



6-15-2017

## Oyez, Oyez, The Administrative Agency Is In Session: A Look At The Role Of Agencies And Courts In Recent Cases Applying to The Chevron Doctrine

John M. Scheib

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Law Commons](#)

---

### Recommended Citation

John M. Scheib, *Oyez, Oyez, The Administrative Agency Is In Session: A Look At The Role Of Agencies And Courts In Recent Cases Applying to The Chevron Doctrine*, 61 Vill. L. Rev. 37 (2017).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol61/iss6/3>

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

OYEZ, OYEZ, THE ADMINISTRATIVE AGENCY IS IN SESSION:  
A LOOK AT THE ROLE OF AGENCIES AND COURTS IN RECENT  
CASES APPLYING THE *CHEVRON* DOCTRINE

JOHN M. SCHEIB\*

I. INTRODUCTION

In 1984, the United States Supreme Court enunciated a test that defers to regulatory agencies when construing ambiguous statutes. From the earliest days of the Republic, however, that task fell to the courts. The result of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>1</sup> has been a shift of the role of interpreting statutes from the courts to regulatory agencies.

Some early commenters did not view *Chevron* as a major shift.<sup>2</sup> After analyzing Supreme Court cases decided in the aftermath of *Chevron*, others concluded that not much had changed.<sup>3</sup> However, most cases never make it to the Supreme Court. The real test of the impact of a Supreme Court decision is how lower courts apply a rule of law announced by the Supreme Court.

Prior studies have looked at the behavior of lower courts immediately prior to and immediately after *Chevron* and concluded that *Chevron* resulted merely in a “significant but subtle change[] in legal doctrine[].”<sup>4</sup> Equally significant, however, is how the law “settles out” after years of implementation by lower courts filling in the gaps. Thus, to truly answer the question posed by E. Donald Elliott—“[has] the *Chevron* doctrine really affected the way that . . . courts decide cases”—additional study of lower court decisions is needed.<sup>5</sup>

A survey of recent cases decided by the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) is instructive. That survey, which is presented in this article, demonstrates that in cases decided in 2012, 2013, and 2014, the D.C. Circuit overturned agency interpretations or applications of statutes about 60% of the time when the statute was unambiguous. However, when the statute was ambiguous, the D.C. Circuit almost always deferred to the agency’s interpretation

---

\* The author is General Counsel-Commerce at Norfolk Southern Corporation, but the views expressed are his alone. He has previously served as Chief of Staff and Counsel to the Chairman at the United States Surface Transportation Board and as Counsel to the Subcommittee on Railroads of the Committee on Transportation and Infrastructure of the U.S. House of Representatives. He holds a J.D. from Villanova University School of Law and a B.A. from the University of Virginia.

1. 467 U.S. 837 (1984).

2. See generally Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984; Peter M. Shane, *Ambiguity and Policy Making: A Cognitive Approach to Synthesizing Chevron and Mead*, 16 VILL. ENVTL. L.J. 19 (2005).

3. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992).

4. See Schuck & Elliott, *supra* note 2, at 1026.

5. See E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 1 (2005).

of the statute. Thus, it is nearly impossible to get an agency interpretation of an ambiguous statute overturned, which supports the theory that agencies are now the interpreter of ambiguous statutes.

Some have argued that this transfer of power is appropriate or acceptable because regulatory agencies are subject to indirect political accountability. To the extent that this political accountability even exists at a time when the accountability for any one regulation is diluted by the fact that federal agencies are issuing thousands of rules each year, it is not an applicable rationale to most independent agencies, which by definition are insulated from political accountability.

## II. THE COURT WAS THE INTERPRETER OF LAWS

Justice Thomas recently addressed the role of the separation of powers.<sup>6</sup> He noted that, rooted in history and centuries of political philosophy, the Founders sought to implement the principles of power separation.<sup>7</sup> Among other things, they freed judges from external influences.<sup>8</sup> In contrast, they explicitly tied legislators and the executive to those influences.<sup>9</sup>

The Founders contemplated that the judiciary should have the role of interpreting statutes. Alexander Hamilton wrote in the Federalist 22:

A circumstance which crowns the defects of the Confederation remains yet to be mentioned, the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.<sup>10</sup>

In Federalist 78, Hamilton explained the rationale for why judicial interpretations of statutes should be definitive; the courts after all are “an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”<sup>11</sup> Hamilton discussed the relation of the judiciary to the other two branches of government and noted how important it was to separate those who “expound and define [the] true meaning” of laws from the legislative and executive branches.<sup>12</sup>

It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary

---

6. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213-25 (2015) (Thomas, J., concurring).

7. See *id.* at 1215-17.

8. See *id.* at 1217 (citing U.S. CONST. art. III, § 1).

9. See *id.* at 1218-19 (citing U.S. CONST., art. I, §§ 2-3; art. II, § 1).

10. THE FEDERALIST NO. 22, at 112 (Alexander Hamilton) (Ian Shapiro ed., 2009).

11. See THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (Ian Shapiro ed., 2009).

12. See THE FEDERALIST NO. 22, *supra* note 10, at 112.

remains truly distinct from both the legislature and the Executive. For I agree, that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.”<sup>13</sup>

As the new Constitution sprung to life, the three branches of government sought to implement these lofty principles. Justice Thomas points out that long before the Constitution, judges had recognized and asserted their role to apply the law.<sup>14</sup> In *Marbury v. Madison*,<sup>15</sup> however, the Supreme Court marched stalwartly into the separation of powers breach and asserted the role of the courts under the new Constitution.<sup>16</sup> “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”<sup>17</sup>

Determining the meaning of a statute, therefore, was the prerogative of the courts. Again, the views of the executive and the legislators may, by design, shift with the political winds. In their minds, the meaning of a statute may similarly shift with those same winds—particularly when years have passed since the adoption of the statute.<sup>18</sup> But, the judiciary is insulated. For judges, the meaning of the statute does not change with the political winds.

### III. WHAT IS THE *CHEVRON* DOCTRINE?

The Chevron two-step framework for reviewing an agency’s interpretation of a statute is now well known.<sup>19</sup> So only a brief review is necessary.

Under *Chevron* step one, the court must first determine “whether Congress has directly spoken to the precise question at issue.”<sup>20</sup> In answering this question, the court reviews the statute de novo,<sup>21</sup> “employing traditional tools of statutory construction.”<sup>22</sup> The rationale for *Chevron* step one is similar to the holding in

13. THE FEDERALIST NO. 78, *supra* note 11, at 392.

14. *See Mortg. Bankers Ass’n*, 135 S. Ct. at 1215-18 (Thomas, J., concurring).

15. 5 U.S. 137 (1803).

16. *See id.*; *see also* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 2 (1983).

17. *Marbury*, 5 U.S. at 177.

18. Of course, if the political winds have changed such that the legislators and the executive desire to change the law, the Constitution provides a process for that to happen. The legislators may pass new or amended statutes, and the executive can sign those statutes into law.

19. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (summarizing two-step analytical process).

20. *Id.* at 842; *see also* *Petit v. U.S. Dep’t of Educ.*, 675 F.3d 769, 785-90 (D.C. Cir. 2012) (discussing application of *Chevron*); *Pub. Citizen v. Nuclear Regulatory Comm’n*, 901 F.2d 147, 153-54 (D.C. Cir. 1990) (discussing *Chevron*).

21. *See Wells Fargo Bank, N.A. v. Fed. Deposit Ins. Corp.*, 310 F.3d 202, 205-06 (D.C. Cir. 2002) (“Because the judiciary functions as the final authority on issues of statutory construction, [a]n agency is given no deference at all on the question whether a statute is ambiguous.”) (citations and internal quotation marks omitted).

22. *Nat’l Ass’n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007) (internal quotation marks omitted); *see also Petit*, 675 F.3d at 781 (“Appellants are correct that we must start with the statute’s text.”); *PDK Labs., Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 794 n.1 (D.C. Cir. 2004) (“[O]ne cannot understand a statute merely by understanding the words in it.”); *Wells Fargo*, 310 F.3d at 205-06 (“Because the judiciary functions as the

*Marbury*: “Because the judiciary functions as the final authority on issues of statutory construction, [a]n agency is given no deference at all on the question whether a statute is ambiguous.”<sup>23</sup> As the D.C. Circuit has observed about its own employment of traditional tools of statutory construction, however, “[t]his court’s decisions discussing the application of these canons at *Chevron* step one are not entirely consistent.”<sup>24</sup> In sum, at *Chevron* step one, if the intent of Congress is clear, then the court’s inquiry ends, and the clear and unambiguous statutory language controls.<sup>25</sup>

If Congress has not directly addressed the precise question at issue, the reviewing court proceeds to *Chevron* step two. Under step two, “[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are . . . manifestly contrary to the statute.”<sup>26</sup> Stated differently, “[t]he question

---

final authority on issues of statutory construction, [a]n agency is given no deference at all on the question whether a statute is ambiguous.”) (alteration in original) (internal quotation marks omitted); *Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1014 (D.C. Cir. 1999) (“[T]o prevent statutory interpretation from degenerating into an exercise in solipsism, ‘we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law.’ . . . ‘[W]e consider not only the language of the particular statutory provision under scrutiny, but also the structure and context of the statutory scheme of which it is a part.’”) (citations omitted); *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (characterizing *Chevron* step one inquiry “as a search for the plain meaning of the statute . . . . The literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use.”).

23. *Wells Fargo*, 310 F.3d at 205-06 (alteration in original) (internal citations and quotation marks omitted).

24. *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 443 (D.C. Cir. 2012); *see also Halbig v. Burwell*, 758 F.3d 390, 406-07 (D.C. Cir. 2014) (questioning whether court must look at legislative history at *Chevron* step one); *Bell Atl. Tel. Cos.*, 131 F.3d at 1047 (noting courts must “exhaust the traditional tools of [statutory] construction” at *Chevron* step one) (citations and internal quotation marks omitted). As the court in *Duncan* pointed out, there are numerous examples of such inconsistent application. *Compare* *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 644-45 (D.C. Cir. 2000) (rejecting agency’s interpretation at step one based on the tandem “cannons of avoiding surplusage and *expressio unius*”), *with* *Mobile Comm. Corp. of Am. v. FCC*, 77 F.3d 1399, 1405 (D.C. Cir. 1996) (“*Expressio unius* ‘is simply too thin a reed to support the conclusion that Congress has clearly resolved [an] issue.’” (alteration in original) (citations omitted)), *and* *Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (“[A] congressional prohibition of particular conduct may actually *support* the view that the administrative entity can exercise its authority to eliminate a similar danger.” (alteration in original) (citation omitted)). But the *Duncan* court also made clear that “a court need not follow these canons, when they do ‘not hold up in the statutory context.’” *See Duncan*, 681 F.3d at 444. (citation omitted).

25. *See Petit*, 675 F.3d at 778; *Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 4 (D.C. Cir. 2011) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)); *see also Merrill*, *supra* note 3, at 977 (“The two-step structure makes deference an all-or-nothing matter. If the court resolves the question at step one, then it exercises purely independent judgment and gives no consideration to the executive view.”).

26. *Chevron*, 467 U.S. at 843-44; *see also Duncan*, 681 F.3d at 441; HARRY T. EDWARDS & LINDA A. ELLIOTT, *FEDERAL COURTS STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS AND Agency ACTIONS* 141 (2007); *Merrill*, *supra* note 3, at 977 (“If [the court] resolves the question at step two, then it applies a standard of maximum

for a reviewing court is whether in doing so the agency has acted reasonably and thus has ‘stayed within the bounds of its statutory authority.’”<sup>27</sup> The rationale for deference to agencies in this step is the legal fiction that Congress provided discretion for agencies to fill in the blanks. In short, if a statute is ambiguous and an agency’s interpretation of that statute is reasonable, the court defers to the agency’s interpretation.<sup>28</sup>

To be a reasonable statutory interpretation, the interpretation must account for both “the specific context in which [the] language is used, and the broader context of the statute as a whole.”<sup>29</sup> A statutory “provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”<sup>30</sup> Thus, an agency interpretation that is “inconsisten[t] with the design and structure of the statute as a whole” does not merit deference.<sup>31</sup>

There are at least two significant legal changes embedded in *Chevron*, both of which altered the relationship between courts and agencies in statutory interpretation. First, “[i]n effect, *Chevron* transformed a regime that allowed courts to give agencies deference along a sliding scale into a regime with an on/off switch.”<sup>32</sup> Second, the Court’s new framework inverted the traditional default rule. In the pre-*Chevron* period, deference to executive interpretations required special justification; independent judgment was the default rule. Under *Chevron*, the court must initially establish whether the issue is suitable for independent judicial resolution; if it is not, the court automatically shifts into a deferential mode. As a result, independent judgment by a court now requires special justification, and judicial deference is the default rule. If, as the Court in *Chevron* seemed to suggest, the circumstances justifying independent judgment were defined narrowly, this inversion portended a major transfer of interpretative power from courts to agencies.<sup>33</sup>

---

deference.”).

27. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2439 (2014) (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1864 (2013)).

28. The D.C. Circuit has said that at step two, “we ask whether the [agency] has reasonably explained how the permissible interpretation it chose is ‘rationally related to the goals of’ the statute.” *See Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 665 (D.C. Cir. 2011) (quoting *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 388 (1999)); *see also Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (“A ‘reasonable’ explanation of how an *agency’s* interpretation serves the statute’s objectives is the stuff of which a ‘permissible’ construction is made . . . .” (emphasis added) (citations omitted)); *Bell Atl. Tel. Cos.*, 131 F.3d at 1049 (“[W]e will *defer* to the [*agency’s*] interpretation if it is reasonable and consistent with the statutory purpose and legislative history.” (emphasis added) (citation omitted)). The Supreme Court recently noted that “[e]ven under this deferential standard, however, ‘agencies must operate within the bounds of reasonable interpretation.’” *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (quoting *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442).

29. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

30. *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.* 484 U.S. 365, 371 (1988).

31. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013).

32. Merrill, *supra* note 3, at 977.

33. *See id.*

To support a legal test that made deference to administrative agencies the default rule, the Court relied on a theory of political accountability. Unlike federal courts, which are insulated from politics, an agency is indirectly accountable democratically through the oversight and supervision of the President, who is directly accountable to the people.<sup>34</sup> “While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .”<sup>35</sup> What about Congress, the maker of law pursuant to Article I of the Constitution, whose members are directly accountable to the people? The *Chevron* Court ruled that whenever Congress delegated to an agency the authority to administer a statute, it also delegated the authority for the agency to interpret ambiguities in the statute.<sup>36</sup>

In addition to the political accountability rationale for *Chevron*, the Court also relied on a theory of agency expertise. Under this theory, it is supposed that Congress left the statute ambiguous precisely so that the experts at an agency could fill in the blanks using their subject matter expertise.<sup>37</sup> Indeed, as experts gain more knowledge, they would have the flexibility to alter interpretation to meet changing situations.

Some legal experts have added another rationale. Although commentators give it different names, essentially it is congressional intent. The rationale assumes that by leaving a statute ambiguous, it is the intent of Congress that courts defer to the agency’s interpretation of a statute.<sup>38</sup> This rationale seems to hold up better for statutes enacted after *Chevron* was decided—when Congress is legislating against the backdrop of the *Chevron* doctrine and can make a judgment about whether to be specific or ambiguous in a statute. But even then, it seems to ignore the constitutional role of the courts—as envisioned by the Founders—“to say what the law is” as enacted by Congress.<sup>39</sup>

#### IV. DATA ON RECENT CASES IN THE D.C. CIRCUIT SUGGEST THAT THERE HAS BEEN A SUBSTANTIAL CHANGE IN THE RELATIVE ROLES OF THE COURTS AND AGENCIES POST-*CHEVRON*

Thomas Merrill has observed that “*Chevron* is widely regarded as a kind of ‘counter-*Marbury*’ for the administrative state. Indeed, read for all it is worth, the decision would make administrative actors the primary interpreters of federal statutes and relegate courts to the largely inert role of enforcing unambiguous statutory terms.”<sup>40</sup> Data on recent applications of the *Chevron* doctrine by the

---

34. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865-66. This rationale seems to be based on the theory of a unitary executive.

35. *Id.* at 865.

36. See *id.* at 843-44.

37. See *id.* at 865.

38. See David M. Gossett, Comment, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 681 (1997).

39. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

40. Merrill, *supra* note 3, at 969-70. Merrill concluded that “[i]t turns out that the Court does not regard *Chevron* as a universal test for determining when to defer to executive interpretations.” *Id.* at 970. But his conclusions are based on the Supreme Court’s later

D.C. Circuit suggest that, perhaps, the *Chevron* doctrine is being applied in a way that minimizes the role of courts to interpret the law.

In the wake of the *Chevron* decision, commentators argued about whether the decision and its two-step analysis would have an effect on subsequent cases. In a 1991 article, E. Donald Elliott and Peter H. Schuck studied cases from lower courts decided in the six months prior to and the six months after the Supreme Court's decision in *INS v. Cardozo-Fonseca*,<sup>41</sup> in which the Supreme Court clarified and reiterated the *Chevron* doctrine.<sup>42</sup> Elliott and Schuck summarized their findings as follows:

We found a statistically significant increase in the level of deference the courts were paying to agency decisions. In other words, the pattern of courts affirming agency decisions went from approximately 71% to approximately 81%, and this change is highly statistically significant because of the large number of cases considered.<sup>43</sup>

In 1992, Thomas W. Merrill conducted a study of the Supreme Court's own application of the *Chevron* doctrine in the years immediately after the *Chevron* decision.<sup>44</sup> He reached two conclusions. "First, it is clear that *Chevron* is often ignored by the Supreme Court."<sup>45</sup> Second, although noting that the number of cases examined "is too small to attribute significance to the precise percentages," he determined that "there is no discernible relationship between the application of the *Chevron* framework and greater acceptance of the executive view."<sup>46</sup> This conclusion was based on the observation that:

[I]n the cases actually applying the *Chevron* framework in the post-*Chevron* period—59% adopting the agency view—with either the overall acceptance rate in the post-*Chevron* period (70%) or the rate in the pre-*Chevron* era (75%). Paradoxically, it appears that adoption of the *Chevron* framework has meant, if anything, a decline in deference to agency views.<sup>47</sup>

Understandably, Merrill attempted to reconcile his findings with those of the Schuck and Elliott study. His conclusion in part was that Schuck and Elliott studied lower courts and that "[l]ower courts probably take Supreme Court opinions more seriously than does the Court itself."<sup>48</sup> In addition, he stated that

---

decisions, not on lower courts' implementation.

41. 480 U.S. 421 (1987).

42. See generally Schuck & Elliott, *supra* note 2.

43. Elliott, *supra* note 5, at 9.

44. See generally Merrill, *supra* note 3.

45. *Id.* at 982. One way around *Chevron* is for the Court to determine that the agency's interpretation is not reasonable, which engenders disputes among the Justices because the standard is so ambiguous. See *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (reaching 5-4 decision with majority holding agency interpretation failed *Chevron* Step Two and with Justices arguing about whether agency interpretation was reasonable).

46. See Merrill, *supra* note 3, at 984.

47. *Id.*

48. See *id.*



“there is evidence in the Schuck and Elliott study that suggests the ‘*Chevron* effect’ in the lower courts may have been only temporary.”<sup>49</sup> His thought was that the “*Chevron* effect” might continue to diminish “as it became increasingly evident over time that the Supreme Court employs the *Chevron* approach only sporadically. . . .”<sup>50</sup>

It seems reasonable, after the passage of time, to examine whether the “*Chevron* effect” has in fact diminished. Because so many appeals from federal agency action are heard by the D.C. Circuit, one would naturally look at how that court has applied *Chevron* recently. In calendar years 2012, 2013, and 2014, the D.C. Circuit decided 57 cases using the *Chevron* analysis.<sup>51</sup> In two of those cases, the court considered two separate questions in which it applied the *Chevron* analysis. A table of those cases is provided as Appendix A to this article.

Those 59 applications of *Chevron* can then be categorized based on two criteria. The first criterion is whether the case was resolved at *Chevron* step one or *Chevron* step two; the second criterion is whether the court (a) affirmed the agency or (b) remanded to or reversed the agency. Table 1 shows the results of this categorization, and Table 2 provides a further analysis of the data.

TABLE 1

	Step 1	Step 2
Agency Affirmed	9	34
Agency Reversed	14	2
Total	23	36

TABLE 2

Agency reversed overall	27%
When case resolved at <u>Chevron</u> Step 1, agency reversed	61%
When case resolved at <u>Chevron</u> Step 2, agency reversed	6%

From these data, we see that twenty-three issues were decided by the court applying *Chevron* step one. Of those cases, the agency was overturned in fourteen—or sixty percent of the cases. Stated differently, in sixty percent of the cases, the agency misinterpreted or misapplied an unambiguous statute. The

---

49. *Id.*

50. *Id.*

51. Two cases were omitted because the court determined that the agency’s position was clearly incorrect or correct on the statute and did not appear to apply a *Chevron* analysis. *See Mack Trucks, Inc. v. EPA*, 682 F.3d 87 (D.C. Cir. 2012); *Nat’l Ass’n of Regulatory Util. Comm’rs v. U.S. Dep’t of Energy*, 680 F.3d 819 (D.C. Cir. 2012). To the extent they should have been included in the data, both would have been categorized as *Chevron* step one, and, in one case, the agency was affirmed and in the other reversed. Accordingly, the trends in the data would not have been altered.

remaining thirty-six issues were decided at *Chevron* step two. Of those, the agency was overturned only twice in three years.

What can we glean from these data about the D.C. Circuit's application of *Chevron* during this time period? Like Merrill concluded, it is worth observing that the number of cases examined "is too small to attribute significance to the precise percentages . . ."<sup>52</sup> But also like Merrill found, the data reveal at least a "general phenomenon."<sup>53</sup> In fact, we can glean two lessons, one related to litigants and the second related to the relationship between the courts and agencies.

First, the appellant's chances of getting the agency reversed were substantially better if the court applied *Chevron* step one. If the appellant could convince the court to view the dispute as one of interpretation of an unambiguous statute, the appellant had a better chance of getting the court to overturn the agency interpretation. Although the court reversed the agency in only twenty-seven percent of the cases overall, there was a sixty-one percent reversal rate if the court resolved the issue at *Chevron* step one. The implication for appellants is that attempting to show that the statute is clear and that the agency misinterpreted it is the better path to success. At the same time, the court seems to decide substantially fewer cases under *Chevron* step one.

More often, however, the court decides the case under *Chevron* step two. Of course, as the data show, there is an incentive for the agency to contend that the statute is ambiguous. Indeed, in a recent case in which the Court ruled an agency's interpretation of a statute was unreasonable under *Chevron* step two, Justice Thomas noted that "we should be alarmed that [the agency] felt sufficiently emboldened by [the Court's] precedents to make the bid for deference that it did here."<sup>54</sup> Although we should be alarmed, perhaps we should not be surprised because it is clear that the appellant has a far steeper hill to climb under *Chevron* step two to convince the court to overturn the agency's interpretation. The deference given to the agency for articulating any reasonable interpretation—even if it is one with which the court itself would disagree—proves to often be insurmountable. The six percent reversal rate at *Chevron* step two suggests there is very infrequently a role for the judiciary at this step.

Second, it seems clear that *Chevron* has altered the relationship between courts, Congress, and the executive. Looking at statements made by the court in individual cases is also telling as to the extent to which the relationship among the branches has been altered. In *Gentiva Healthcare Corp. v. Sebelius*,<sup>55</sup> Gentiva contended that the Department of Health and Human Services had acted unlawfully by delegating certain tasks to a contractor. The court determined that the statute at issue "is not unambiguous and the Secretary's reading is not unreasonable."<sup>56</sup> Nevertheless, the court noted that "although we believe Gentiva

---

52. See Merrill, *supra* note 3, at 984.

53. See *id.*

54. *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., dissenting).

55. 723 F.3d 292 (D.C. Cir. 2013).

56. *Id.* at 295.

may have the better reading [of the statute], we must defer to the Secretary.”<sup>57</sup> Whether the court was correct, the statement indicates the extent to which *Chevron* deference has rendered courts irrelevant as the decider of what the law is. Although the *Gentiva* court thought that the proper legal interpretation was something else, it was bound by *Chevron* to uphold a reasonable interpretation of the statute by the agency. *Gentiva* demonstrates the point made by Justice Thomas:

*Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is “the best reading of an ambiguous statute” in favor of an agency’s construction. It thus wrests from Courts the ultimate interpretative authority to “say what the law is,” and hands it over to the Executive.<sup>58</sup>

One interpretation of the data is that if the court determines that the statute is clear, it has found that the court has only been correct in interpreting that clear meaning of the statute in fewer than forty percent of the cases. But if the statute is unclear, the court has determined that the agency decision is due deference thirty-four out of thirty-six times—or in about ninety-four percent of the cases. Somehow, it seems wrong that application of a legal rule like *Chevron* would result in a court so reliably deferring to agencies on unclear questions while so frequently disagreeing with the agency on how to interpret an unambiguous statute. If the agency gets straightforward interpretations of statutes wrong in about sixty percent of decided cases, why should a rule of law be so deferential to the agency when the interpretation question is even more difficult?

Ironically, one of the exceptions to the *Chevron* doctrine that has sprung up is that agencies are not entitled to deference when a statute applies to more than one agency, such as the Freedom of Information Act.<sup>59</sup> The logic of that exception is somewhat astounding because it seems to be that the court “must decide for [itself] the best reading” of the statute out of fear that agencies might interpret it differently.<sup>60</sup> That rationale sounds a bit like something from Article III of the U. S. Constitution as explained in *Marbury*, except that the worry should not be whether agencies interpret it differently. The concern should be whether

57. *Id.* (citation omitted).

58. *See Michigan*, 135 S. Ct. at 2712 (Thomas, J., dissenting) (citation omitted).

59. *See Pub. Inv’rs Arbitration Bar Ass’n v. SEC*, 771 F.3d 1, 3 (D.C. Cir. 2014) (“[B]ecause FOIA’s terms apply government-wide, moreover, ‘we generally decline to accord deference to agency interpretations of the statute, as we would otherwise do under *Chevron*.’”) (quoting *Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001)); *see also Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997) (“[W]e will not defer to an agency’s view of FOIA’s meaning . . . no one federal agency administers FOIA . . . one agency’s interpretation of FOIA is therefore no more deserving of judicial respect than the interpretation of any other agency.”); *Reporters Comm. for Freedom of the Press v. U.S. Dep’t of Justice*, 816 F.2d 730, 734 (D.C. Cir. 1987) (declining to accord *Chevron* deference to Justice Department interpretation of FOIA exemptions because FOIA “applies to all government agencies, and thus no one executive branch entity is entrusted with its primary interpretation”), *rev’d on other grounds*, 489 U.S. 749 (1989).

60. *See Miller v. Clinton*, 687 F.3d 1332, 1342 (D.C. Cir. 2012) (quoting *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1136 (D.C. Cir. 2001)).

they interpret the statute correctly. Indeed, nothing is inherently different about an agency's interpretation skills when a statute applies to multiple agencies. Given that the data seem to suggest that the agency wrongly interprets the statute in about sixty percent of cases when *Chevron* applies and the statute is unambiguous, it would seem that the courts are needed to determine what the law is even when the statute applies to only one agency.

In addition to rendering courts largely irrelevant, *Chevron* has, in some ways, neutered Article I of the Constitution. Article I vests “[a]ll legislative Powers herein granted” in the Congress.<sup>61</sup> Agencies, unlike courts, are not searching for the law duly passed by the legislature. They are making policy—a fact that was acknowledged by the Court in *Chevron*.<sup>62</sup> As Justice Thomas describes it, “[s]tatutory ambiguity thus becomes an implicit delegation of rule-making authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress.”<sup>63</sup>

Only the most brazen actions by agencies have resulted in the courts taking action. For example, in *Utility Air Regulatory Group v. EPA*,<sup>64</sup> the Supreme Court struck down agency action in which the agency attempted blatantly to substitute its judgment of what the law should be for the express action of Congress.<sup>65</sup>

Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, “faithfully execute[s]” them. The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.<sup>66</sup>

Paraphrasing Justice Thomas, the shocking part of the case was that the agency tried to alter the clear statutory terms in the first place.

Furthermore, under *Chevron*'s progeny, an agency can determine over time that the same statute has diametrically different meanings—without any further act of Congress. Under *Chevron*, an agency is able to say at one moment that the statute means “X” and later say the statute means “not X.”<sup>67</sup> As long as the agency provides a reasoned explanation, the agency is free to change direction

---

61. U.S. CONST. art. I, § 1.

62. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

63. *Michigan*, 135 S. Ct. at 2713 (Thomas, J., dissenting).

64. 134 S. Ct. 2427 (2014).

65. See generally *id.*

66. *Id.* at 2446 (citations omitted) (alteration in original).

67. See *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427 (D.C. Cir. 2012); see also *Verizon v. FCC*, 740 F.3d 623, 636 (D.C. Cir. 2014) (citations omitted) (discussing ability of agencies to change interpretive stances).

completely from what it originally thought Congress meant.<sup>68</sup> The ability of the agency to flip-flop on its interpretation of a statute, so long as it offers a new reasonable explanation, is further evidence that the agency is not looking for the meaning of the statutory text or the will of Congress.<sup>69</sup> Indeed, the discussions of this rule rely on the ability of the agency to change “policy” rather than on the ability of the agency to determine what the law is.<sup>70</sup> Changing the law so dramatically—from “X” to “not X”—is the role of Congress and not of an agency under Article I.

#### V. JUDICIAL OVERSIGHT OF AGENCY ACTIONS IS THE ONLY CONSTITUTIONAL CHECK ON AGENCY ACTIONS

An agency is an extension of the executive. There are two schools of thought regarding the extent to which the agency is part of the Presidency—(1) whether the President is the ultimate decider of questions through agency personnel or (2) whether the agency is an extension of the executive branch over which the President is merely an overseer.<sup>71</sup> The first school of thought is rooted in the

68. The court in *Duncan* summarized the law. See *Duncan*, 681 F.3d at 441 (citations omitted) (noting general approach for addressing altered agency interpretations).

69. See *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1235 (D.C. Cir. 2014), *rev'd by Michigan v. EPA*, 135 S. Ct. 2699 (2015). In *White Stallion*, the court noted:

To the extent petitioners' challenge concerns EPA's *change* in interpretation from that in 2005, our approach is the same because “[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.” That is, “if the agency adequately explains the reasons for a reversal of policy, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.” And while “[u]nexplained inconsistency” may be “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice,” our review of a change in agency policy is no stricter than our review of an initial agency action. Thus, although an agency may not “depart from a prior policy *sub silentio* or simply disregard rules that are still on the books,” the agency “need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one.” Rather, “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.”

*Id.* (citations omitted) (alterations in original).

70. See *Verizon*, 740 F.3d at 636 (“But so long as an agency ‘adequately explains the reasons for a reversal of policy,’ its new interpretation of a statute cannot be rejected simply because it is new.”) (quoting *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

71. See Peter L. Strauss, *Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 702-03 (2007). Strauss writes:

On the one hand, the opening words of Article II locate all executive power in the President, and the Philadelphia convention famously and emphatically rejected any idea of a collegial executive. Those who take the strongest perspective on what it means to have a unitary chief executive thus argue that when Congress assigns a matter for decision to a constituent element of the executive branch, it does so only for convenience—that, as a matter of constitutional power, the President has the right to decide it. On the other hand, the Constitution twice refers to “duties” or “powers” assigned to other officers. Article II in terms gives the President only the right to seek from those officers a written opinion about their exercise of those duties (i.e., it does not say he may command their exercise of the duties assigned to them), and it concludes that he is responsible to see to it that the laws “be faithfully executed”—

statement in Article II of the Constitution that provides that “[t]he executive Power shall be vested in a President of the United States of America”<sup>72</sup> and in the President’s obligation to ensure that the laws of the country are faithfully executed.<sup>73</sup> The second school of thought finds its origins in other provisions of the Constitution that provide: (1) Congress the authority to “make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,”<sup>74</sup> and (2) that the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices,” which implies these agency officers have powers over which the President is the overseer.<sup>75</sup>

In some ways, this debate may be largely academic. At the end of the day, as Justice Scalia wrote, “[i]t is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are.”<sup>76</sup>

In either event, the President appoints the leaders of executive agencies, even if most agency employees are career bureaucrats. And these administrators execute the law by, among other things, adopting rules and regulations. Their ability to adopt rules and regulations is limited to the express powers given to them in statutes. Thus, agencies must execute those statutes by reading and understanding what they mean.

Agencies can be held accountable for the way they execute those statutes in

---

i.e., as if by others. From this perspective, as some (but not all) Attorneys General have concluded, when Congress creates duties in others, that act creates in the President constitutional obligations not only to oversee but also to respect their independent exercise of those duties. Just as he must respect a statutory framework that assigns care for the national parks to the Department of the Interior, and care for the national forests to the Department of Agriculture, on this view, he must respect a statutory framework that assigns actual decision making about particular issues affecting air quality to the EPA; he is entitled only to his (inevitably political) oversight.

*Id.* (citations omitted) (footnotes omitted).

There is an alternative view that the president is the decider of issues through agencies. See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 549-50 (1994); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 730 (2005). There is also a view that the Constitution does not confer decisional authority, but it should be presumed Congress intends it, given the realities of modern administration. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2-3 (1994). Additionally, some believe that the President, unless directly authorized, is only an overseer. See Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987-89 (1997); Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 984-86 (1997).

72. U.S. CONST. art. II, § 1, cl. 1.

73. See U.S. CONST. art. II, § 3, cl. 3.

74. U.S. CONST. art. I, § 8, cl. 18.

75. See U.S. CONST. art. II, § 2, cl. 1.

76. *Morrison v. Olson*, 487 U.S. 654, 709 (1988) (Scalia, J., dissenting).

three ways. The first is through congressional oversight and budget control, which has not been used as a rationale in the debate over *Chevron*. The second—at least for agencies that are not independent agencies<sup>77</sup>—is through the political accountability of the President. The third is through judicial review by courts. The proper roles of political accountability and judicial review have been the subject of debate regarding the proper role of the courts under the separation of powers.

Political accountability is most often referenced when evaluating the proper extent for courts to defer to agencies. The theory goes that if an agency makes an unwise decision, the President will feel the political consequences through pressures from the public or ultimately at the ballot box—directly in his reelection if he is a first term President and potentially indirectly through congressional elections. The notion of political accountability was noted by the Supreme Court in *Marbury*:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.<sup>78</sup>

Supporters of this theory of political accountability contend then that agencies should have latitude to interpret statutes themselves and that courts should defer to those interpretations because the President is directly accountable to the people through the political process and courts are not. This analysis misses the mark because what a statute means is not dependent upon whether the people like it or not. It really misses the mark when agencies attempt to alter the interpretation of statutes long ago enacted because the political winds change. And it misses the mark when the agency is an independent agency, which means that by design it is insulated from the direct control of the President. Indeed, this

---

77. The extent to which independent agencies are subject to political accountability is debatable, although it is certainly to a lesser extent than executive branch agencies. See Elena Kagan, *supra* note 71; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 591 (1984). The Supreme Court's precedent on the extent of political influence over independent agencies is not consistent. Compare *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 682 (10th Cir. 1988) ("The President has the power to appoint the commissioners; he has the power to choose the chairman of the SEC who has broad powers concerning the operation and administration of the commission; the chairman serves at the President's pleasure; and, the President has the power to remove a commissioner for inefficiency, neglect of duty, or malfeasance in office. We conclude these powers give the President sufficient control over the commissioners to insure the securities laws are faithfully executed and the removal restrictions do not impede the President's ability to perform his constitutional duty."), with *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (rejecting removal premised on lack of agreement on either policies or administering of Federal Trade Commission because FTC was designed to be "independent in character," "free from political domination or control," and not "subject to anybody in the government" or "to the orders of the President"). A somewhat extensive discussion is included in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, but the D.C. Circuit's reliance on *Weiner* may have been misplaced given the actual holding in *Humphrey's Executor*. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 679-80 (D.C. Cir. 2008).

78. *Marbury v. Madison*, 5 U.S. 137, 165-66 (1803).

analysis ignores the Constitution. Although the law may need to change, the constitutional path to change is through the legislature and then to the executive for signature or veto.

The political accountability theory is more debatable in the current age—the age of the administrative state. There are now scores of executive agencies taking literally thousands of actions each year. According to a Congressional Research Service report, from 1997 to 2012, the number of final rules issued by the federal government each year has ranged from 2,482 in 2012 to 4,388 in 1998.<sup>79</sup>

The political pressure related to any one action is therefore theoretical at best because the general public is often unaware of most of those actions. Many policy decisions made by agencies affect only a sliver of the electorate. Indeed, the general public may have little interest in, for example, a regulation issued by the Federal Aviation Administration “requiring helicopter pilots to use a route one mile off the north shore of Long Island, New York for the purpose of noise abatement in residential areas.”<sup>80</sup> It would certainly be a stretch to argue that such a regulation had broad enough appeal for a particular election to be a referendum on it.

Judicial review provides the other opportunity to hold agencies accountable. It affords a party the opportunity to challenge the execution of the law by the agency in court. The court therefore plays a role in ensuring that, among other things, the agency does not act outside the scope of its powers or inconsistently with the statutes properly adopted by the legislators and signed by the President in accordance with the Constitution. “[T]he particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and the courts as well as other departments are bound by that instrument.”<sup>81</sup> With its separate powers and independent obligation to the Constitution, the judiciary is a line of defense against unlawful agency action.

## VI. CONCLUSION

The *Chevron* doctrine attempted to accommodate the growth of the administrative state. However, it has done so at the expense of the judicial check on executive power and the constitutional requirements for enacting the laws or changes to the laws of the United States. The data from the D.C. Circuit seem to indicate that the judiciary is no longer the last line of defense against unlawful agency action. That agencies are overturned in more than sixty percent of cases in which the law is unambiguous, but rarely ever overturned when the statute is ambiguous, seems to demonstrate that the courts no longer play the role of determining “what the law is” as described in *Marbury*.<sup>82</sup> Cases like *Gentiva*, in

---

79. See MAEVE P. CARVEY, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 5 (May 1, 2013).

80. *Helicopter Ass’n Int’l v. FAA*, 722 F.3d 430, 431 (D.C. Cir. 2013).

81. *Marbury*, 5 U.S. at 180.

82. See *id.* at 177.



which courts openly state that they think the agency's interpretation may not be correct but is a reasonable interpretation of an ambiguous statute, further confirm the diminished role of the judiciary.

APPENDIX A:  
2013 CASES IN THE D.C. CIRCUIT APPLYING CHEVRON

Where the court found under Step One that statute was clear and nevertheless continued to Step Two, the cases was classified as a Step One case.

\*\* Cases omitted because arguably not Chevron cases.

chevron and agency and defer/ and date/geq (01/01/2012) and leq (12/31/2013)	Independent	Chevron Step Applied		Agency	Agency
	Agency?	Step 1	Step 2	Upheld	Overtumed
Gaughf Props., L.P. v. Comm'r, 738 F.3d 415	No			1	1
Agape Church, Inc. v. FCC & United States, 738 F.3d 397	Yes			1	1
Newspaper Ass'n of Am. v. Postal Regulatory Comm'n, 734 F.3d	No			1	1
Riffin v. Surface Transp. Bd., 733 F.3d 340	Yes			1	1
Nat'l Ass'n of Clean Water Agencies v. EPA, 734 F.3d 1115	No			1	1
Black Oak Energy, LLC v. FERC, 725 F.3d 230	Yes			1	1
Texas v. EPA, 726 F.3d 180	No	1			1
Gentiva Healthcare Corp. v. Sebelius, 723 F.3d 292	No			1	1
Helicopter Ass'n Int'l, Inc. v. FAA, 722 F.3d 430	No	1			1
Safari Club Int'l v. Jewell (In re Polar Bear Endangered Species ..., 720 F.3d 354	No	1			1
Catholic Health Initiatives Iowa Corp. v. Sebelius, 718 F.3d 914	No			1	1
Cumberland Coal Res., LP v. Fed. Mine Safety & Health Review Com..., 717 F.3d 1020	No			1	1
Nat'l Shooting Sports Found., Inc. v. Jones, 716 F.3d 200	No	1			1
Blue Ridge Emvtl. Def. League v. NRC, 716 F.3d 183	Yes			1	1
Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947	Yes	1			1
Mingo Logan Coal Co. v. United States EPA, 714 F.3d 608	No	1			1
Int'l Bhd. of Teamsters v. United States DOT, 714 F.3d 580	No			1	1
Int'l Bhd. of Teamsters v. United States DOT, 724 F.3d 206	same case as immediately above				
AFGE, AFL-CIO, Local 3669 v. Shinseki, 709 F.3d 29	No	1			1
Am. Elec. Power Serv. Corp. v. FCC, 708 F.3d 183	Yes			1	1
Shieldalloy Metallurgical Corp. v. NRC, 707 F.3d 371	Yes			1	1
New Eng. Power Generators Ass'n v. FERC, 707 F.3d 364	Yes			1	1
Hearth, Patio & Barbecue Ass'n v. United States DOE, 706 F.3d 499	No	1			1
EchoStar Satellite L.L.C. v. FCC, 704 F.3d 992	Yes			1	1
NRDC v. EPA, 706 F.3d 428	No	1			1
Coalition for Common Sense in Gov't Procurement v. United ..., 707 F.3d 311	No			1	1
Cellco P'ship v. FCC, 700 F.3d 534	Yes	1			1
Desert Citizens Against Pollution v. EPA, 699 F.3d 524	No			1	1
EME Homer City Generation, L.P. v. EPA, 696 F.3d 7	No	1			1
Friends of Blackwater v. Salazar, 691 F.3d 428	No			1	1
Friedman v. Sebelius, 686 F.3d 813	No			1	1
Rural Cellular Ass'n & Universal Serv. v. FCC, 685 F.3d 1083	Yes			1	1
Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102	No	1			1
Ass'n of Private Sector Colleges & Univs. v. Duncan, 681 F.3d 427	No			1	1
Petit v. USDE, 675 F.3d 769	No			1	1
AKM LLC v. Sec'y of Labor, 675 F.3d 752	No	1			1
** Mack Trucks, Inc. v. EPA, 682 F.3d 87	No	x		x	
** Nat'l Ass'n of Regulatory Util. Comm'rs v. United States DOE, 680 F.3d 819	No	x			x
Total		13		22	28

Agency affirmed		Agency reversed	
Step 1	Step 2	Step 1	Step 2
7	20	6	1
SAMPLE SIZE = 34 applications of Chevron			

2014 CASES IN THE D.C. CIRCUIT APPLYING CHEVRON

chevron and agency and deferr and date[eq (01/01/2014) and leq (12/31/2014)	Independent Agency?	Chevron Step Applied		Agency	
		Step 1	Step 2	Upheld	Overtured
Trumpeter Swan Soc'y v. EPA, 774 F.3d 456	No	1			1
Issue I - ability to deny petitioners right to file					
Issue II - jurisdiction		1		1	
NRDC v. EPA, 777 F.3d 456	No			1	1
Issue I - deadline					
Issue II - conformity		1			1
Associated Builders & Contrs., Inc. v. Shiu, 773 F.3d 257	No	1		1	
Verizon & AT&T, Inc. v. FCC, 770 F.3d 961	Yes			1	1
S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41	Yes			1	1
Halbig v. Burwell, 758 F.3d 390	No	1			1
SEC v. Sec. Investor Prot. Corp., 758 F.3d 357	No	1			1
New Eng. Power Generators Ass'n v. FERC, 757 F.3d 283	Yes			1	1
Sierra Club & La. Emtl. Action Network v. EPA, 755 F.3d 968	No	1			1
NRDC v. EPA, 755 F.3d 1010	No	1			1
CSX Transp., Inc. v. Surface Transp. Bd., 754 F.3d 1056	Yes	1			1
Nat'l Treasury Emples. Union v. Fed. Labor Rel. Auth., 754 F.3d 1031	No			1	1
Ill. Pub. Telecoms. Ass'n v. FCC, 752 F.3d 1018	Yes			1	1
Prime Time Int'l Co. v. United States Dept of Agric., 753 F.3d 1339	No			1	1
Ctr. for Biological Diversity v. EPA, 749 F.3d 1079	No			1	1
BNSF Ry. Co. v. Surface Transp. Bd., 748 F.3d 1295	Yes			1	1
Elec. Power Supply Ass'n v. FERC, 753 F.3d 216	Yes	1			1
NRDC v. EPA, 749 F.3d 1055	No			1	1
White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222	No			1	1
NACS v. Bd. of Governors of the Fed. Reserve Sys., 746 F.3d 474	Yes			1	1
Adirondack Med. Ctr. v. Sebellus, 740 F.3d 692	No			1	1
Dish Network, L.L.C. v. FCC, 552 Fed. Appx. 1	No			1	1
Verizon v. FCC, 740 F.3d 623	Yes			1	1
Total		10		15	16

Agency affirmed		Agency reversed	
Step 1	Step 2	Step 1	Step 2
2	14	8	1
<b>SAMPLE SIZE = 25 applications of Chevron</b>			

<b>All agency analysis</b>			
		Step 1 cases	23
		Step 2 cases	36
		<b>Agency affirmed</b>	<b>Agency reversed</b>
		Step 1	Step 2
		9	34
		Step 1	Step 2
		14	2
Sample Size =59 applications of Chevron in 57 cases			
Agency reversed overall		27%	
When case resolved at Step 1, agency reversed		61%	
When case resolved at Step 2, agency reversed		6%	
<b>Independent agency analysis</b>			
		Step 1 cases	4
		Step 2 cases	16
		<b>Agency affirmed</b>	<b>Agency reversed</b>
		Step 1	Step 2
		1	15
		Step 1	Step 2
		3	1
Sample Size =20 applications of Chevron in 20 cases			
Agency reversed overall		20%	
When case resolved at Step 1, agency reversed		75%	
When case resolved at Step 2, agency reversed		6%	