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Deferring to Agency Amicus Briefs that Present New Guidance

Aaron-Andrew P. Bruhl
William & Mary Law School, apbruhl@wm.edu

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In reading some of the Supreme Court's recent cases, I was intrigued by its willingness to defer to administrative interpretations presented to the Court in the form of amicus briefs filed by the relevant agency or by the Solicitor General. I refer in particular to *Williamson v. Mazda Motor* (relying, in part, on a brief expressing the government's view that a federal vehicle-safety regulation did not preempt a state tort suit) and *Chase Bank v. McCoy* (deferring to the agency's interpretation of its own regulation, which was conveyed in an amicus brief). Giving some degree of deference to positions expressed in agency amicus briefs is not a new development, though it does seem to me that the Court perhaps used to express a bit more hesitation about doing so.

In any event, whether or not there is a trend in this regard, one interesting feature of deferring to an amicus brief is that the Supreme Court might be relying on an interpretive authority that *did not exist* until the Supreme Court's decision to review the case brought it into existence. (This new-authority scenario doesn't describe every instance in which the Court defers to a brief. After all, agencies sometimes file briefs in lower courts; plus, some briefs merely restate administrative guidance offered elsewhere, in which case the deference is not to the brief's position per se.) The right answer to the case could therefore change as the case moves from the lower court to the high court. That seems, at first blush, a bit strange. How should we respond to this state of affairs?

There are a few possibilities:

1. Because uniformity, consistency, and predictability are important, the lower courts should do a better job of conforming their interpretive practices to the Supreme Court's model. Indeed, in *Chase Bank v. McCoy*, the Supreme Court seemed to criticize the Ninth Circuit for not inviting the agency to submit an amicus brief. And yet . . . Should we really expect every lower court in the land to ask for, and wait for, an agency's views whenever a statute administered by the agency is the subject of litigation? Would the agencies and the Department of Justice welcome a regime in which they had to take positions like this routinely?

2. Because uniformity, consistency, and predictability are important, the Supreme Court should stop deferring to new guidance provided in government amicus briefs.

3. No change is needed. When the Supreme Court decides to hear a case, it should try to get the right answer, even if that means relying on a new source of guidance that was called into existence by its decision to review the case. If Congress passed a new statute that applied to pending cases, the Court would apply that. Same thing here. (Here I am borrowing from footnote 6 of Justice Scalia's dissent in *Mead*.)

Thoughts? (I should add that I recognize that the considerations presented here concern just one aspect of the larger issue of deferring to agency views expressed in connection with litigation.)

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