10-1-2017

Chevron in the Circuit Courts: The Codebook Appendix

Kent H. Barnett
Associate Dean for Academic Affairs & J. Alton Hosch Professor of Law *University of Georgia School of Law*, khbarn@uga.edu

Christopher J. Walker
Associate Dean for Academic Affairs & J. Alton Hosch Professor of Law *Ohio State University, Moritz College of Law*, walker.1432@osu.edu

Repository Citation

CHEVRON IN THE CIRCUIT COURTS: THE CODEBOOK APPENDIX

Kent Barnett* & Christopher J. Walker**

For our empirical study on the use of *Chevron* deference[1] in the federal courts of appeals, we utilized the following Codebook.[2] This Codebook draws substantially from the codebook appended to William Eskridge and Lauren Baer's pathbreaking study of administrative law's deference doctrines at the Supreme Court.[3] Our research assistants and we followed the instructions below when coding judicial decisions.[4] To address questions as they arose and to ensure consistent coding, we maintained close contact with each other and our research assistants throughout the project and clarified the Codebook to address additional issues. Further details concerning our methodology (and its limitations) are further detailed elsewhere.[5]

I.   BACKGROUND

Within each judicial decision, we separately coded entries for each issue of statutory interpretation. For instance, if a decision considered three different agency interpretations of a statute that it administered (the meaning of "reasonable," the meaning of "automobile," and the meaning of "large"), we coded separate entries for each of the three interpretations.

1

Case Name

Year

If there is a panel opinion and an en banc opinion for the case, we coded only the en banc opinion, but we added the citation and details of the panel opinion in the *Add'l Notes* field.

Circuit

We used the following format to refer to the circuits: CA1, CA2, CA3 . . . CA11, CADC (D.C. Circuit), and CAFC (Federal Circuit).

Irrelevant Case

Because we sought to capture all cases that referred to *Chevron* during our selected timeframe, there were a fair number of irrelevant decisions in our database. For instance, numerous decisions concerned Chevron Corp. as a party, not an agency's statutory interpretation. If the case did not involve a court's review of an agency's interpretation of a statute that it administers, we included a "1" in this box and did not fill out the rest of the coding for this decision *except* for the *Key Language* from the opinion.

We marked as irrelevant decisions vacated by the courts of appeals. But we coded decisions that the Supreme Court of the United States either affirmed, reversed, or vacated.

We marked cases as "2" if we were unable to code them accurately because the court was not clear about the nature of its review[6] or if the three-judge panel did not have a rationale that commanded a majority.[7] Where one issue was clearly that of statutory interpretation but the others were unclear, we coded the clear issue without coding or remarking on the others.[8]

Authoring Judge

We inserted the last name and first initial of the authoring judge (e.g., "Cole, R."). We also identified "per curiam" decisions.

Panel Judges (1, 2, and 3).

We inserted the last name and first initial of each judge on the panel.

---

6. *See, e.g.*, Abraham Lincoln Mem. Hosp. v. Sebelius, 698 F.3d 536 (7th Cir. 2012) (referring to several judicial review standards but appearing to concentrate on arbitrary-and-capricious and substantial-evidence review).

7. *See, e.g.*, Creekstone Farms Premium Beef, LLC v. USDA, 539 F.3d 492 (D.C. Cir. 2008).

8. *See, e.g.*, North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008).

En Banc

We inserted "1" when the decision was decided en banc. If there was a panel opinion and an en banc opinion for the same case, we coded only the en banc decision and noted in the *Add'l Notes* the citation and details of the panel opinion.

Dissent

We inserted the last name and first initial of the author of the dissent if the dissent disagreed with the majority opinion as to the agency's interpretation of a statute that it administers. We included the key language or a summary of the dissenting argument in the *Other Opinion Language* column.

Other Opinions

We inserted the last name and first initial of the author(s) of any other opinion, including any concurring opinions and any additional dissents as to the agency's interpretation of a statute that it administers. We included the key language or a summary of the additional argument in the *Other Opinion Language* column.

II.   THE AGENCY'S INTERPRETATION

Agency

We identified the agency whose statutory interpretation the court reviewed based on the numerical assignments from Eskridge and Baer and additional numerical assignments that we included to ease coding. In coding the relevant agency, we further followed the Eskridge and Baer methodology:

> For agencies within larger executive departments (such as the Coast Guard and the Army Corps of Engineers, both within the Department of Defense (DOD)), the department rather than the specific agency was coded, with the exception of the CIA, which has its own category. The residual category was the Department of Justice, whose Solicitor General represents the federal government before the Court in almost all cases and whose staff routinely make policy-significant decisions that the agencies themselves would not have made (and sometimes do not support).[9]

Moreover, the ICC category also includes its successor, the Surface Transportation Board.

---

9.   Eskridge & Baer, *supra* note 3, at 1204.

Treasury = 0	Interior = 18	CFTC = 36	MSPB = 54
Copyright = 1	IRS = 19	Agriculture = 37	U.S. Trade Representative = 55
DOD/Armed Forces = 2	Labor = 20	Commerce = 38	GSA = 56
DOJ = 3	NLRB = 21	HUD = 39	NASA = 57
Education = 4	OPM = 22	Veterans Admin. = 40	Fed. Marine Comm'n = 58
EEOC = 5	Patent & Trademarks = 23	Customs = 41	Fed. Credit Adm. = 59
Energy = 6	Pension Guar. = 24	FAA = 42	Adv. Council on Hist. Preserv. = 60
EPA = 7	Post Office = 25	Nat'l R.R. Adj. Board = 43	Librarian of Congress = 61
FDIC = 8	President/White House = 26	Judicial Conference = 44	Nat'l Indian Gaming Comm'n. = 62
Federal Reserve = 9	SEC = 27	Nat'l Mediation Bd. = 45	ATF = 63
FERC = 10	Sentencing = 28	Comptroller General = 46	Parole Comm'n = 64
FHLBB/FSLIC = 11	Transportation = 29	Social Security Admin. = 47	BOP = 65
FLRA = 12	Panama Canal Comm'n = 30	FMSHRC = 48	DEA = 66
FTC = 13	Dep't of State = 31	CFPB = 49	Advocacy Training & Tech. Assistance Ctr. = 67
FCC = 14	FEC = 32	Congressional Office of Compliance = 50	Agriculture & Interior = 68
HHS = 15	Nuclear Reg. Comm'n = 33	ITC = 51	Treasury & Federal Reserve = 69
STB = 16	FDA = 34	Small Business Administration = 52	Education & HHS = 70
EOIR/BIA/DHS = 17[10]	CIA = 35	NTSB = 53	DOD GSA & NASA = 71

---

10.   DHS includes the U.S. Coast Guard's National Pollution Funds Center. *See* Buffalo Marine Servs. Inc. v. United States, 663 F.3d 750, 752 (5th Cir. 2011).

Subject Matter

We indicated the subject matter of the interpretation based on the numerical assignments from Eskridge and Baer and additional numerical assignments that we included to ease coding.

Bankruptcy = 1	Health & Safety = 11	Education = 21
Business Regulation = 2	Immigration = 12	Foreign Affs/Nat'l Security = 22
Civil Rights = 3	Indian Affairs = 13	Housing = 23
Criminal Law = 4	IP = 14	Prisons = 24
Energy = 5	Collective Barg. / Labor = 15	Antidumping/Trade = 25
Entitlement Programs = 6	Maritime = 16	Postal = 26
Environment = 7	Pensions = 17	Agriculture = 27
Federal Government = 8	Tax = 18	Employment = 28
Fed. Jur. & Proc. = 9	Telecom = 19	
Federal Lands = 10	Transportation = 20	

Final Decisionmaker
1 = Administrative Law Judge (ALJ)
2 = Non-ALJ adjudicator
3 = Appeals Panel/Board
4 = Head of Agency (Secretary, Commission, etc.)
5 = Other (Briefly describe other type of final decisionmaker)

When the court merely identified the position as that of the agency or a delagatee (aside from an administrative appellate tribunal), we coded the final decisionmaker as the head of the agency.

Agency Interpretation
1 = Liberal
2 = Conservative
3 = Neutral or Mixed

We followed Eskridge and Baer's methodology (with our additions in brackets) in identifying the ideological valence of the agency interpretation:

Interpretations were coded as *liberal* if the agency view favored the interests of bankruptcy debtors, antitrust and securities plaintiffs, civil rights plaintiffs and other victims of discrimination (except claimants in "reverse discrimination" cases), criminal defendants, energy consumers, claimants seeking information or entitlement benefits from the government, citizens demanding environmental protection, plaintiffs seeking access to federal courts, governmental and private employees, persons benefiting from health/safety protections, immigrants, Native Americans, claimants opposing intellectual property interests, pension beneficiaries and state regulators of pension funds, taxpayers, telecomm and transportation consumers, [trade decisions that favored domestic industry,]students and their parents seeking educational benefits, and tenants.

Interpretations were coded as *conservative* if the agency view favored the interests of bankruptcy creditors, antitrust and securities defendants, alleged discriminators in civil rights cases (except defendants in "reverse discrimination" cases), criminal prosecutors, energy companies, agencies withholding information, government institutions paying for statutory entitlements, companies accused of polluting the environment or violating business-regulating laws, defendants opposing access to federal courts, governmental and private employers, defendants charged with violating health/safety rules, officials opposing the rights of immigrants, state and federal entities denying claims by Native Americans, holders of intellectual property interests, pension funds and their managers, tax collectors, telecomm and transportation companies, [trade decisions that favored foreign industry,]schools and school boards, and landlords.

Interpretations were coded as *neutral or mixed* if the agency interpretation was liberal on one issue and conservative on another.[11]

Agency Format

We indicated the process that the agency used to create statutory interpretation with the following options:

0 = Formal Rulemaking (very rare: must be "on the record" after "agency hearing")

1 = Informal Rulemaking (most common rulemaking: "notice and comment")[12]

---

11.   Eskridge & Baer, *supra* note 3, at 1205–06.

12.   Informal rulemaking includes substantive rules that do not require notice and comment, as well as procedural, interim, and temporary rules. *See* 5 U.S.C. § 553(b)(A)–(B) (2012).

    2 = Formal Adjudication (when there is an adversarial hearing/adjudication)
    3 = Informal Interpretation (anything that does not fall into the above three categories)
    4 = FERC Proceedings (excluding notice-and-comment rulemaking)
    5 = Unclear

Informal Interpretation

For those interpretations marked as "3" for *Agency Format*, we further identified the type of informal interpretation with the following options:

    1 = Agency Litigation Position
    2 = Interpretative Rule or Similar Guidance
    3 = Agency Manual or Policy Statement
    4 = Agency/Solicitor General Amicus Brief
    5 = Letter/Revenue Ruling
    6 = Permit/Licensing Decision
    7 = Settlement
    8 = Arbitration Decision
    9 = Orders with notice-and-comment proceedings
    10 = Interpretations arising from rulemaking proceedings (in comments, orders withdrawing rulemakings, etc.)
    11 = Miscellaneous Informal Decisions
    12 = Unclear
    13 = Mixed (more than one informal format under review for the same interpretation)

Continuity

We indicated the continuity (or lack thereof) of the agency's statutory interpretation:

    0 = long-standing and fairly stable
    1 = evolving (agency had prior interpretation that was not consistent)
    2 = recent (new interpretation where no prior interpretation was present)
    3 = not evident from opinion

Unlike Eskridge and Baer,[13] we did not look outside the court's opinion. Instead, we carefully evaluated whether the court commented on the continuity of the agency's position and considered the date of the regulation, agency precedent on point, etc.

---

13.   *Cf.* Eskridge & Baer, *supra* note 3, at 1206–08.

If Evolving OR Recent, Because

For interpretations identified as "1" or "2" for *Continuity*, we identified the reason for the agency's changed or new interpretation:

0 = New issue for the agency
1 = New administration
2 = New or amended statute
3 = Agency's practical experience
4 = Agency found changed facts/technology
5 = Agency's litigating position
6 = Responding to judicial decisions or decisions from other tribunals (e.g., WTO)
7 = Unclear

If the reason for the agency's interpretation did not fall into these categories, we coded the reason as "Other" and provided a brief description of the other reason for the agency's evolving or recent interpretation.

Congressional Delegation Questioned

1 = Yes

Unlike Eskridge and Baer,[14] we did not look outside the court's opinion. Instead, we indicated whether the parties or the court questioned whether Congress had delegated authority to the agency to interpret the statute at issue.

III. AGENCY ISSUES

Jurisdiction & Regulatory Authority

We inserted "1" if the statutory interpretation concerned the agency's jurisdiction or authority to regulate. As set forth by Eskridge and Baer:

> An agency interpretation was coded as relating to the *agency's jurisdiction or regulatory authority* only if the agency was asserting (or denying) its own power to regulate a whole category of conduct or activity. . . . In contrast, if the agency were setting forth rules that regulated entities must follow or clarifying a regulatory category, the interpretation was coded as *not* involving the agency's jurisdiction or regulatory authority.[15]

---

14. *See id.* at 1209.

15. *Id.* at 1211–12.

Regulation Interpretation

We inserted "1" if the statutory interpretation question at issue included an agency's interpretation of its own regulation. Unlike Eskridge and Baer,[16] we did not look outside the court's opinion. Instead, we included "1" only where the court mentioned that the agency interpreted not only the statute but also the agency's regulation or other formal interpretation. As Eskridge and Baer note, "If the [regulation] does not address the issue by its plain language, the brief typically represents the agency's interpretation of its own [regulation]."[17]

Preemption

We inserted "1" if the statutory interpretation involved federal preemption of state law.

Foreign Affairs

    1 = Immigration
    2 = National Security (outside of the immigration context)
    3 = Extraterritoriality (if the court mentioned "foreign affairs," extraterritoriality," "treaties," or related terms)
    4 = Antidumping
    5 = Other trade matters
    6 = Taxation of foreign citizens

IV. COURT'S DECISION

Decision Overall

    0 = Liberal
    1 = Conservative
    2 = Neutral or Mixed

We applied the same criteria as in the *Agency Interpretation* field above.

Decision with regard to the Agency

    0 = Case decided in favor of agency's interpretation
    1 = Case decided against agency's interpretation

Outcome as to Statutory Interpretation Issue

    0 = Petition denied/dismissed
    1 = Petition granted or remanded *and* statutory interpretation issue remanded to agency

---

    16.   *Cf. id.* at 1211–12.
    17.   *Id.* at 1212.

> 2 = Petition granted or remanded *but* the court decided statutory interpretation question and thus did not allow agency to reconsider the issue
>
> 3 = Did not originate from agency proceeding
>
> 4 = Other (petition dismissed or granted in part) (if other explain)

Chevron Step 0

We inserted "1" if the court concluded that the *Chevron* framework applied. Eskridge and Baer note:

> Decisions are coded [1] as applying the *Chevron* framework if the Court cited *Chevron* or a *Chevron* precedent (*Chemical Manufacturers*, *Cardoza-Fonseca*, or *K Mart*) and then applied a deference approach consistent with *Chevron*.
>
> Decisions are coded as *not* applying the *Chevron* framework when the Court cited *Chevron* or a *Chevron* precedent but announced that it need not decide whether *Chevron* applies . . . . [or expressly decided that *Chevron* does not apply].[18]

Chevron Step 1

We inserted "1" if the court concluded that Congress has clearly addressed the issue. Eskridge and Baer note:

> Decisions are coded as [1], Congress has clearly addressed the issue, when the Court announces that there is an answer dictated by traditional sources of statutory meaning (statutory text, the whole act, legislative history and purpose, judicial precedent, various canons of statutory construction). It does not matter to the coding scheme whether Congress's answer is the same as, or different from, that of the agency.
>
> Decisions are coded as [0 or empty], Congress has not clearly addressed the issue, when the Court is unable to say for sure that there is one answer dictated by traditional sources of statutory meaning, as in *Chevron* itself. Thus, even when the Court believes that the traditional sources provide somewhat more support for one interpretation than another, but is not prepared to say that the other interpretation is precluded, the decision is coded as [0 or empty], Congress has not *clearly* addressed the issue.[19]

---

18. *Id.* at 1214–15.

19. *Id.* at 1215.

If the court first determined that the statute was clear but then decided, in the alternative, that the agency's interpretation was reasonable even if the statute were ambiguous, we coded the interpretations as step-one interpretations.

Chevron Step 2

We inserted "1" if the court concluded that the agency's interpretation was reasonable. We inserted "2" if the court concluded that the agency's interpretation was unreasonable. Eskridge and Baer note:

> Decisions are coded as [1], the Court determines that the agency interpretation is reasonable, when the Court applies *Chevron* (Step 0), announces that Congress has not clearly addressed the issue (Step 1), and says that the agency interpretation prevails. It is implicit in such decisions that the Court has made a judgment that the agency interpretation is "reasonable" for *Chevron* purposes. And, of course, if the Court explicitly says the agency interpretation is reasonable (Step 2), then the decision is coded as [1].[20]

Deference Regime

We identified which type of deference framework, if any, the court ultimately applied to the agency's statutory interpretation:

- 0 = no regime indicated, directly or indirectly
- 1 = anti-deference (rule of lenity, presumptions against, etc.)
- 2 = [omitted]
- 3 = *Skidmore* or similar (agency expertise/power to persuade)
- 4 = [omitted]
- 5 = *Chevron* (need not defer to interpretation, only apply two-step framework)
- 6 = *Seminole Rock/Auer* (defer to agency's interpretation of its own regulations)
- 7 = *Curtiss-Wright* (super-deference concerning foreign affairs/national security)
- 8 = no deference

Key Language

We pasted the key sentences from the opinion that summarize the court's review of the agency's statutory interpretation.

Other Opinion Language

We pasted key sentences from the dissenting or concurring opinions that summarize those judges' views of the agency's statutory interpretation.

---

20.   *Id.*

Notes

We included any other notes about the decisions—including quotations from other opinions where helpful—that are not captured by the quoted language in the previous two columns.

V.   REASONS CITED

For each category below, we coded "1" for reasons that the court expressly gave for upholding or rejecting the agency's interpretation.

Agency Expertise

We inserted "1" if the court justified upholding or rejecting the agency's interpretation based on the agency's expertise or lack thereof.

Accountability

We inserted "1" if the court justified upholding or rejecting the agency's interpretation based on the agency's democratic/political accountability or lack thereof.

National Standard

We inserted "1" if the court justified upholding or rejecting the agency's interpretation based on the desirability of having a national standard on the interpretive question at issue.

Long-standing Interpretation

We inserted "1" if the court justified upholding or rejecting the agency's interpretation based on the long-standing nature of the agency's interpretation or lack thereof.

Contemporaneous Interpretation

We inserted "1" if the court justified upholding or rejecting the agency's interpretation based on the contemporaneous nature of the agency's interpretation or lack thereof.

Public Reliance

We inserted "1" if the court justified upholding or rejecting the agency's interpretation based on public reliance, or lack thereof, in the agency's interpretation.

Rulemaking Authority

We inserted "1" if the court justified upholding or rejecting the agency's interpretation based on the agency's rulemaking authority or lack thereof.

Agency Procedures

　　We inserted "1" if the court justified upholding or rejecting the agency's interpretation based on the extent of the agency procedures (formal rule-making, notice-and-comment rulemaking, formal adjudication procedures) utilized, or not, in promulgating the agency's interpretation.

Congressional Acquiescence

　　We inserted "1" if the court justified upholding or rejecting the agency's interpretation based on the congressional acquiescence/ratification/approval or lack thereof.

VI. OTHER

Subsequent History

　　We checked Westlaw KeyCite to see whether the Supreme Court had granted review or whether there was subsequent history in the court of appeals after an agency remand. If there was subsequent history, we briefly noted (with citation) what the ultimate outcome was before the Supreme Court or in the court of appeals after remand.

Needs Further Review

　　We included "1" if the interpretation needed further review due to questions about coding. We included "2" if the case merited further review because it may have been worth discussing in the body of the article.

Additional Notes

　　We included any additional notes about the interpretation or decision—including a panel decision where we coded the en banc decision—that may have assisted in analyzing the cases.

Reviewer

　　We included the reviewer's initials for each case.