the Chevron doctrine and has also done a lot of empirical work in that area. Before arriving at University of Georgia, Kent clerked for Judge John Rogers of the U.S Court of Appeals for the sixth Circuit practiced law at Weil, Gotshal & Manges in its complex commercial litigation and appellate groups. Earned his undergraduate degree summa cum laude, Phi Beta Kappa from Center College and his law degree summa cum laude and Order of the Coif from University of Kentucky College of Law. So Kent, a very warm welcome to our show today.

Kent Barnett:

Thank you, Alan. I'm delighted to be here not only to talk about Chevron, which I apparently can't get enough of, but also just to say thank you for the blog that you all run. I have been looking at it since I was back in practice and teaching and it is just an indispensable tool for the professor of consumer law to stay on the cutting edge of the latest cases coming through in issues that practitioners are facing. So thank you for all you've done to help us inside the academy.

Alan Kaplinsky:

Well, I appreciate that Kent, very kind of you. So as I've given everybody a little sneak preview what we're going to be covering today, but let me get down a little bit more into the weeds and we are going to talk about whether or not the Chevron judicial deference doctrine or framework is likely to be overruled or whittled away by the US Supreme Court as a result of two cases pending it before it in which it is granted certiorari. And this is a topic to show you how important I think it is in the

consumer finance area. This is not the first time that we've actually covered the topic on our podcast show. We're covering it constantly on our blog. We talk about all the briefs that have been filed beginning from the time when CERT was granted back in the spring of this year.

So earlier this year, I had Professor Craig Green, professor at Temple University of School of Law. He spoke right after CERT was granted and before any of the briefs were filed. And then on September 7th of this year, I moderated a live and a virtual program at the ABA Business Law Section annual meeting in Chicago. And one of my guests at that time was Professor Jonathan Mazur of University of Chicago School of Law. So we are covering this in depth because to my way of thinking is as important as and maybe more important in terms of thinking long-term than another case pending before the US Supreme Court in which oral argument was recently had involving the constitutionality of the funding mechanism used by the consumer financial protection bureau, the CFSA versus CFPB case.

So let me now give you some background on the cases that are pending in front of the court. In Loper-Bright Enterprises versus Raimondo as case number 22-451, the US Supreme Court has agreed to hear a case in which the petitioners are challenging the continued viability of the Chevron framework that courts typically invoke when reviewing a federal agency's interpretation of a statute. The Chevron framework derives from the Supreme Court's 1984 decision in Chevron USA Inc. versus National Resources. What is the official name of the defendant? Kent, I only have the abbreviated name.

Kent Barnett:

I think it's National Resources Defense Counsel if I recall correctly.

Alan Kaplinsky:

Thank you. And the site to that's 467US837. Under the Chevron framework, a court will typically use a two-step analysis to determine if it must defer to the agency's interpretation. In step one, the court looks at whether the statute directly addresses the precise question before the court. If the statute is ambiguous, at that point the court will proceed to step two and determine whether the agency's interpretation is reasonable. If it determines that it's reasonable, that's the end of the matter. The court will defer to the agency's interpretation. They are required to defer to the agency's interpretation. So there are now two cases that I mentioned in front of the court. One I already mentioned Glover Bright Enterprises, there's another one called Relentless Inc. versus the US Department of Commerce. And that case CERT was very recently granted. In these two cases, they're identical and they deal with the same subject matter.

And what it is the following, a statute that I knew nothing about before getting involved in learning about these cases called the Magnuson Stevens Act, and it governs another topic I know nothing about, fishery management in federal waters. And it provides that the National Marine Fisheries Services and Agency I knew nothing about may require vessels to carry federal observers on board to enforce the agency's regulations. In three circumstances, not applicable in Raimondo or Relentless, the MSA goes further and requires vessels to pay the salaries of the federal observers. The statutory question underlying the CERT petition in both Raimondo and Relentless is whether the National Marine Fisheries Service can force a wide variety of other vessels to pay the salaries of the NMFS, that's the shorthand or acronym for the federal agency involved. Whether they can force a wide variety of vessels to pay the salaries of the NMFS observers, they must carry up to 20% of their revenues.

The precise question before both courts is whether the court should overrule Chevron or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute doesn't constitute an ambiguity down to step one of Chevron requiring deference to the agency. In Raimondo, a divided panel, the DC Circuit applying Chevron held that statutory silence with respect to the precise issue, produced an ambiguity that justified deferring to the agency's regulations under Chevron. While Loper and Relentless involved regulations of this rather arcane federal agency, the Supreme Court's decision could have significant potential implications for when courts should give deference to regulations issued by all federal agencies, including most importantly the agencies that those of us that practice in the consumer finance area are concerned about. The CFPB, the FTC, HUD, and the federal banking agencies, the Comptroller, the Fed, and the FDIC. So I have already described Chevron deference Ken, so I don't think you have to describe that, but how does it compare to de novo or Skidmore deference?

Kent Barnett:

Sure. So de novo review is going to be a type of review where the court will decide what the best reading of the statute is, and of course it would be the court's best reading of the statute, and the court would not be required to defer to what the agency may think is the best reading of the statute, even if the agency's reading is otherwise reasonable. Skidmore deference continues to give the court interpretive primacy, meaning that the court decides what the actual meaning of the statute is, but the court is required to consider various factors when assessing the agency's interpretation of the statute. And those include the thoroughness of the agency's rationale in its interpretation, the persuasive of the agency's interpretation, how logical is it? There are some other factors that it considers perhaps like the contemporaneity of the agency's interpretation with the passage of the statute, but it can be quite open-ended.

One of the factors for Skidmore deference is all of those other factors which have a tendency to persuade, which means it can be fairly open-ended and indeed Skidmore was criticized before Chevron deference was created 1984 as having this open-ended number of factors including up to 11 factors that courts were considering when deciding how to review an agency's interpretation. But the key thing with Skidmore is the court does not have to actually defer to the agency's interpretation. Instead it's turning to the agency's interpretation in order to inform what it thinks the best reading is. And it in general looks to an agency's expert interpretation and it puts well reasoned and it's thorough, tends to go along with the agency's view of it. And that's in contrast to Chevron, as you indicated, where the court has to go through two steps. And if the court determines that we have an ambiguous statute and the agency's interpretation is reasonable, the court has to adopt the reasonable agency interpretation even if it is not the reasonable agency, I'm sorry, reasonable statutory interpretation that the court itself would've adopted.

Alan Kaplinsky:

Yeah. So let me ask you this, Chevron came down in 1984, I assume Skidmore predated that, am I right?

Kent Barnett:

It did.

Alan Kaplinsky:

Did Chevron overrule Skidmore or Skidmore did that still exist as a doctrine even after Chevron got decided?

Kent Barnett:

That was an open question for a while. So Skidmore deference was created in 1944, which was two years before the APA, which was enacted in 1946, and has its own judicial review provision, which there's debate over exactly what it means, but it says courts shall interpret statutes, constitutional provisions and agency action. And the question was, well, does that incorporate Skidmore? Well, courts continued to use Skidmore all throughout the decades leading up to Chevron. When Chevron became the law in 1984, part of the question was, did Chevron really intend to do anything new or not? And Justice Stevens who wrote the decision for, if I recall correctly, a six-member court didn't think they were doing anything new, thought they were just kind of restating the law. Not much of a concern about Skidmore one way or the other. But one of the future justices, justice Scalia, who at the time was on the DC circuit, thought that Skidmore created essentially an earthquake within administrative law and created a new regime under how courts would have to review agency statutory interpretations.

And one thing Justice Scalia did not like was Skidmore deference because he found it too open-ended, too factor-based, too wishy-washy totality of the circumstances type of analysis. So in his view, Chevron had overruled Skidmore. Well, we have a period of time where courts are working all this out, courts are still using Skidmore. And the issue reaches the Supreme Court in 2001 in a case called United States versus Meade. And in Meade, the court clarified in a decision that was eight to one with Justice Scalia in dissent that Skidmore deference continued to be good law and it had its own place.

Chevron applies when agencies act with the force of law, which is usually through a formal adjudication or a notice-in-comment rule, or very rarely a formal rule that goes through the formal proceedings under the APA, but there could also be some other types of agency actions that may have the force of law. And the court left that open-ended. Justice Scalia and

dissent thought that this was the exact wrong way to reach Chevron because Chevron should have overturned Skidmore to create more clarity so that Chevron served as a background principle for Congress when drafting statutes. It would know that if it gave an agency authority to interpret a statute, that agency was going to get Chevron deference. So Skidmore is still alive and well.

Alan Kaplinsky:

Right. And then there's yet another case that you and I have chatted about called Auer, A-E-U-E-R, I think is the name of the case. First of off, what's the formal name of the case for our listeners?

Kent Barnett:

Well, so there's Auer deference, but Auer deference was just a reaffirmation of the doctrine, which is earlier known as a seminal rock deference. My recollection, although someone would've to check me, is the Seminole Rock case, the Seminole Rock versus Bowles. And it was decided in 1945 again immediately before the Administrative Procedure Act was enacted 1946. And Auer deference, which was if I recall correctly, decided in 1996 by Justice Scalia reaffirmed Seminole Rock. Seminole Rock acts very similarly to Chevron deference. Under Auer deference or Seminole Rock deference, a court must defer to an agency's reasonable interpretation of an ambiguous regulation as opposed to a statute where Chevron would govern. But otherwise it acts very similarly. We have to know whether the regulation was ambiguous, we have to know whether the agency's interpretation was reasonable. And we also have to know whether or not there are various indicia that indicate that the agency should get deference for its interpretation. So it works very similarly to Chevron deference.

Alan Kaplinsky:

Yeah. Okay. All right. We've got the great lesson in administrative law in which we've now been able to cover all these judicial deference doctrines. Let's get into some of the questions that are raised here. Why do you think the court's now reconsidering the Chevron doctrine? Why have they granted CERT in two cases? It's the same question presented. What's going on?

Kent Barnett:

I think it would be fair to say there are probably two different things that are affecting why the court wanted to address this issue. First, and I think perhaps most charitably, there's concern over whether or not Chevron has proved workable. And the idea is that if you think about Chevron's two steps first, whether or not a statute is ambiguous, well that can be pretty hard to tell. And how is it that courts should go about that determination? Chevron itself said that we follow the traditional tools of statutory construction, but it didn't lay out what those traditional tools were. Depending on who the judge is and which tools they prefer and the order they want to use them in, it can create quite a bit of briefing and quite a bit of decisional resource in deciding step one, whether the statute is ambiguous.The same issue applies to step two and reasonableness. How does one determine whether the interpretation is reasonable?

Indeed, one issue that I think litigators have had with the court is the court often refers to step two is similar to arbitrary capricious review under the APA, but if you read the step two cases where the agency loses, it doesn't read like arbitrary and capricious review at all. It reads like some form of hyper textualism in most cases where the court is just really involved with the text and combing through it over and over again. So I think it sent some mixed signals, which creates some confusion in the courts of appeals and the district courts on how to go about step two. And then finally, a step I don't think we've mentioned yet, which has become referred to as step zero or sometimes step 1.5 is trying to determine whether or not Congress gave the agency the power to act with the force of law and whether the agency indeed acted with the force of law.

And oftentimes that's going to be a question of did the agency use its rulemaking power, its formal adjudication power, or was there some other action that Congress wanted to have the force of law? Or more recently, the court has looked at the kind of question that the agency is addressing and asking whether Congress would want the agency to address that specific question. And for instance, to the extent that the question is what's deemed a major question that of major political or economic significance, the court will decide that the agency is not intended to be able to answer that question with the force of law. So now you've got all of these litigation issues before the actual interpretive issue that the court has to get to. Should Chevron apply at all? Is the statute ambiguous? How do you go about determining reasonableness? Well, that's a whole lot of work to

do before you actually get to what everybody cares about how to interpret the statute. So I think that's one issue that's motivating the court.

The second one, and I suspect that your prior guest, Professor Craig Green touched on this a bit. I think there's been a political shift in how courts, especially conservative judges, think about Chevron. As I suspect he was telling your audience, Chevron really was a creation of the conservative judicial movement. It was created quite expressly by Justice Scalia while he was still a Republican operative as a device to control, as he said, not just the bureaucrats, but once Reagan was in office, our bureaucrats. And so we want everyone to know those are ours and we want them to do what it is we want as a policy decision, which was something towards a deregulatory agenda. And as between what it understood is liberal courts, especially in the DC Circuit versus Reagan agency officials, it would prefer that the agency have deference and have interpretive primacy. So he saw this as part of a larger project of creating a deregulatory regime.

So this goes into effect maybe to some surprise, probably the one person I would think of as having some criticism of Chevron out there was Justice Breyer who was then Judge Breyer on the first circuit who thought it was all just a little too cut and dry, step one, step two. And he thought this was like a multi-factor test that one had to consider to decide whether there would be deference. And the DC Circuit picks the Chevron test up as I said earlier, this was an earthquake in administrative law, this is the new regime that we use going forward. And it was largely put in place by then Judge Scalia and Judge Wald of the DC Circuit and the other courts of appeals pick this up. We continue our march down time where everyone is using Chevron. There's really not much controversy over it at all.

You even have Justice Thomas write the most, I think powerful Chevron case called Brand X, which extends Chevron's reasoning really to its fullest extent before we get to the 2012 election with Obama running for re-election. And now you start to see in conservative circles concerns that liberals use Chevron to their advantage to go above and beyond what a statute requires and to aggrandize the administrative state. So you have real concern over how big the administrative state is getting. And Chevron has considered one of these ways that liberals can do more with government than the more conservative judges or policymakers would prefer. And so in very rapid succession, we see Chevron become this critical component of the conservative judicial movement where you see judges now flagging, oh, I'm not so sure about this Chevron thing anymore. It might violate Article III or it may just not work in some way.

It goes so far to even become part of the Republican platform in 2016 where they expressly call for the end of Chevron deference in it and it continues on into the 2020 platform too. And during this entire period, you're seeing policy think tanks, pick up this argument, judges and the lower courts pick it up. Justices including Justice Thomas, Justice Alito, justice Kennedy, even Justice Scalia starting to pick up this argument too that maybe this thing we created with Chevron isn't what we had intended to result from this. And I often say in administrative law, it's all about procedure. And you can create something that can help you one moment, but at some point you're going to fall out of power and you're going to have to hand that tool over to the other side. And oftentimes there's remorse over this thing that we have created.

And so the Republicans really create Chevron, but come to see that actually liberals are really good at using Chevron. You could point to something else like standing doctrines. Standing doctrines were created by liberals to stop businesses from challenging congressional actions. Well guess who hates standing now? It's the liberals that don't like how it's used to stop results. So you have to think really hard about what are these tools we're creating? How do we think they're going to be used? And I think you're seeing that angst conservatives now have over Chevron deference.

Alan Kaplinsky:

And tell me, how long has it been since the Supreme Court in a judicial deference in a case that required them to determine the validity of a regulation? How long has it been since they've cited Chevron? It's a long time, right?

Kent Barnett:

My recollection is 2018 was the last time, so quite a while at this point. And now it's become sort of like that decision whose name cannot be said, and it'll just be ignored throughout their opinions.

Alan Kaplinsky:

So in the five years since they last cited Chevron, when they are faced one of these cases, how do they decide it? They use de novo review they just interpreted themselves,

Kent Barnett:

That's what it looks like. Now, whether or not actually doing a pure de novo review or they're answering the question at step one, which would look like de novo review, we'll have to leave to the readers of the judicial opinions to figure that out. Of course, the ones that have tended to cause the most concern are when the briefing refers to Chevron, and yet the court never touches it or explains why it's not using Chevron. We're all just kind of left with a question of what exactly precluded the court from using the doctrine.

Alan Kaplinsky:

Right, right. So let's talk about whether this doctrine has really had an impact. And I know you've done some very extensive empirical research to answer that question. What have you found? First of all, you wrote an article in Michigan Law Review?

Kent Barnett:

I did. So I completed this empirical project with Professor Chris Walker, who is now a professor at Michigan Law School. He was at Ohio State when we wrote the article. And we created the largest data set of Chevron cases that have been studied in the court of appeals, and we chose the courts of appeals because they're the ones that have the lion's share of the cases before them. So ultimately what we did was create a data set by trying to pick up every case that had mentioned to Chevron over an 11-year period from 2003 to 2013. And we chose 2003 because that was shortly after two related cases to Chevron, Mead that I mentioned earlier, and another case called Barnhart, which gave some additional guidance on when Chevron would apply. And we went to 2013 only to stop at that point just so we could start reviewing all of the cases, which took years to do even with a number of research assistants.

Alan Kaplinsky:

Can I ask you, you looked at only cases in federal court, I take it, did you look at Supreme Court opinions or just courts of appeals?

Kent Barnett:

We looked only at published court of appeals cases from this, and we used very broad search terms hoping to get all of the Chevron cases. And within this, we also got a large number of Skidmore cases and we actually went back and picked up all of the Skidmore cases during this same period of time and a significant number of de novo cases as well. I will say, just to be really clear for your audience, we do not have all judicial review cases of statutory interpretation at that point. That would be impossibly large and we wouldn't have been able to get through the cases. So we have some subset of de novo cases, but certainly not all of them. And what ultimately happened is once we got through the cases, we came up with about 1600 separate agency statutory interpretations that the courts of appeals were reviewing, and that was actually coming in, sometimes you would've two interpretations per case. So it was I think roughly 1400 cases or so that led to roughly 1600 interpretations or so.

And then we went through those and we coded them for almost 40 variables following some earlier empirical studies too. So we could track some differences that looked just at the Supreme Court and some earlier ones at the court of appeals to determine how Chevron was working in the courts of appeals. Now, the most important thing, I think what you were getting at is does any of this matter? Why are we talking about this? Does it actually affect anything at the end of the day? And I'll tell you before we did our project, the received wisdom was, no, none of this matters that agencies are going to win about two-thirds of the time no matter what standard of review applies. And this was using various studies that were much more limited in ours, but kind of taking them together in the aggregate.

So one of the main things we wanted to find was, well, is there any difference between this? And here are the key findings that we had that I think your audience will probably appreciate the most, we looked at agency win rates under the different forms of review. Under Chevron agencies won a little over 77% of the time. Okay? If we then turn to Skidmore deference, agencies won about 50% of the time. If we had de novo interpretations, agencies won a little more than 1/3 of the time, about 39% of the time. So what we saw was actually quite a marked difference between the three key forms of judicial review where agencies were likely to do substantially better under Chevron deference.

We also looked at steps one and steps two of Chevron, and if you looked at step one agencies one about 39%of the time, which to my mind was fascinating because that's almost the exact number that agencies won by under de novo review, which suggests that courts really are doing de novo review under step one. They're really trying to be pretty honest about this. The key finding we had, which I thought was actually pretty consistent with what expectations would be, if not a little higher, was that at step two agencies won almost 94% of the time. So the key thing is if agencies can get to step two, that's usually the ballgame and they end up winning. So again, our big finding was it matters, these deference regimes, it has some relationship to the agency win rates.

Alan Kaplinsky:

Right, right. How did you deal with cases where a court relied on Chevron but said something like, even if we were looking at a de novo and we weren't bound by Chevron, we'd reached the same conclusion. Were those cases excluded from the universe of cases that you were looking at?

Kent Barnett:

My recollection is that we treated those as step one cases for it depending on how they worded the matter. If they were at step one and they said we would do this the same under de novo, we would treat that as a step one case because it's the same. If they were under step two and they'd say we would reach the same best understanding under de novo review, we would treat it as a Chevron case because they had gone through the two steps of Chevron.

Alan Kaplinsky:

Right. Okay. I got it. So let's turn, I mean, our audience is not so concerned about the Fisheries Agency or some of these, what I call the arcane agencies. Let's talk about the ones that my audience does care about, like the FTC, the Treasury, the CFPB. I don't know if you have data on the federal banking agencies, Comptroller, FDIC, Fed. Do you know how they fared, Ken?

Kent Barnett:

Sure. So let me take them essentially together first and then I'll split them out. So we did look at subject matter and how agencies fared depending on the subject matter. And the most relevant to your audience is the category that we refer to as business regulation. And if you looked at business regulation and you put it in a listing from highest agency win rates to lowest agency win rates on the subject matter, business regulation is exactly in the middle. So it did fine, but it's really hard to take a lot away from how Chevron absence or presence would really change much. For instance, what we saw with business regulation is that agencies one under the subject matter about 80% of the time. Interestingly though, they only got Chevron's framework to apply just going through the steps 60% of the time, which was one of the lowest of any of the areas.

But again, just to keep everything as part of an interesting story, if they got Chevron deference, which was very rare, they had one of the highest win rates. So if they could get Chevron deference to apply, they won almost 88% of the time. So that was going to be the key question for them. Now, if you turn to the agencies themselves, I'll start with the CFPB to put it aside as it won't surprise your listeners, we had very few CFPB cases. We only had one case that had made it to the court of appeals within our data set. And that's in part because the CFPB was brand new during the timeframe and it didn't even exist until, you'll have to correct me out, I think 2010.

Alan Kaplinsky:

Well, your cutoff date was 2013.

Kent Barnett:

Exactly.

Alan Kaplinsky:

The CFPB didn't become operational until July 21st, 2011.

Kent Barnett:

There you go.

Alan Kaplinsky:

So we're talking about a very short period.

Kent Barnett:

And you'd have to get some challenge from an agency action through the district court of appeals. It would take a while to have that happen. Essentially, I can't tell you anything about the CFPB because we have an in of one with that. We have though several, even though it's not as many as you might think, FTC decisions. So we ended up having 11 decisions, and the FTC I thought had one of the most interesting stories from our data. It had the lowest rate of getting the Chevron framework of any of the agencies that we included in our study. That was out of 28 agencies. The FTC received just the Chevron framework, I'm not telling you whether it won or lost or which step, but just they used the Chevron framework at 36.4% of the time. So essentially 1/3 of the time, that was dead last in our numbers.

But if they got Chevron deference, they won 75% of the time. Okay. I mean, that's about what we would've expected under Chevron deference, where under Chevron agencies win about 75% of the time. So that story holds. What's interesting about the FTC is they do much better just overall than under the Chevron win rate. So if you look at just how the FTC did overall in all agency judicial review of their agency statutory interpretations, they won 91% of the time. So Chevron, if anything was hurting the FTC, it wasn't helping the FTC. And there were two other agencies, the Bureau of Prisons and the International Trade Commission that had the same phenomenon where Chevron seemed to have them doing worse.

Alan Kaplinsky:

Let me ask a very unsophisticated question that I'm sure is a simple answer to. If a court is giving Chevron deference in these cases you looked at, why isn't the agency winning 100% of the time in those 25% of cases where the court gives Chevron deference, but yet the agency loses, why?

Kent Barnett:

I'd have to go back through them and really parse out the 11, but you're not going to like my answer because it's fairly simplistic. They're losing it's step one or step two. Knowing our cases, because there are so few losses at step two almost certainly these are losses at step one where the court says, nope, that is not the plain meaning of the statute.

Alan Kaplinsky:

Yeah, the statute's clear. Right. Got it. Okay. All right. Let's turn now to, well, let me ask you a question. Do you tend to update your research?

Kent Barnett:

We have not updated it since. We've talked about doing so after this case so that we can see not only what was going on during this period where the Supreme Court wasn't citing it, what was happening in the court of appeals? Were they taking the hint or not? I think you'll find they were, but there's still a good number of Chevron cases. And then for a small period of time

after whatever the court decides here, if it leaves Chevron in some form to figure out how the courts of appeals are responding to the decision.

Alan Kaplinsky:

Let's talk. I mean there are two other areas I want to get into. The likelihood of a court overturning Chevron and what are the likely effects if a court does overrule Chevron. I think I'll take them in the order in which I've raised them. In other words, let's talk about what you think the likelihood is of the court overruling Chevron and at the same time express your view of what do you think is the right result here? I mean, did you write an amicus brief?

Kent Barnett:

I did. So Professor Walker, whom I mentioned earlier, he and I both wrote an amicus brief. We wrote it in support of neither party, but we did say that the Supreme Court should retain Chevron deference largely under stare decisis principles.

Alan Kaplinsky:

Okay. All right. Well let's talk about what you think, first of all, the court is going to do here.

Kent Barnett:

Sure. So with the significant caveat that predictions can prove quite worthless, especially what trying to guess what the Supreme Court is going to do.

Alan Kaplinsky:

It's very hazardous.

Kent Barnett:

Isn't it? I know. I actually lean towards the court retaining Chevron deference, but limiting it in some way, and I think some of those limitations could prove quite helpful for the courts of appeals and the district courts. And primarily the ways I think they would go about limiting it is one, to give more guidance on what the steps should look like. What are the tools of statutory construction? Is there an order of battle that they should be used in? Is there a way the court should approach different forms of textualism that we know many of the justices now prefer? Likewise, what is step two? What is a reasonableness review? Is it the same thing as arbitrary and capricious review? Are there certain factors that a court should have to consider? But in essence what the court would do is just put much more meat on the bones for how Chevron should operate.

Likewise, there's been significant amount of confusion as I intimated earlier about step zero. When should Chevron apply at all? In other words, when do agencies act with the force of law? You could create a fairly simplistic world where you say every time there are notice and comment or formal regulations or every time there are notice and comment or formal regulations and formal adjudication, you could create a pretty bifurcated way of thinking about agency action. As it exists now, the court has left this open and said that there are numerous ways that an agency might have the force of law. And indeed this has been called the Mead puzzle of trying to figure out, well just when does Chevron apply? So there's quite a few ways here that the court could narrow Chevron and indicate how it should be operating in a more consistent way in the lower courts.

Alan Kaplinsky:

Yeah, in fact, I just to mention, there is a case involving the CFPB right now where a district court judge in Texas concluded that an amendment to an exam manual used by the CFPB had the force of law even though it was never published for common or never went through any of the APA procedure that a formal regulation would, but the court had no problem in finding that if companies didn't comply with this exam manual, the CFPB would come down on them very hard.

Kent Barnett:

Right. Which is just one more of the many cases where you have to try to divine how the court's going to think about force of law. And indeed some of the more ironic ones that I've come across and others including Lisa Bresman at Vanderbilt have talked about are things like, as you're saying, you've got exam manuals there or policy statements. Policy statements by definition do not have the force of law yet the DC circuit has found some policy statements have the force of law. Likewise some interpretive rules, which again, by definition do not have the force of law had been found to have the force of law.

Alan Kaplinsky:

Well, and here's the real irony In the case I just mentioned Ken, the CFPB said throughout, well it said in their exam manual expressed there was a disclaimer, this does not have the force of law. This is not a regulation. But yet everything else they said about it made it pretty damn clear that you better follow what they said.

Kent Barnett:

Which really gets us back to even a question we would have outside of Chevron too. I've heard some people say that the thorniest question in all of administrative law is what is the difference between a notice and comment rule, a substantive regulation that has the force of law and these interpretive rules or policy statements. It's really ugly and the Supreme Court hasn't given much guidance on it. We will continue to have that same issue though even outside of Chevron.

Alan Kaplinsky:

All right, well let's get back to what the court's going to do here. So you believe they will not overrule Chevron deference, but they will chip away at it and provide more guidance and probably limit the number of circumstances in which it gets applied. Why do you believe that? I mean, let me push back on it a little bit. They haven't cited Chevron in five years. They reached out to take these two arcane cases, they didn't have to take them. There's really no split in the circuits and you've got the conservative justices who've done politically and about faced. Why wouldn't they get rid of Chevron?

Kent Barnett:

It's a great question, and I will say with, again, I have to keep giving caveats here, with the caveat that we have a slightly changed membership since 2019, the court essentially went through this same exercise with the doctrine we mentioned earlier, Auer deference or Seminole Rock deference in a case called Kaiser v. Wilkie. And just like with Chevron deference, there had been academic entreaties to overturn the doctrine. There had been growing judicial skepticism by judges on the courts of appeals and justices on the Supreme Court itself. They accepted certiorari on a course to decide directly whether to overturn Auer deference, and the court blinked, it didn't do so. And it's a case that has both opinions of the court and plurality opinions. So you have to be careful when you're reading it. You had at the time, the liberal justices, Justice Ginsburg, Justice Breyer, Justice Kagan and Justice Sotomayor joined in various sections by Chief Justice Roberts.

And part of the reason I am leaning towards the court retaining Chevron goes to those stare decisis arguments. So in Kaiser V. Wilkie, the court said the way it's going to think about stare decisis first off is that this is a form of statutory stare decisis and statutory stare decisis is the strongest stare decisis there is. And it said it applies with even greater force in the context as was true in our deference that is also true with Chevron deference. That is when the case concerns, not overturning just one precedent, but a line of precedence. Well, that existed in our deference that went back all the way to 1945 and had numerous cases. Same thing with Chevron that has had numerous cases applying Chevron and extending Chevron through Mead, Brand X, there are other cases as well. When it invades the entire corpus of administrative law in other words, it applies to all of administrative law. Well, our deference did, Chevron deference does.

And then finally, when overruling that doctrine would allow re relitigation of any decision based on that framework. So in Auer deference, you could have had a court earlier decide that an agency's interpretation of its own regulation was reasonable. Well, if we get rid of Auer deference, do we now have to re litigate whether or not the agency's interpretation is consistent with the court's best understanding of the regulation? Likewise with Chevron, would you have to essentially go back to every interpretation that has been deemed reasonable under an ambiguous statute and decide whether or not it's consistent with

what the court views as the best interpretation of the statute? Well, even if you are a judicial conservative, that's your worst nightmare. You've opened this Pandora's box of perhaps having to re litigate all of these cases that have been decided for decades not only going back to Chevron in 1984, but Chevron itself really just followed one line of cases that go back to the early 1940s. So what happens to all of those cases going back in time as well?

So I think you can start to see how strong the stare decisis was in Kaiser concerning Auer, and that was a majority of the court. If the court isn't going to follow it in Chevron, I don't know what the argument would be for how Chevron is distinguished. That would mean the court would ultimately have to overturn its precedent on stare decisis, which ironically is really just a form of deference to an earlier court that came up and decided how one is going to consider overturning a agency's statutory interpretation and the judicial deference to that. So you've got all of that sitting there with Kaiser. Then I would go just a bit further and say, well, Chevron deference as it is articulated, is intended to be a reflection of Congress's intent. And Congress intends for agencies to have interpretive primacy over these ambiguities and statutes because the agencies are more expert, they have better ways of getting evidence through things like notice and comment rulemaking, and they're more politically accountable because they work through the president who is elected nationwide.

Okay, well, how does this look if we think about this as a matter of congressional intent? Well, first off, Congress has refused to overturn Chevron numerous times, even before Chevron was decided. Congress has refused to do it back in the 1970s under kind of the proto-Chevron doctrine, and it's refused to do it in the '90s during Gingrich's Republican Revolution that came through. It's refused to do it in the 2010s, including during the Trump administration. And just this year in 2023, the house passed an Act to abrogate Chevron. It hasn't made it through the Senate, and I doubt very highly that President Biden would sign it. So if we're looking for some evidence of, well, what does Congress really want? We've got pretty good evidence from what it's refusing to do in abrogating Chevron. Moreover, and I think this will be particularly germane to your audience, Congress has relied upon Chevron in drafting statutes including Dodd-Frank, and it specifically took pains to extend Chevron in certain instances and to retract Chevron in certain instances.

So in a matter that I know is close to the hearts of many of your audience members, one of the things that the office of the Comptroller of the Currency can do is preempt state consumer financial protection laws. Congress found before Dodd-Frank that the OCC was not using its expertise in making these preemption decisions, and essentially it was kind of handing preemption decisions out like candy and it wasn't being as thoughtful about them. So they decided instead in Dodd-Frank, OCC can continue to make these preemption decisions, but it's going to have to do them on a case-by-case basis. And when they are subject to judicial review, they're going to be subject to Skidmore deference, and the statute actually lists out the factors for Skidmore deference. Congress then created a savings provision that says, but the use of Skidmore deference for those preemption decisions doesn't affect judicial deference that may apply to anything else the OCC does.

And in the legislative history, the Senate goes out of its way to say, and we understand that Chevron is going to apply to those other decisions. So it's using Chevron as a background norm and is it's saying when it doesn't want it to apply. Likewise, when Dodd-Frank creates the Consumer Financial Protection Bureau, Congress has to go about reallocating the power to enforce consumer protection laws such as the truth in Lending Act or the Equal Credit Opportunity Act, something along those lines. And it starts allocating who has authority to do these things. Well, one lingering question with Chevron is what happens when more than one agency can administer a statutory scheme? The general rule has been then nobody gets Chevron deference because Congress wouldn't intend for one agency to get Chevron or all these agencies to get Chevron. Well, Congress and Dodd-Frank actually plays with this idea, and for certain of these reallocations, it says the CFPB should be treated as if it were the only enforcing agency. Why? To get Chevron deference.

In other context, it says all of the agencies, the FTC, the CFPB, the OCC, whoever they are, all of the agencies should be treated as if they were the only enforcing agency. Meaning every agency can get Chevron deference. And then in another spot too, Congress indicated when it didn't want Chevron to apply to certain decisions that were made under the Act. So when I'm trying to figure out, okay, did the court get Chevron wrong as a matter of congressional intent, which was exactly what it was trying to do, I think the best evidence is, no, it got it right. Congress has refused to abrogate it, it's used it as a background norm, and it has extended or retracted Chevron in specific instances where it thinks useful.

Alan Kaplinsky:

But there is a contrary point of view, at least that I've read, and I don't know how much weight to put on it. I've heard arguments to be made that this isn't an area that Congress can really overturn. This is a sort of a very internal court procedural mechanism, judicial mechanism that if Congress were to pass a law overturning Chevron, a court might say that's unconstitutional, that it violates separation of powers. This is Congress. You're treading on a judicial function here. How do you respond to that?

Kent Barnett:

I think the argument is incorrect because at the end of the day, this goes back to congressional intent. So the court has never suggested that Congress can't turn off Chevron deference. Indeed, Congress has done so in several places. There hasn't been a challenge to that. So if Congress wanted to come in, enact a statute which the House has passed several times, abrogating Chevron or Auer deference, that has also been done through a bill in the House, I don't think there's any article III concern with it. Indeed, I'm not even quite sure what the Article III concern would be because generally those who argue that Chevron is unconstitutional say, the problem with Chevron is courts need to be doing de novo review and exercise independent judgment under Article III. So to me, the objection just falls in on itself.

Alan Kaplinsky:

So okay, let's turn to what I'm going to consider I think the final issue we have time to explore. And that is let's assume you are wrong, and the Supreme Court does overrule Chevron deference. What's the impact of that going to be? I'm in particular concerned about a 1986 Supreme Court case called Citibank V. Smiley, where the Supreme Court relying exclusively on Chevron deference concluded that a late fee charged by a credit card issuer constitutes interest within the meaning of Section 85 of the National Bank Act that says that the National Bank may charge interest at the rate allowed by the law of the state where it's located.

An old statute enacted, I think in 1866 as part of the National Bank Act. Court relied exclusively on Chevron to uphold an OCC regulation that was promulgated literally on the eve of the Supreme Court briefing and argument in the Smiley case. Is that case out the window? I mean, is that case no longer precedential? Can plaintiff's attorneys take another run at what they did back in 1986 where they tried to argue that national banks didn't have the right to charge a late fee permitted by the law of the state where they're located elsewhere in the country?

Kent Barnett:

So I'd answer that in two ways. One, I think the most specific answer I can give you is this opens that exact Pandora's box that Justice Kagan identified in Kaiser, which is now we may have to re litigate all of these decisions, at least those that we understand the court to have decided it's step two under Chevron. So I think the short of the answer is we don't know. It looks like it might. Now, there might be equitable defenses that apply. There might be limitation defenses that apply, but my own view is that's going to get complicated fast because sometimes you are challenging an agency action directly, but there can be different forms of collateral challenges, especially between two private parties who may be relying upon a regulation in some way that it's going to create its own messy area of law figuring out which kinds of regulation, or I'm sorry, what kind of interpretations based on those statutes are back in play again and are suitable for challenge. So to me, this is the thing that the court did not want to see happen in Kaiser.

But let me answer in a more broad way too on this. I was at a symposium that the Boyden Gray Center sponsored two weeks ago at the Mayflower in D.C, and they had an excellent lineup of scholars. And one of the questions that they considered was exactly what you asked. What happens if the court overturns Chevron? Is this going to be a big deal or not? And the opinion that I heard from several of the panelists and the one that I remember the best, but I know there were some others who thought similarly was from Lisa Bressman at Vanderbilt. And her view was that, well, if you get rid of Chevron, really what you're going to do is just move the battle. Okay, so what's the new battle going to be?

Well, instead of asking whether or not we have legal interpretation, and that legal interpretation is consistent with Congress's intent at step one, and then going through the reasonableness, we're going to ask, is this actually a legal interpretation where

we would have presumably de novo review or Skidmore review if Chevron's overturned? Or is it a policy decision, a notoriously difficult type of decision to define? If it's a policy decision, then under the APA we would simply turn to the administrative procedures Acts arbitraging capricious standard. Now, she says this is going to be the real fight. Is it a legal interpretation or is it a policy decision?

And what I think supports her view is that this is largely the view that Justice Kavanaugh has propounded before that we should be thinking of things as policy decisions. And if it is a policy decision he has said, then we are extremely deferential. That is an area the courts don't get involved. We leave that to the agency as long as they've essentially shown us their homework on how they came to their decision and they haven't acted in a capricious fashion. Well, if it's not a policy decision and it's a legal interpretation, well that's when we're going to go full board de novo review. Courts are going to give us their best interpretation. So I think you can see this is setting up the new battle. How do we frame the agency action?

Alan Kaplinsky:

Boy, but what it means, I think when you cut through all of it, is it means that you can take another rum at a statute trying to get a court to declare it invalid despite prior Supreme Court precedent using Chevron saying that the regulation is valid, it's going to be chaotic, I think.

Kent Barnett:

I think so too. Again, you may have some forms of defenses that preclude the review, but I think they're going to be very case by case as they're coming through and it's going to create that form of judicial chaos you're mentioning.

Alan Kaplinsky:

Okay. Well, we've come to the end of our program today. This is such an interesting topic. I could literally go on and on with you for several more hours, Ken. We will soon find out that as there will be oral argument in these cases, probably mid to late January and a decision certainly no later than the end of June of next year. So I want to thank you very, very much for sharing your time with us today. Really do appreciate your being a part of the program today.

Kent Barnett:

Well, thank you. I've really enjoyed this, and I hope your listeners have enjoyed not only how Chevron might apply to their specific concerns and agencies that they're involved with, but just to the larger project that is federal administrative law.

Alan Kaplinsky:

Well, we come to the end of our program, and I also want to thank all of our listeners for downloading our podcast show today. To make sure you don't miss any of our future episodes, please subscribe to our show on your favorite podcast platform, be it Apple Podcasts, Google Play Spotify, or wherever you listen. And don't forget to check out our blog Consumerfinance.com for daily insights on the consumer finance industry. And if you have any questions or suggestions for our show, please email us at podcast@ballardspahr.com. Stay tuned each Thursday for a new episode of our show. Thank you very much for listening, and have a good day.