



Developments in Clean Water Law

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Judicial Deference of Agency
Interpretations:

Is Judicial Deference Dying?

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President Obama

- Will probably have the opportunity to appoint 2-4 judges, expected to be Stevens, Ginsburg, and possibly Breyer.
- Intends to appoint justices with "empathy."
- Has criticized Justice Anthony Kennedy and Justice Clarence Thomas.
- Feels that judicial philosophy should be weighted more seriously than superficial character issues.

Will he appoint activists members? How does he view the role of the judiciary in shaping policy?

Roles of Federal Agencies

- Include:
- Gathering information
- “Legislative” Rulemaking
- “Interpretive” Rulemaking
- Investigating
- Enforcing
- Adjudicating

Federal Administrative Procedure Act

5 U.S.C. 500 *et. seq.*

Enacted in 1947

Section 551(4) defines a rule

Section 551(5) defines rulemaking

Section 553 Rulemaking

Section 706 Scope of Review - requires that to set aside agency action, the court must conclude that the regulation is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)

“When a court reviews an agency's construction of the 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; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)

“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 for the court is whether the agency's answer is based on a permissible construction of the statute.”

The Rationale for Deference

- Presumption of Congressional Intent to Delegate Power to Interpret Law to the Agencies – Explicit or Implicit
- Agency Expertise and Experience
- The Separation of Powers and the Role of the Judiciary in Setting Policy

United States v. Mead, 121 S. Ct. 2164 (2001)

- The Court granted certiorari to consider the limits of *Chevron* deference owed to administrative practice in applying a statute. Held: Administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent. The Customs ruling at issue failed to qualify, although the possibility that it deserves some deference under *Skidmore* leads us to vacate and remand.

Whitman v. American Trucking Assns, Inc., 531 U.S. 457 (2001)

- Our approach to the merits of the parties' dispute is the familiar one of *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.*). If the statute resolves the question whether Subpart 1 or Subpart 2 (or some combination of the two) shall apply to revised ozone NAAQS, then "that is the end of the matter." But if the statute is "silent or ambiguous" with respect to the issue, then we must defer to a "reasonable interpretation made by the administrator of an agency." We cannot agree with the Court of Appeals that Subpart 2 clearly controls the implementation of revised ozone NAAQS,, because we find the statute to some extent ambiguous. We conclude, however, that the agency's interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear. We therefore hold the implementation policy unlawful.

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)

- *This Court would not extend deference to the Migratory Bird Rule under Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.,. Where an administrative interpretation of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to Congress' intent. The grant of authority to Congress under the Commerce Clause, though broad, is not unlimited. Respondents' arguments that the Migratory Bird Rule falls within Congress' power to regulate intrastate activities that substantially affect interstate commerce, raise significant constitutional questions, yet there is nothing approaching a clear statement from Congress that it intended §404(a) to reach an abandoned sand and gravel pit such as the one at issue. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the Migratory Bird Rule would also result in a significant impingement of the States' traditional and primary power over land and water use. The Court thus reads the statute as written to avoid such significant constitutional and federalism questions and rejects the request for administrative deference.*

RAPANOS v. UNITED STATES, 547 U.S. 715 (2006)

Even if the term "the waters of the United States" were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.

In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] ... oceans, rivers, [and] lakes." The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

The Corps' expansive interpretation of the "the waters of the United States" is thus not "based on a permissible construction of the statute." *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*

Massachusetts v. EPA, 127 S. Ct. 1438 (2007)

- Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. *Ibid.* To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.

Major Questions Exception to Chevron Deference?

- Legal Scholars and Commentators are writing about the courts movement away from deference, citing a “major question” as being one of the grounds for declining to defer.
- See 60 Administrative Law Review Number 3, Summer 2008, etc. for articles discussing the issue.
- Is judicial deference dying?

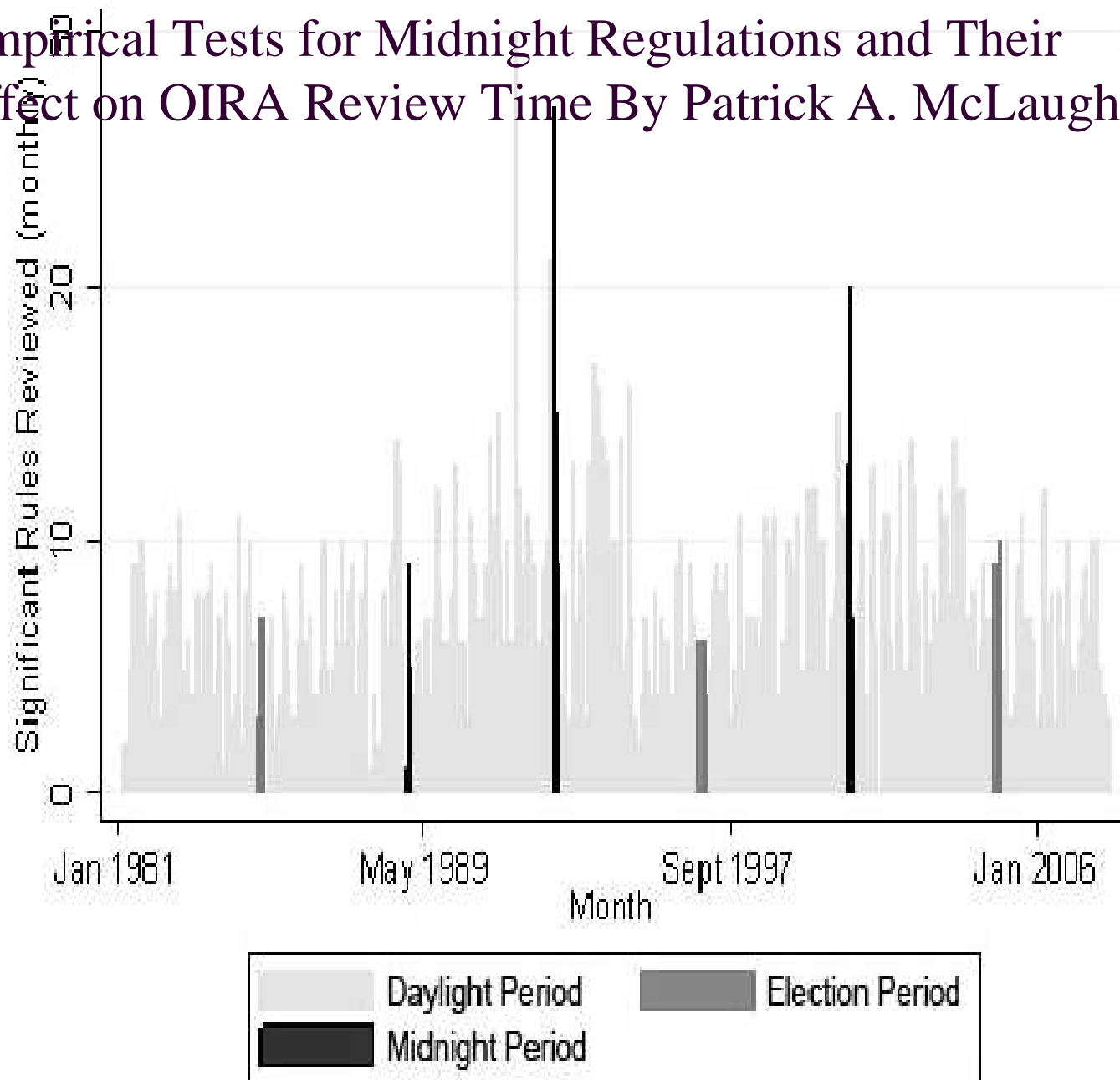
Utility Air Regulatory Group v. EPA, 320 F.3d 272 (D.C. Cir. 2003)

EPA's "Instruction Manual for Permit Application Form", which included monitoring requirements required in Clean Air Act permits, found to be a guidance document (interpretive rule), not requiring public notice and comment.

Croplife America v. EPA, 329 F.3d 876 (D.C. Cir. 2003)

- A press release issued by EPA concerning the type of data that would be accepted by the Agency in considering pesticide safety was found to reflect an obvious change in established agency practice, create a “binding norm” that is “finally determinative of the issues or rights to which it is addressed.” Required public notice and comment.

Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time By Patrick A. McLaughlin



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