Consumer Finance Monitor (Season 7, Episode 11): The U.S. Supreme Court Hears Two Cases in Which the Plaintiffs Seek to Overturn the Chevron Judicial Deference Framework: Who Will Win and What Does It Mean? Part II

Speakers: Alan Kaplinsky, Kent Barnett, Jack Beermann, Craig Green, and Carter Phillips

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly podcast show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'll be moderating today's program.

For those of you who want even more information, either about the topic that we'll be discussing today or anything else in the consumer finance world, don't forget to consult our blog, consumerfinancemonitor.com. Goes by the same name as our podcast show. We've hosted the blog since July 21, 2011 when the CFPB became operational. So there is a lot of relevant industry content there.

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Also, please let us know if you have any ideas for any other topic that we should consider covering or speakers that we should consider as guests on our show. Finally, I'm very pleased to let our listeners know that our podcast show was recently ranked by Good2BSocial as the number one podcast show among law firm podcast show within the United States devoted exclusively to consumer financial services. Good2BSocial is a prominent law firm consulting firm owned by Best Lawyers. We're very gratified by this recognition from one of the country's leading social media consultants for law firms.

This is part two of our two part series, which is a repurposing of a webinar that we presented on February 15th entitled "The U.S. Supreme Court's Decision in the Two Cases Raising the Question of Whether the Chevron Judicial Deference Framework Will be Overturned: Who Will Win and What Does it Mean?"

Today I am very pleased to be joined by our speakers, Kent Barnett, Jack Beermann, Craig Green, and Carter Phillips. And let me just tell you a little bit about each of our presenters. Kent is the Associate Dean for Academic Affairs and the J. Alton Hosch Professor at the University of Georgia Law School where he teaches administrative law, consumer law, contracts, et cetera. He's very focused on the separation of powers and administrative law. His law review articles have been published in numerous law reviews, not just University of Georgia.

And before going into academia, Kent clerked for Judge John Rogers of the Court of Appeals for the Sixth Circuit, and he was in private practice prior to that. Next to Kent Barnett is Jack Beermann. Jack is the Philip S. Beck Professor of Law and Professor of Political Science at Boston University, where he is been on the faculty since 1984. His teaching and research interests lie in administrative law, civil rights litigation, and constitutional law.

He received his law degree from the University of Chicago Law School, and he has served as a visiting professor at DePaul and Harvard Law School. Before joining the Boston University Law School faculty, Jack clerked for the late Judge Richard Cudahy of the US Court of Appeals with the Seventh Circuit. And then the most interesting thing that Jack has done by far is

that while he was growing up in Chicago, he was a food and beer vendor at Chicago Cubs, White Sox, and Bears games and at Northwestern University Football.

That is quite an achievement, Jack. Congratulations. So Craig Green, Craig is the Charles Klein Professor of Law and Government at Temple University. He teaches administrative law, constitutional law, and federal courts. He received his JD degree from Yale Law School. And while teaching at Temple, he received a PhD in history from Princeton. And before joining academia, Craig clerked for Judge Lewis Pollock and Judge Merrick Garland.

He also was an appellate lawyer for several years at the Department of Justice. And last but certainly not least and really the only non-academic on the program today other than me is Carter Phillips. Carter is one of the most experienced Supreme Court and appellate lawyers in the country. He has argued 90 cases before the Supreme Court as a private practitioner, and he's argued more than 150 times before the US Court of Appeals, in several different Courts of Appeals. He was an Assistant to the Solicitor General from 1981 to '84.

And before that, he clerked for Judge Robert Sprecher on the US Court of Appeals of the Seventh Circuit and for Chief Justice Warren Burger on the US Supreme Court. And as you can see, all of our presenters today are extremely distinguished and very preeminent in their areas, and I'm really looking forward myself to hearing the discussion today.

So let's move on to our agenda for today. We're really going to have a lot of fun. We're going to share our thoughts with you on the oral argument, the briefing, what happened during the oral argument, and who do we think is going to prevail. And then finally, we'll talk about what a world without Chevron or a modified Chevron would look like. And that will be round table format. The fun will begin by my calling on Carter Phillips who appears in front of the Supreme Court it seems like every week to me. But needless to say, a very experienced Supreme Court advocate who knows the Justices extremely well. So Carter, I would like your thoughts on the oral argument and what you think is going to happen here.

Carter Phillips:

Well, let me start the same way all of the other panelists have, which is, one, thank you for letting me be here. It's a pleasure to be with my esteemed colleagues and I think their presentations have been quite informative and candidly quite on point. I have a couple of preliminary comments I'd like to make and then I'll specifically answer your question. In that respect, obviously I'm deviating from the way I normally advocate in the Court where if I get a question I'd the answer the question first. But I'm going to take the speaker's privilege here and make a few preliminary comments.

First of all, like Kent, I'm old enough to actually have lived in a world prior to Chevron. Actually, I was a lawyer in this Solicitor General's office before Chevron was decided. And as I told the panelists the other day, actually was a moot court judge for Paul Bator who argued the case, the Chevron case. And I at least will tell you from that vantage point, I don't think any of us viewed that case as raising a fundamental administrative procedure act doctrine that would live for the next 40 years and create anywhere near the kind of fundamentalism that it has or foundational approach that it has. We were just looking for a ruling that would bless EPA Administrator Gorsuch's decision to go with the bubble concept as opposed to what [inaudible 00:52:46] approach that a friend previously described it as.

And the truth is, before Chevron, I think every brief I wrote for the United States government probably used the word deference in every other paragraph. And after Chevron we continued to use deference in every other paragraph, whether we actually specifically identified it as Chevron deference or not. So at least in some ways it took me by surprise when down the road, because Chevron wasn't Chevron on day one, it sort of got picked up and run with and became Chevron over time, which is sort of an interesting development. But aside from the fact that the EPA's judicial review provision is the one that applied, I doubt seriously that at least in our advocacy, any of us thought about the APA specifically or would've given a whole lot of thought about the language of the APA and how that plays out.

One place where I think I have to at least push back a little bit on a comment that Alan made, which is sort of where's the business community come out on Chevron. And the Chamber of Commerce filed briefs in support of the petitioners in both of those cases. And I think while it is undeniably true that there are lots of situations where regulated entities love having Chevron because the agency has come in on their side in a way that seems at best arguable, but they can take that to the bank that they'll be able to defend that decision in court. The flip side is that Chevron allows a significant amount of flip-flopping. Again, you can sort of use the State Farm argument as a backup to that, but there's a lot of flip-flopping.

We know the Biden administration currently has something like 1,100 proposed regulations that it's planning on dropping largely on the business community between now and the end of the administration. So I think the notion that agencies can adopt creative interpretations of statutes that operate at the margins of the agency's authority has overridden the values of the Chevron Doctrine in situations where they come to the aid and comfort of the business industries. So that's where the business community in general sort of has come out in this case.

And then the final comment I'll make about the case, it's interesting to me just as a practitioner before the Court is the question presented is not whether or not this regulation adopted by this little agency that nobody candidly has probably heard of other than people who are in the fishing industry should be struck down because it is difficult to imagine in what world the Supreme Court would possibly care about that specific issue. And the question presented is, as Alan described it, whether Chevron should be overruled. I mean that's a question presented, certainly when I was in the Solicitor General's office, it would've been almost unthinkable to ask a question that bluntly asking for the Court to overrule prior precedent. And frankly, in my private practice, I can't imagine very many circumstances in which I would've been that bold.

But now in the last, oh, three to five years with sort of a brave new world and the Court is much more open to the idea of taking an issue with an eye toward specifically overruling a prior decision of the Court. And obviously stare decisis is now a significant source of focus and concern by the justices themselves and by most of the commentators. But I mean, I was slightly surprised candidly that the Court granted this case and the routine reaction is the Court doesn't grant them to affirm them. So what does that ultimately mean? And now we have the benefit of the oral argument to give us a hand here. So I think the way this case is, if I were betting, I would bet that the Court is going to do to Chevron what the Court did to Auer doctrine, A-U-E-R doctrine and the Kisor case several years ago where the Court didn't overrule Auer deference, which is deference that agencies previously received in their interpretation of federal regulations interpreting federal statutes.

I think most people thought at the time that the Court would overrule Auer because that in a lot of ways seemed easier because if you have a federal statute that grants broad policymaking authority and the agency then just repeats that in its own regulation and then interprets the regulation very provocatively or at the outer margins of what might seem appropriate under the statute, the agency gets deference to that. And that seemed like an opportunity for mischief that courts took some offense at and certainly some members of the Court expressed misgivings about. But when the time came to consider whether or not to formally overrule, the Court backed off an opinion by the Chief Justice in which he said, "Look, we are going to significantly narrow circumstances in which that form of deference is appropriate, but we don't think it's necessary to overrule that decision."

I can see where the Court could overrule Chevron, I'll talk about that in a minute. I think the more likely outcome is that they will, what was commented during the oral argument is Kisor-ize Chevron. I think it is absolutely clear that there are nine justices who agree completely that if a court does the hard work and concludes that there is a best answer to a specific question that the Court does not defer under those circumstances, the Court simply makes that decision.

And Justice Kagan, who probably would've been the most favorable towards Chevron, acknowledged that that portion, there's a footnote in the Chevron itself that says that you have to use all of the tools in the judicial kit to determine what the meaning of the statute is. And candidly, I for a long time figured that the reason why Scalia was okay with Chevron and other conservative justices were was because for them they were more than happy to do the hard work. They didn't find ambiguity anywhere. And so therefore their focus tended to be on get the right answer from the statute and you don't have to worry about step two under those circumstances. And there was a lot of talk about by various justices along those lines.

The two justices you got to look at to see whether you think the Chevron's going to go down or not, I think are the Chief Justice and justice Barrett. And their questions didn't particularly seem to me like they were inclined to overrule. I mean, they certainly asked questions that would allow them to vote that way. Roberts asked, "What do we do with the question of the length of a truck and whether or not there's a delegation to the agency to decide what's the reasonable length of a truck? What should courts be doing in that situation?" Which candidly is probably not at the outer limits of what the Chevron doctrine is about. And I think most people would say under those circumstances, certainly the factual and policy determinations of the agency in deciding reasonableness is probably going to be entitled to deference without Chevron because they clearly have the authority to regulate that specific issue.

And then he focused on the fact that the Supreme Court itself has not cited Chevron or has not gotten past step one in Chevron in I think more than 14 years, which, interestingly, I think covers essentially the same period of time that he's been

sitting on the Court. And so what does that mean? And it's quite clear that there are a lot of lower court decisions that have relied on Chevron as an excuse not to do the hard work of statutory interpretation, which candidly is why I'm pretty sure this issue was still in front of the Court. And then we'll talk a little bit obviously about what comes next. And Roberts did ask the question about, So does Skidmore..." Which I think is not a deference doctrine, right? Skidmore simply says, you respect the actions of the agency if you are in fact persuaded that the agency has acted correctly. But is that what comes next?

So Roberts said that Kisor doesn't preordain that Chevron will survive. He was very specific about that. On the other hand, he at least implicitly had to have acknowledged that not having overruled Auer when the opportunity arose, makes it at least questionable as to why you would do that here. And then Justice Barrett seemed very concerned about what would happen to all of those cases in the past that have been decided on the basis of Step Two of Chevron where strong arguments could be made that that was not the best interpretation of the statute. And it seems to me that's the kind of concern that would lead you to say, "I'm not going to overrule Chevron. I'm simply going to narrow it to the various circumstances and try to make it significantly more difficult for challengers to be able to come in after the fact and complain about the agency's decision-making process in a particular case."

So I didn't discern from either of them the kind of... If you read Justice Gorsuch's questions, it was a hundred percent clear that he would jettison Chevron years ago, he would've jettisoned it years ago. The same with Kavanaugh, to some extent Thomas. Alito was a little less aggressive in his questioning. But nevertheless, I think there's no doubt in my mind how he come out. As I say, Jackson, Sotomayor and Kagan were all, I think, inclined to try to find a way to save some portions of Chevron. But all of them, I think, recognize that it has to be a new and skinnied down version of it.

The one thing we haven't talked that much about it, there was a lot of teasing, I think, of Justice Thomas who wrote the Brand X opinion, which in fact is an instance, is the last instance in which the Court basically said, "Well, I'm not going to do the hard work." The question is whether these cable services are information services or telecommunication services. And if you went through even the Court's opinion, much less the briefs in the case, it would make your head explode unless you're really a nerd into the nuances of these things. And the Court just basically said, "Look, this is the kind of call you got to let the commission make. And so we're not going to decide, even if I thought it wasn't an information service..." And this is all in the context of the agency, the commission flip-flopping all over the place, I'd give it to the agency. And there was a lot of poking about that.

So I think the Brand X methodology is without question going to be terminated, not that Brand X itself will be overruled, although the net neutrality issues will undoubtedly live on and be the source of continuing fights. So my prediction is I think the Court's going to reverse. I mean, they're not asked to decide the underlying question of whether the regulation is valid or not. There was a little bit of a discussion of that. I think the Court's going to say, "Chevron's been modified, send it back to the Courts of Appeals to let them take into account whether or not the new version of Chevron, whether it'll be called Loper Bright or Relentless, how that should be applied by the lower court and then go from there."

Alan Kaplinsky:

Okay. Well, thank you, Carter. Let's go to Kent now to get your thoughts on the argument or anything that Carter said.

Kent Barnett:

Sure. And I'll try to be fairly brief with it because I think I agree with practically everything Carter said. And I agree, I think if I were betting, I would say it's likely that they are going to limit Chevron deference similarly to how they did in Kisor. And the interesting thing about that is if they do it, the debate that arose after Kisor was, did they actually do anything after Kisor? And on one reading you could read Kisor and all it did was summarize all the limitations that they had already created for the doctrine. And another reading was no, what they've done is narrow when Auer should apply. And they've essentially kind of put a new mood on it. I'd be curious to see what the actual limitations on Chevron look like and is it going to be understood as doing something new and narrower, or is it going to be understood to be more of just a rehash of other limitations? And there are several that they've attempted to create on the doctrine.

The two things that I would note of interest to me at least when I was listening to the argument, and this may sound a little professorial when I say it, so I'll explain it in a second, is that I thought it was the last gasp of what would often referred to as the legal process school. And legal process was essentially this version of how you think about legal questions that was really at

its height in the 1940s, '50s, '60s, '70s, '80s I guess too, and then it's fallen out of favor in many circles, in favor of something akin to textualism or more historical analysis. But what legal process really does is it's fine looking at legislative history, it's trying to get an intent, but it's also thinking about what other values should motivate decision making. So the judge has a larger role in it than the judge at least nominally has in textualism or historical analysis.

And part of what's important about legal process is there was generally this understood view that policy and law come together and you can't make a legal decision without thinking about policy. And so if you think about Chevron, what it essentially says is it's really hard to distinguish law from policy. So you're going to call this our review of statutory interpretation. But really it's a whole mix of policy and we've tried to separate it out a little bit, but we don't have to think too hard about whether it's actually a legal issue or whether it's a policy issue.

A growing number of the membership of the Court, including the conservatives, just do not think that way. They think that legal issues are much easier to spot and to separate out from policy decisions. And that's how they're approaching this problem. And that's why Chevron feels anathema to them because it's combining these two concepts. So what I really got from this was you're seeing more of this push towards this textualism historical analysis, and I don't think, of course, this is going to be the last time that we see it. The second thing I would say that was a bit of a surprise to me was how Justice Kagan engaged in oral argument. She's famous in two ways in academic circles, aside from being the dean of Harvard Law School, one for having an article called Presidential Administration, which is extremely well-known in scholarly circles. And essentially what its thesis is, is that the president should have more oversight over agency decisions, and we should be thinking about how the administration supervises agencies. Well, Chevron deference could be thought to be complementary to that, because it's giving more power to the agencies themselves, and the president ultimately can help oversee that through various internal mechanisms.

But she had another law review article that she published with now Judge Baron on the First Circuit, where she referred to Chevron as both being fictional and fraudulent. Fictional because it didn't really get it Chevron's intent, and fraudulent because the court didn't really care about what Congress's intent was. And it had suggested some skepticism over Chevron in general, because it really wasn't based on anything legitimate. You certainly didn't feel that in the oral argument, and indeed, she kind of came back with a statement when confronted with this obliquely, saying, "Well, by fictional that just meant it's hard to figure out." So kind of walking back a little bit from where she had been some years ago, to being someone I saw at oral argument as much more sympathetic than I would've expected to Chevron, even though she was the one who wrote Kaiser, and even though it's also consistent I think with her broader project for presidential administration while she was a scholar.

Alan Kaplinsky:

Okay. Jack?

Jack Beermann:

Oh, thank you. I'm just going to really be really brief, and I'm going to combine the next two questions 'cause I think we're going to run out of time, and I'm just going to talk a little bit about my impression of the oral argument, and a little bit about the new Chevron world. I was really surprised at oral argument that we didn't learn much of anything about what's going to happen, so I think I agree with the prior speakers on this. But I was really interested in the focus on Brand X, because I actually think Brand X was the only good thing about Chevron. 'Cause what Brand X said was that if an agency has offered a reasonable interpretation, which gets approved by a court, and then it offers a new one, new reasonable interpretation, that it ought to have that sort of flexibility.

Because I agree with that kind of flexibility as a matter of policy, and Chevron itself was actually a case involving that, that is the EPA had said no to the bubble, yes to the bubble, no to the bubble, and then finally said yes to the bubble again, which is this... Combining all stationary sources into one large stationary source in a plant, and the court approved that. And that seems to me to make sense, because agencies ought to be making the policy decisions.

It would be interesting to preserve Chevron and get rid of Brand X, because Chevron itself is a Brand X case, so it seems a little illogical to me. The only other thing I want to say is that, in my opinion, if Chevron is severely limited or eliminated, what you're likely to see is agencies pushing to characterize their cases as arbitrary capricious cases, rather than Chevron cases.

They're going to push them to characterize them as matters of agency policy, rather than matters of agency statutory interpretation.

So on Chevron itself, I think it's a good question whether it makes sense in terms of pollution control to regulate all stationary sources within a plant as one single source, or whether it makes no sense because it defeats the purposes of the Clean Air Act, I don't know enough about that to actually have an opinion on that, but it seems to me that that's the real question, not whether the words stationary source mean either the bubble, or individual, or either. And I think in other cases too. So I think what happens is, you're going to see agencies adjust very quickly, and try to avoid characterizing their decisions as matters of statutory interpretation, and characterize them as policy choices within the range of discretion granted to the agency.

Alan Kaplinsky:

Okay. Craig?

Craig Green:

Great. Yeah, I also have a couple of things. One, I really wanted to emphasize Carter's message about the experience of Solicitor General's office, I had a much lesser role litigating for the government, but deference under Chevron and otherwise meant something to me. I was told it meant something to me, because I was actually working for an administration I didn't vote for, and I was taught that basically what it meant was that when a president comes into power, that person gets to drive the government a little bit to the right, or a little bit to the left, or a lot to the right, and that's, we were told elections had consequences in that kind of way.

So that's kind of the regime under which I grew up, and I think it's really the thing that's missing from this panel I think, because we don't have anyone espousing this point of view, is Thomas, and Gorsuch, and a lot of conservative jurists have made very emphatic arguments that Chevron is unconstitutional, and I think it analogizes to the argument that I think Jack has made that maybe it violates the APA. Those kinds of categorical attacks on Chevron deference.

There's another question lurking out there, which is literally, what comes next? And a suggestion that no deference at all is one answer. A suggestion that this other doctrine Skidmore, Mead, which I think Carter had said, and people can debate about it, whether that's actually no deference, but it purports to be a slippery slope, sort of a sliding scale would be the metaphor, a cliche, a sliding scale of deference. But that kind of deference also should be unconstitutional or violating the APA as much as anything else, as far as anybody can tell.

So this question of, what comes next? I think is really out there, and I think as long as... I think three justices, for sure, are going to really hammer in on constitutional arguments, or have those in their mind. I think they will hammer in on those. That's the part that really made me agitated about the Chevron issue, is I think this is making up new constitutional law, in order to upset tons of precedent. It makes me very upset, to be polite. That kind of a thing.

And you can ask the question whether Kaiser just codified hour, or maybe eviscerated hour to make it really relatable. I think you could ask the question of whether the next chapter of Chevron will be more like Casey in the abortion context, which really scaled back a lot of things from Roe, but had a lot of Roe left. Or is it more like Dobbs? It really throws out abortion altogether. And I think that that will absolutely... Agreeing with Carter, that will depend on Chief Justice Roberts and Barrett.

The reason Barrett is so important, which I know he knows, is Barrett is the one who came on late. In 2018, there was a coalition between Kagan and Roberts to save at least a name, hour, but that included Ginsburg. That five vote included Ginsburg, and so that's why I think Barrett plays such an important role to whether Kaiserization, the survival or zombie style Chevron will survive.

Then the last thing I'll say in terms of consequences, people ask, always think about, what is it that defeating Chevron will mean? Chevron has been kind of a hash from the beginning to the end. And again, echoing Carter much like deference was before, was kind of a hash, very unstable, this and that, back and forth, notwithstanding good empirical work by Kent. But I think Chevron is just a piece of a broader anti-administrative law project for the modern court. And I think that's maybe something to carry with us going forward, is attacking Chevron is part of attacking the administrative state altogether. So the major questions doctrine, and all that kind of stuff is all of a piece. And what we're seeing in this context as others are that the stakes are being pulled up from the tent of things that people thought they knew about administrative law and federal

government, and they will be re-nailed down in some other place. And I think that a lot of those things are in motion at the same time, and so I think that's another thing to really pay attention to.

But if Chevron gets partly saved and partly lost, then I think that'll be a real message for the legal process-ish, maybe alliance of Roberts and Barrett to save a lot of the administrative state, but there are other voices out there who want to burn it down, and I think that's another thing that we'll see come out of this opinion. Chevron does have this iconic significance regardless of its practical effect, and I think the decision about Chevron will signal a lot of things about what we can expect in the years to come.

Alan Kaplinsky:

Well, thank you, Craig. All right, in the remaining time, let's talk about what a world without Chevron or a modified Chevron would look like. And I want to pose to all of you a case that's near and dear to my heart, because I was involved in... Not the particular case, but I was defending a whole bunch of class actions that had been brought at the time, where the issue was a question of the interpretation of the National Bank Act. And the question that was presented, or one of the questions, was whether or not a regulation promulgated by The Comptroller of the Currency, which interpreted Section 85 of the National Bank Act, the term interest. The statute said a national bank may charge interest at the rate allowed by the laws of the state where the bank is located. And The Comptroller of the Currency defined interest to encompass a lot of elements of pricing package of a credit card transaction that were not known conventionally, at least under state law as being interest, but were considered to be fees.

And the particular fee that the Supreme Court had a deal with in the Smiley v. Citibank case was a late fee on a credit card. And The Comptroller issued a regulation while the case was pending, literally at the 11th hour, they defined interest to encompass among other fees, late fees. The Supreme Court opinion relied exclusively on the Chevron doctrine. I think it was 1996, so at the time, they were still willing to recognize this Chevron doctrine that they created in '84, and they said, "We think it's..." They went through the two steps, that the statute was vague or ambiguous on what the term interest means, does it encompassed the late fee? And that The Comptroller's regulation was a reasonable interpretation.

Now, here's the question. They overrule Chevron, would it now be fair game for somebody to come along... I know they may not be able to challenge it under the APA, because there is a six-year statute of limitations, and there's another question before the court, it's going to be argued next week as to when that statute of limitations begins to run from. There could be certainly a collateral attack on the regulation issued by The Comptroller in, let's say, just a lawsuit brought by a cardholder, saying, "Well, Chevron's out the window, and with it goes the Smiley v. Citibank case, and I've got the right now to let the courts, unburdened by Chevron, figure out what does interest mean." Now, I give that as one example, there are literally hundreds, if not thousands, of examples in a whole range of industries. So let me go first to Carter on that one, and I'd like to get your thoughts about that, Carter.

Carter Phillips:

If somebody's willing to go ahead and violate the regulation in order to expose themselves to an enforcement action of some sort by the private or public, I think there's no question that they're going to be entitled in a world where Chevron has... If the post-Chevron world says, "Look, you've got to do the hard work of figuring out what Congress intended and using, again, all of the tools in your kit, and where... In all contextual matter, are late fees interest? Is that what Congress had in mind?" And make that decision, and I'm assuming... I mean, you know the substance of that debate better... Much more than I do, although I did file a brief in Smiley in support of the court's decision. But at the end of the day, I mean, I think those things are going to be subject to serious re-scrutiny.

Which is one of the reasons why I'm skeptical, is that... I mean, the court's going to try to come back with a ruling on Chevron that doesn't sort of put everything back into play. 'Cause they were clearly cognizant of it, and at least from their perspective, they thought of this as thousands, I don't think they thought, you know, if not hundreds of thousands of potential problems that are out there, because there have been regulations adopted. Again, it looks like it's a CFR to know how many regulations are out there that are worth worrying about.

I realize this is not responsive to your question, but let me... One other interesting point that was made by the Solicitor General at the oral argument about the effect of the Kaiserizing of our deference, according to her, there has been a significant

drop in the number of cases in which deference... Our-like deference as reinterpreted in Kaiser has been relied upon as a basis for upholding any kind of agency decision-making. Her basic point was, "Look, if you Kaiserize Chevron, who will send a strong message to the lower courts that they should focus almost all of their effort on step one Chevron, and not find themselves worrying about the second step."

Alan Kaplinsky:

Right. Right. Anybody else want to chime in on my hypothetical?

Craig Green:

I'll chime in, and also dodge it a little bit. So I think the issue of the past cases is one that's really important. I think Chief Justice Roberts's answer to a lot of that is... And of course, Neil Gorsuch too, is Chevron has already become a toxic precedent for anybody to cite anyway. Anyone who wants to rely on them, the Court of Appeals should look to get reversed, this kind of a message, and so it's already baked in the cake, this kind of an idea, and so the transition is already quite underway.

But in addition to thinking of things in the past, and I think someone had... Jack maybe had mentioned the number of regulations that are in the present, and they might get caught in the breakwater as things are changing, as the regime is shifting. I think also a part of the bigger picture about the administrative state is the ability of the agencies to adapt to new issues, and so I think that possibility, for a lot of reasons, including major questions doctrine, you can expect agencies to be a less powerful force of government, of law, of democracy in meeting new challenges, because things that seem new would be exactly the kind of thing that might rely on this kind of a deference. One that comes to mind obviously climate change, and that kind of a thing. So I think you can think of past, present, and future effects for whatever it is that comes in the future in this kind of case.

Alan Kaplinsky:

So do you think that it will have a chilling effect on federal agencies, that they'll be a more reluctant to issue formal regulations that will end up seeing things that are less formal, that don't... They're not published for notice and comment, they can be called guidance, or advisories, or no action letters, and things of that sort?

Craig Green:

That's the advice I would've given people when I worked in the Department of Justice, that's what people are writing memos in the Solicitor General's office right now about. They're all counseling agencies and doing those things. And how could they be anything but chilled? Chilled for an indeterminate range, and then how much risk do they like to take on particular issues.

Jack Beermann:

Again, I'm going to disagree about Chevron being a toxic precedent right now. I had no trouble finding every circuit over the last year citing Chevron as established law, and I did it the last two years in a row. And I think parties argue Chevron like crazy in the lower courts, and the percentage of cases that are going to really make it to the Supreme Court is pretty low. So I think people are winning cases under Chevron in the courts of appeals. There's some judges that are complaining that their colleagues are jumping to what they call Chevron maximalism, and saying... Without doing the hard work of applying the traditional tools of statutory interpretation. But the Supreme Court has never actually told the courts what to do, because it just ignores Chevron. So when I say never, I mean in the last 10 years or so, they haven't given any guidance to the lower courts about what to do with Chevron, they've just sort of behaved badly in the sense of not following their own precedent.

Craig Green:

30 seconds, if I were a clerk for a court of appeals, I would never write in an opinion, 'cause it could get reversed. And Lisa Blatt has a really great example of how she could barely even say the word Chevron in the Supreme Court. So I don't disagree, Jack, that they're still citing it, but it's legal force I think could be measured by other metrics.

Alan Kaplinsky:

Okay.

Carter Phillips:

I would actually add a more interesting point, Jack, that... What you made, which is, I think the justices themselves, because individually, they had all cast serious doubts on Chevron, thought that somehow that had gotten the message out to the lower courts. But the truth is, because the court itself hadn't reached any conclusive decision on the issue, the lower courts found themselves bound by Chevron, and they continued to apply it, and when it's a hard question... Human nature being what it is, easier to just say, "It's too close to call, give it to the agency, I'm done with it." And the likelihood of the Supreme Court is going to decide a case like the Fisherman's case in the context of how actually Chevron should be applied is close to zero. So it's not surprising that that's what's going on, and it's part of, I think, of why the court finally decided, "Well, maybe we ought to revisit Chevron itself." 'Cause honestly, after they decided the major questions issue, I didn't see why anybody got excited about Chevron anyway.

Alan Kaplinsky:

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