**HOUSE DEFERENCE HEARING**

# TESTIMONY OF RICHARD J. PIERCE, JR.

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## IN A HEARING ON JUDICIAL DEFERENCE

## TO AGENCY DECISIONS

## BEFORE THE

## SUBCOMMITTEE ON REGULATORY REFORM

## COMMERCIAL AND ANTITRUST LAW

## OF THE

## HOUSE COMMITTEE ON THE JUDICIARY

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Thank you, Chairman Marino, Ranking Member Johnson, and distinguished members of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, for the opportunity to testify today about the practice of the federal courts of conferring some degree of deference on agency interpretations of the statutes they administer and the rules they issue.

My name is Richard J. Pierce, Jr. I am Lyle T. Alverson Professor of Law at the George Washington University School of Law and a member of the Administrative Conference of the United States. For 38 years my teaching, researching and scholarly writing has focused on administrative law and government regulation. I have written 125 articles and 20 books on those subjects. My books and

articles have been cited in scores of judicial decisions, including over a dozen opinions of the United States Supreme Court.

Before I discuss the deference doctrines, I will place them in the context of the types of actions in which agencies announce interpretations of the statutes they implement and the rules they issue. Most agencies have the power to announce interpretations of statutes and rules either in rules or in adjudications. Agencies usually announce the most important ways in which they will interpret and implement a statute in rules.

The Administrative Procedure Act (APA) divides rules into several categories. The most important type of rule is often called a legislative rule because, if it is valid, it has the same legally binding effect as a statute. Subject to some exceptions, an agency cannot issue a legislative rule without first conducting a notice and comment proceeding. If the proposed rule is controversial and its imposition will require regulated firms to incur substantial costs, the notice and comment process can require an agency to devote substantial scarce resources to the rulemaking process for many years.

The lengthy and costly notice and comment procedure gives rise to a phenomenon that is often referred to as “ossification” of the rulemaking process. Thus, for instance, agencies were unable to comply with 1400 statutory mandates to issue rules by a statutorily-prescribed date during the period 1995 to 2014 because the rulemaking process is so lengthy and costly. Ossification also produces a situation in which many agencies have rules that have long been obsolete because they do not have the time or resources required to use the expensive and time-consuming notice and comment process to amend or rescind a rule.

Several categories of rules are exempt from the notice and comment process. The most important types of exempt rules are interpretative rules and general statements of policy. Courts differ with respect to the ways in which they distinguish between legislative rules that are subject to the

notice and comment process and interpretative rules or general policy statements that are exempt from that process. I describe the types of rules and the rulemaking process in detail in chapters six and seven of my treatise. I Richard J. Pierce, Jr., Administrative Law Treatise chapters 6 and 7 (5th ed. 2010), and 2015 Cumulative Supplement to Administrative Law Treatise.

Agencies typically issue legislative rules that are relatively broadly worded and then use interpretative rules (or decisions in adjudications) to announce the more particularized interpretations, scope, and effect the agency plans to give the legislative rules. The process the Department of Labor (DOL) has long used to implement the Fair Labor Standards Act (FLSA) illustrates this common agency approach. FLSA requires employers to pay an employee overtime for every hour an employee works in excess of forty hours per week. FLSA exempts "administrative" employees from that requirement, however. In 2004, DOL used the notice and comment rulemaking process to issue a legislative rule in which it adopted a new definition of the "administrative" employees who are exempted from the overtime requirement in FLSA. The new rule included a section in which it stated that the "administrative" exemption applies to "employees in the financial services industry" whose day-to-day work "generally meet the requirements for the administrative exception" except that it does not apply to "an employee whose primary duty is selling financial products."

In 2010, DOL issued an interpretative rule in which it interpreted its 2004 legislative rule not to exempt mortgage loan officers from the overtime pay requirement in FLSA because their "primary duty" is to make sales. The U.S. Court of Appeals for the District of Columbia Circuit held that the 2010 DOL rule was invalid because DOL did not use notice and comment to issue the rule. Mortgage Bankers Association v. Harris, 720 F.3d 966 (D.C. Cir. 2013). The Supreme Court unanimously reversed the circuit court. It held that the 2010 rule was valid notwithstanding DOL's decision to issue it without using notice and comment because it fell within the interpretative rule exemption to the notice and comment

requirement. Perez v. Mortgage Bankers Association, 135 S.Ct. 1199 (2015). Notably, however, DOL could not apply its new interpretation of its 2004 rule retroactively because FLSA has a provision that protects employers from having to pay overtime to employees when the employers had inadequate notice that the employees were entitled to overtime at the time the employers did not provide the employees with overtime pay.

Until late in the Nineteenth century, courts could not and did not review the vast majority of agency actions. The Supreme Court held that courts lacked the power to review exercises of executive branch discretion. A court could review an action taken by the executive branch (or a refusal to act) only in the rare case in which a statute compelled an agency to act in a particular manner. In that situation, the court was simply requiring the agency to take a non-discretionary ministerial action.

Over a period of about fifty years, the Court gradually eliminated the prohibition of judicial review of executive branch exercises of discretion. By early in the twentieth century, it was well settled that a court could review an agency exercise of discretion if Congress authorized judicial review of the action. In 1967, the Supreme Court began to apply a presumption of reviewability that has the effect of authorizing judicial review of an agency action when the intent of Congress with respect to the reviewability of the action is not clear.

Once courts began to review agency actions, they had to decide how much, if any, deference to confer on the agency. Over time, the Court has issued many opinions on that issue. For present purposes the most important are two opinions that announce doctrines that courts apply when they review agency interpretations of agency-administered statutes and one opinion that announces a doctrine that courts apply when they review agency interpretations of the legislative rules they issue. I describe those deference doctrines in detail in my treatise and in a recent essay that I have attached to

this statement. See Richard J. Pierce, Jr. I Administrative Law Treatise §§ 3.1-3.6 and 6.11 (5th ed. 2010) and 2015 Cumulative Supplement.

In its 1944 opinion in *Skidmore v. Swift and Co*. the Supreme Court announced that:

> "The weight [accorded to an agency judgment] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier, and later, pronouncements, and all those factors that give it power to persuade, if lacking power to control."

The test was based on the comparative advantage of specialized agencies over generalist courts because of agencies' greater subject matter expertise and greater experience in implementing a statutory regime. The results of applications of the test suggest that it is deferential to agency decisions. Depending on the time period studied, researchers have found that courts have upheld agency actions in 55% to 73% of cases in which they applied the test. The *Skidmore* test has also produced inconsistent and unpredictable results, however.

In its 1984 opinion in *Chevron v. Natural Resources Defense Council*, the Court announced a new somewhat more deferential test that most people believed to be a replacement for the *Skidmore* test:

> "When a court reviews an agency's construction of a statute which it administers, it is confronted with two questions. First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is

> silent or ambiguous with respect to the specific issue, the question is whether the agency's answer is based on a permissible construction of the statute."

In other parts of the opinion, the court replaced "permissible" with "reasonable." The second step of the *Chevron* test is a restatement of the test to determine whether an agency action is "reasonable" or arbitrary and capricious that the Court announced in its 1983 opinion in *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Automobile Insurance Co*.:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The Court based the *Chevron* test on constitutional and political grounds as well as on the basis of comparative expertise. The Court distinguished between issues of law that a Court can resolve by determining the intent of Congress and issues of policy that should be resolved by the politically accountable Executive Branch rather than the politically unaccountable Judicial Branch when Congress has declined to resolve the issue.

The *Chevron* test has another beneficial effect in addition to the enhanced political accountability for policy decisions that it yields. By giving agencies the discretion to choose among several "reasonable" interpretations of an ambiguous statute, the *Chevron* test reduces geographic differences in the meaning given to national statutes by reducing the number of splits among the circuits that were produced by circuit court applications of the less deferential *Skidmore* test. At least for a time, *Chevron* had that effect as it was applied by circuit courts. A study of applications of *Chevron* by circuit courts the year after the court decided *Chevron* found that the rate at which courts upheld

agency interpretations of statutes was 81%--a rate between 10% and 30% greater than the rate at which courts upheld agency actions through application of the *Skidmore* test. Since there is only one agency and many circuit courts, that increased rate of upholding agency statutory interpretations necessarily produced increased geographic uniformity in interpretation of national statutes.

*Chevron* also had another effect that is more controversial. It created a legal regime in which a new Administration could change the interpretation of an ambiguous provision of a statute as long as it engages in the process of reasoned decision-making required by *State Farm*. Indeed, that is what the agency did and the Court unanimously upheld in *Chevron*. The Court explicitly confirmed that effect in its 2005 opinion in *National Cable & Telecomm. Ass'n v. Brand X*. The Court held that a judicial decision that upholds an agency interpretation does not preclude an agency from changing its interpretation if it provides adequate reasons for doing so. *Brand X* made it clear that the only kind of judicial opinion involving interpretation of an agency-administered statute that precludes an agency from adopting a different interpretation is one in which the court concludes that there is one and only one permissible interpretation of the statute. Thus, *Chevron* increased temporal inconsistency in interpretation of national statutes at the same time that it decreased geographic inconsistency in interpretation of national statutes.

Until 2000, most judges and scholars believed that the *Chevron* test had replaced the *Skidmore* test. In 2000, however, the Supreme Court issued an opinion in which it stated that *Chevron* applies to some statutory interpretations while *Skidmore* applies to others. Generally, the somewhat more deferential *Chevron* test applies to interpretations announce by agencies in rules that agencies issue through use of the notice and comment procedure, while the somewhat less deferential *Skidmore* test applies when agencies announce interpretations in rules that they issue without using the notice and comment procedure.

The Court first announced what is now called the *Auer* doctrine in its 1945 opinion in *Bowles v. Seminole Rock & Sand Co*. The Court inexplicably changed the name of the doctrine to the *Auer* doctrine in its 1997 opinion in *Auer v. Robbins*. The *Auer* doctrine is similar in its effects to the *Chevron* doctrine but it applies not to agency interpretations of agency-administered statutes but to agency interpretations of agency rules. In the process of reviewing agency interpretations of agency rules the Court instructed courts to give the agency interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation."

The Court did not give reasons for the *Auer* test when it announced the test but many scholars have drawn the inference that the test was based primarily on comparative institutional expertise with respect to the field in which the rule was issued and the relationship of the rule to the statute the agency was implementing. The test has had effects similar to the effects of the *Chevron* test.

The *Auer* doctrine has produced a rate of judicial upholding of agency interpretations of agency rules that is slightly higher than the rate at which courts uphold agency interpretations of agency-administered statutes. An empirical study of 219 applications of *Auer* by district courts and circuit courts during the periods 1999-2001 and 2005-2007 found that lower courts upheld 76% of agency interpretations of agency rules. Richard Pierce & Joshua Weiss, An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules, 63 Administrative Law Review 515 (2011.)

*Auer* also has the same effects as *Chevron* in the context of agency interpretations of agency rules. It reduces geographic differences in interpretation of rules that are supposed to have a uniform national meaning but it increases temporal differences in interpretation of rules.

In the attached essay, which will be published in the next issue of George Washington University Law Review, I summarize the history of the three deference doctrines. I conclude that they were never

as deferential as many judges and scholars once believed and that they have become less deferential over the past fifteen years. I predict that they will become even less deferential in the future.

I would like to see the Supreme Court make some changes in the legal doctrines it applies and instructs lower courts to apply in this important area of law. Specifically, I would like to see the Court make changes in the law applicable to the notice and comment process that would reduce the incidence and adverse effects of ossification of the rulemaking process and I would like to see the Court clarify the important distinctions between legislative rules that require an agency to use the notice and comment procedure and interpretative rules and general statements of policy that are exempt from that process.

I do not see any opportunity for Congress to make beneficial changes in this area of law by statute at present. The courts have ample discretion to make any needed changes or clarifications in this area of law without any changes in the statutes that now govern this area of law. Courts are in the best position institutionally to make the kinds of changes in legal doctrines that would have a realistic chance of improving the legal framework within which agencies make rules and the quality and timeliness of the resulting rules.