Judge Wald and Justice Scalia Dance the Chevron Two-Step

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Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 Admin. L. Rev. 1 (2013), available at BePress.

If you are teaching administrative law this semester, you can look forward to a riveting discussion of *Chevron*. There have been volumes written on this topic, and here I plead guilty. But if you will indulge me for a moment, I'd like to recommend that you read one more article about *Chevron*.

Professor Gary Lawson and former student Stephen Kam collaborated to write *Making Law Out of Nothing At All: The Origins of the* Chevron *Doctrine*. Their mission is to explain why the *Chevron* decision is irrelevant to the *Chevron* doctrine. They write not to praise or criticize the case, but "to bury it." Or, to put it another way, they explain why one cannot resolve the many questions relating to the *Chevron* doctrine by examining the *Chevron* decision. In their article, Lawson and Kam elucidate how the lower courts, particularly the D.C. Court of Appeals, transformed the unrevolutionary *Chevron* case into the revolutionary *Chevron* doctrine within just two short years.

The authors begin by explaining the state of the law pre-*Chevron*. Specifically, they contend that the world of administrative law deference was broken into two categories: (1) agency decisions involving pure questions of law; and (2) agency decisions involving the application of law to fact. Courts reviewed decisions involving pure questions of law de novo, while they reviewed decisions involving the application of law to fact with some deference, although the exact level of deference was unclear. Further, these standards were not absolute, but rather only rebuttable presumptions.

Lawson and Kam digress briefly to describe and distinguish legal deference from epistemological deference. Legal deference is deference owed to someone simply because of the identity of the entity making the decision; think of parents or a board of directors or juries. *Chevron* deference is a form of legal deference. In contrast, epistemological deference is deference earned from experience and wisdom; think of a mentor or a consultant to a corporation or an expert witness. *Skidmore* deference is a form of epistemological deference. These categories, which the authors created, may help you understand and explain the difference in how the doctrines should be applied and why.

The pre-*Chevron* deference world was not a simple one; hence, a clearer two-step deference framework would have been appealing to the lower court judges, especially those on the D. C. Circuit who routinely faced these issues. Along comes *Chevron*, a case that no one expected to alter this deference framework; as we know, Justice Stevens, *Chevron*'s author, intended to do no more than restate existing law. You don't need me to explain either the decision or the doctrine, but what happened after *Chevron* was decided merits explanation, as it illustrates the development of the *Chevron* doctrine. First, in *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561 (D.C. Cir. 1984), Judge Patricia Wald, a friend of administrative law, ignored the pre-*Chevron* categorization step and framed *Chevron* as a "scope-of-review doctrine." Next came the first clear delineation of *Chevron* as a two-step process in *Reting v. Pension Benefit Guaranty Corp.*, 744 F.2d 133 (D.C. Cir. 1984). It might come as no surprise that Judge Wald authored that opinion as well. Then, the D.C. Circuit issued two more *Chevron* opinions authored by, yes you guessed it, Judge Wald. In *Railway Labor Executives' Ass'n v. United States Railroad*

Retirement Board, 749 F2d. 856 (D.C. Cir. 1984), Judge Wald articulated and applied the two step-analysis she had delineated in *Reting*; however, in *Pennsylvania Public Utility Commission v. United States*, 749 F.2d 841 (D.C. Cir. 1984), she did not refer to *Chevron* despite resolving what she called "substantial issues of statutory interpretation." *Id*. at 849. As Lawson and Kam note, "By the end of 1984, the D.C. Circuit … was applying the *Chevron* two-step episodically at best. Even the judge who birthed the *Chevron* doctrine was not applying it consistently." (P. 50.)

But the schizophrenia did not linger. By *Chevron*'s first anniversary, Judge Wald's *Chevron* two-step had firmly taken root in the circuits, although it had not yet migrated to the Supreme Court. However, in 1986, three judges from the D.C. Circuit authored law review articles identifying the *Chevron* decision as revolutionary. One of these judges, Antonin Scalia, ascended to the Supreme Court on September 26, 1986. Justice Scalia brought with him expertise in administrative law, as well as an understanding of *Chevron*'s significance: "The more *Chevron* mandates deference, the more power flows from the judiciary to the executive." (P. 61.)

INS v. Cardoza-Fonseca , 480 U.S. 421 (1987), set the stage for battle. Trying to return the analysis to pre-*Chevron* categorization, Justice Stevens explicitly and pointedly stated, "The question [in the case]… is a pure question of statutory construction for the courts to decide." *Id*. at 446. Justice Scalia astonishingly responded that "the Court badly misinterprets *Chevron*." *Id*. at 455 (Scalia, J., concurring). Presumably, Justice Scalia was not suggesting that Justice Stevens misinterpreted the opinion he had authored just three years prior; more likely Justice Scalia meant that *Chevron* had taken on a life of its own regardless of Justice Stevens' intent when writing the opinion. As we know, Justice Scalia won the battle and today, the *Chevron* doctrine bears little resemblance to the decision that birthed it.

My brief summary does not do justice to the depth and complexity of Lawson and Kam's analysis and the variety of cases they cover, including some from other judges such as Ken Starr and Stephen Breyer. What, if anything, does this article add to the *Chevron* discussion? I have always found the *Chevron* two-step to be unintuitive: why aren't judges deciding pure questions of law, perhaps with agencies acting as expert advisors? Having used Lawson's administrative law text, I was already familiar with the pre-*Chevron* categorization framework, but I was unaware of the large role Judge Wald played in forming the *Chevron* doctrine and why she might have done so. Also, from reading the article, I better understand the Scalia/Stevens *INS v. Cardoza-Fonseca* battle. Perhaps most importantly, the piece is written with great humor and wit (the headings are all pop culture references, for example) and *relatively* few footnotes, making it an easy read. And while the authors explain well why the *Chevron* case and the *Chevron* doctrine have little relationship to each other, the article will likely not, as they had hoped, bury the former.

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