Legal Backgrounder

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The High Court's *Benzene* Decision at 40: Will it Rise if *Chevron* Falls?

by Christopher H. Marraro and Gary C. Marfin

Nearly four decades have passed since the U.S. Supreme Court set aside the Occupational Safety and Health Administration's (OSHA) 1978 final benzene standard in *Industrial Union Department, AFL-CIO v. American Petroleum Institute (Benzene)*.[1] In *Benzene,* a plurality[2] of the Court held that under the Occupational Safety and Health Act ("OSH Act"),[3] OSHA must make a threshold agency finding that "a significant risk of material health impairment exists" before it promulgates a health-and-safety standard for a toxic substance. The Court reached this decision by finding a substantive "significant risk" threshold requirement in the OSH Act's general and inexact language, namely a statutory provision dictating that regulatory standards must be "reasonably necessary or appropriate" to provide a safe place of employment. Such "reasonably necessary or appropriate" language is a clause that Congress has included in numerous statutes.[4] From that general requirement, the Court found a precise substantive duty where even members of the Court disagreed on its meaning.

At forty, *Benzene* continues to exert influence in at least two areas of administrative law. First, for proponents of quantitative risk assessment, *Benzene* was, and remains, a landmark victory. Although it seems commonplace today in health, safety, and environmental regulation, *Benzene*'s significant risk requirement was fervently resisted by OSHA and not easily reached by the Court. Second, cases involving regulations with a major impact on the economy can be viewed as "linear descendants" of *Benzene*, and such regulations are subject to its holding. Professor Cass Sunstein has said about *Benzene*, "The basic idea is that without a clear statement from Congress, the Courts will not authorize the agency to exercise

[1] 448 U.S. 607 (1980).

[2] In *Benzene*, the plurality consisted of Chief Justice Burger, Justice Stevens, Justice Stewart and Justice Powell. Justice Rehnquist concurred in judgment.

[3] 29 U.S.C. §§ 651 *et seq*.

[4] Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1423h; § 1373 (2018) (Secretary to prescribe regulations "as he deems necessary and appropriate."); Endangered Species Act, 16 U.S.C. §§ 1531-1544; § 1533 (2018) (Secretary to issue regulations "as he deems necessary and advisable."); Clean Water Act, 33 U.S.C. §§ 1251-1388; § 1361 (2018) (Administrator to prescribe such regulations "as are necessary to carry out his functions."); Clean Air Act, 42 U.S.C. §§ 7401-7671q; § 7601 (2018) (Administrator to prescribe such regulations "as are necessary to carry out his functions."); Emergency Planning and Community Right-To-Know Act, §§ 11001-11050; § 11048 (2018) (Administrator to prescribe such regulations "as may be necessary."); United States Housing Act of 1937, as amended, 42 U.S.C. §§ 1437 et. seq.; § 1480 (Secretary to prescribe rules and regulations "as he deems necessary to carry out."); National Labor Relations Act, 29 U.S.C. §§ 151-169; § 156 (2018) (the National Labor Relations Board has the authority to prescribe rules and regulations "as may be necessary to carry out."); Social Security Act, 42 U.S.C. §§ 301-1397mm; §1302 (2018) (Secretaries of the Treasury, Labor, and Health and Human Services shall prescribe rules and regulations "as may be necessary.").

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that degree of (draconian) authority over the private sector."[5] Its influence notwithstanding, *Benzene*, like other administrative law cases, eventually fell under the shadow of *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.* ("*Chevron*"),[6] a case that may well be "the most important case in all of administrative law."[7]

Benzene has yet more to offer, particularly at a time in which *Chevron* is coming under scrutiny, if not outright attack.[8] *Benzene* is arguably still instructive because in the decision, the Court—consistent with its Article III powers—preserved Congressional intent by wrestling with difficult, inexact, ambiguous statutory language and by applying traditional tools of statutory construction to provide meaning.

Chevron: "You know it don't come easy"

Justice Scalia cautioned against thinking of the *Chevron* doctrine as "new law." Under the *Chevron* doctrine, courts should defer to federal agency interpretations of ambiguous or undefined statutory provisions, provided that (a) Congress had not already addressed the specific provision at issue and (b) the agency's interpretation was reasonable and permissible under the statute. Justice Scalia was clearly correct in his contention; courts have long had the option of accepting as valid a regulatory agency's reasonable interpretation of an ambiguous statute. That being said, one should not diminish *Chevron's* novelty. *Chevron* became, over time, not simply the articulation of an option that courts had always enjoyed when the scope of regulatory power was at issue, but the presumptive, preferred option.

How did *Chevron* attain that status? A number of factors helps explain *Chevron*'s rise, but its appeal stems in no small part from the apparent simplicity of its two-step decision rule, coupled with a growing recognition that agency rulemaking had become the norm, rather than the exception.[9] *Chevron* seemed tailor-made to adjudicate the growing volume of regulatory cases involving the scope of agency authority.[10]

However, a central problem, apparent in *Benzene*, is that *Chevron*'s simplicity was illusory. Justice Stevens, the author of both *Benzene* and *Chevron*, appears to have downplayed the example of the former when he crafted the latter. In *Benzene,* the Court confronted problems in both areas integral to *Chevron:* ascertaining ambiguity and deferring to an agency.

Benzene: Ambiguous or Not?

The question of whether the OSH Act was ambiguous proved quite contentious in *Benzene*. Several members of the Court's plurality found that neither the statute nor its legislative history was unambiguous. "One might," Justice Powell admitted, "wish that Congress had spoken with greater clarity."[11] Chief Justice Burger shared the sentiment: "The statute and the legislative history give ambiguous signals as to how the Secretary is directed to operate in this area."[12] None found the statute

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[5] Cass R. Sunstein, *The American Non-Delegation Doctrine* (May 23, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2972935.

[6] 467 U.S. 837 (1984).

[7] Cass R. Sunstein, Chevron *without* Chevron (Sept. 6, 2018) at 1, https//ssrn.com/abstract = 3235655.

[8] C. Marraro and B. McCabe, *The Future of* Chevron *Deference: A Fitting Sequel to* Inherit the Wind or Gone With The Wind*?* 33 WLF 15 (Aug. 17 2018), at 1, https://www.wlf.org/2018/08/17/publishing/the-future-of-chevron-deference-a-fitting-sequel-to-inherit-the-wind-or-gone-with-the-wind/.

[9] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 3 Duke L. J. 511, 516 (June 1989).

[10] At the same time, however, and somewhat paradoxically, *Chevron* deference was contributing to growth in the issuance of regulations and thus, inadvertently, to the very growth in the regulatory docket it promised to reduce.

[11] *Benzene*, 448 U.S. at 668.

[12] *Id*. at 662.

less clear than Justice Rehnquist, who did not join the plurality's opinion, but agreed with its judgment. Justice Rehnquist concluded the statute was an unconstitutional delegation of legislative authority in that § 6(b)(5), was "…completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he cannot."[13] To the contrary, Justice Marshall's dissent found § 6(b)(5) to be of "plain" meaning and would have found that the Secretary's decision was "fully in accord with his statutory mandate 'most adequately [to] assur[e] … that no employee will suffer material impairment of health.'"[14]

Interestingly, the Court focused its legislative-intent analysis on whether Congress had legislated a zero-risk statute. Since there are, the Court recognized, "literally thousands of substances used in the workplace that have been identified as carcinogens or suspect carcinogens, the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit." Given the wide scope of power and impact over the American workplace that OSHA claimed in its view of § 6(b)(5), the plurality searched the statute and legislative materials for a "clear mandate" from Congress to sustain the agency's view. Such a mandate was nowhere to be found.

Instead, the Court found that OSHA had neglected § 3(8) of the statute, which applied to all permanent standards promulgated under the Act. According to Justice Stevens, § 3(8) restricted the potential risks the Secretary might regulate to those demonstrated to be significant. Section 3(8) accomplished this, Justice Stevens reasoned, by defining an occupational safety and health standard as one "which requires conditions reasonably necessary or appropriate to provide safe or healthful employment." What the Secretary failed to see, in the plurality's view, is that a standard is not "reasonably necessary or appropriate" unless the risk of concern is significant. The risk has to be significant because, according to the plurality, Congress recognized that no workplace is completely risk free.

Thus, the plurality concluded that § 3(8) would not affect § 6(b)(5) *if the statutory goal were zero risk*: "If the purpose of the statute were to eliminate completely and with absolute certainty any risk…, we would agree that it would be proper to interpret 3(8) and 6(b)(5) in this fashion (or under OSHA's interpretation). … Rather both the language and structure of the Act, as well as its legislative history, indicate that it was intended to require the elimination, as far as feasible, of significant risks of harm."[15]

Concluding Comments

Even if all the justices had agreed that the OSH Act was ambiguous, the Court in *Benzene* would not necessarily have deferred to OSHA. According to the plurality: "If the Government were correct in arguing that neither § 3(8) nor § 6 (b)(5) requires that the risk be quantified … the statute would make such a sweeping delegation of power that it might be unconstitutional under the Court's reasoning in *A.L.A. Schechter Poultry Corp. v. United States …* and *Panama Refining Co. v. Ryan.*"[16]

In questioning the constitutionality of *Chevron* "deference," Justices Gorsuch and Kavanaugh have suggested that courts might discard the unambiguous/ambiguous dichotomy in favor of the "best reading of the statute," a task that judges are accustomed to perform. In *Benzene*, "the best reading of the statute" was not OSHA's reading, but the plurality's reading, wherein "reasonably necessary and appropriate" mandates a substantive significant-risk threshold finding.

[13] *Id*. at 675 (Rehnquist, J., concurrring).
[14] *Id*. at 689 (Marshall, J., dissenting).
[15] *Id*. at 641.
[16] 448 U.S. 646.

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Perhaps "easy" cases never find their way to the Supreme Court. If, however, such a list of cases exists, *Benzene* is unlikely to be among them. Justice Rehnquist captured well the difficulties *Benzene* presented: "I believe that this litigation presents the Court with what has to be one of the most difficult issues that could confront a decision-maker: whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths."[17] Still, the Court diligently worked to find statutory intent, albeit out of seemingly ambiguous language. It did so, and preserved the constitutionality of an inexact and vague statute.

In *Benzene*, the Court followed its Article III duty to interpret the law itself and protect against the expansion of executive power beyond that which the legislature provided. This is the real legacy of the *Benzene* decision. *Benzene,* at forty, offers a glimpse into a future world where judges, as was intended by the Framers, wrestle with inexact statutes to uncover the legislature's intent rather than defer to the policy judgements of the executive about what the legislature did or did not intend.

[17] 448 U.S. 672 (Rehnquist, J., concurrring).

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