



KEN PAXTON
ATTORNEY GENERAL *of* TEXAS

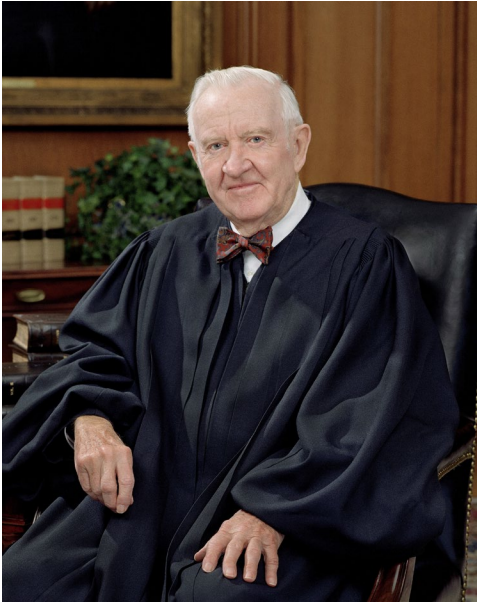
Statutory Construction and Agency Deference

Bill Davis

Deputy Solicitor General

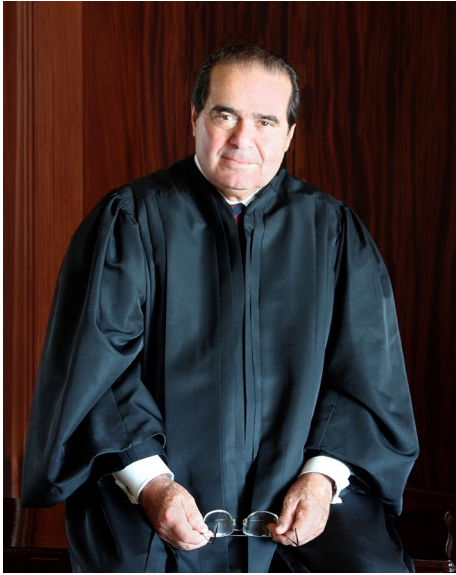
Office of the Attorney General

Agency Deference in Federal Court



- Stevens: When Congress leaves a gap to fill, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”
Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)

Agency Deference in Federal Court



- Scalia: Courts should defer to agency interpretations of their own regulations unless plainly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 518 U.S. 452, 461 (1997).

- ▶ Gorsuch: Agency deference is “a judge-made doctrine for the abdication of the judicial duty.” *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).



Agency Deference in Federal Court



- Kagan: *Auer* deference applies only when: (1) genuine ambiguity after exhausting all tools of statutory construction; (2) agency interpretation must be reasonable; (3) authoritative/official position; (4) within agency's substantive expertise; (5) product of "fair and considered judgment." *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)

6 Steps to Agency Deference

- Step 1: Is the agency interpretation formal and entitled to deference or informal and not entitled to deference?
- Step 2: How long-standing is the agency interpretation?
- Step 3: Does the agency have authority to enforce the statute (*i.e.*, is the statute within the agency's area of expertise)?

6 Steps to Agency Deference

- Step 4: Does the agency interpretation conflict with the plain language of the statute?
- Step 5: Is the agency interpretation reasonable?
- Step 6: Courts will generally uphold agency interpretation.

6 Steps to Agency Deference



6 Steps to Agency Deference

- Step 1: Is the agency interpretation formal and entitled to deference or informal and not entitled to deference?



- Formal adjudication or regulation/administrative rule.
R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water, 336 S.W.3d 619 (Tex. 2011)



- Amicus Briefs. *Id.*
- Comments in Hearings. *Id.*
- Advisories
- Bulletins

6 Steps to Agency Deference

- Step 2: How long-standing is the agency interpretation? The more duration, the more likelihood of deference.



- 13 years is okay. *TDI v. Am. Nat'l Ins. Co.*, 410 S.W.3d 843 (Tex. 2012)
- A half-century is okay. *Tex. Citizens*.



- More recent interpretations are weaker bases for deference.

6 Steps to Agency Deference

- Step 3: Does the agency have authority to enforce the statute (*i.e.*, is the statute within the agency's area of expertise)?
- Courts “should afford no deference to an agency’s interpretation of a statute that does not lie within its administrative expertise[.]” *Tex. Citizens*.

6 Steps to Agency Deference

- Step 4: Does the agency interpretation conflict with the plain language of statute?
- Reframed: Is the statute ambiguous?
- Short Answer: No.

6 Steps to Agency Deference

- Step 4: Does the agency interpretation conflict with the plain language of statute?
- Reframed: Is the statute ambiguous?
- Long Answer: “It is true that courts grant deference to an agency’s reasonable interpretation of a statute, but a precondition to agency deference is ambiguity; ‘an agency’s opinion cannot change plain language.’ There is no ambiguity about the ambiguity requirement, nor with the unassailable rule that agency interpretations cannot contradict statutory text.” *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 630 (Tex. 2013).

6 Steps to Agency Deference

- Step 5: Is the agency interpretation reasonable?

“Because we only require an agency’s interpretation of a statute it is charged with administering to be reasonable and in accord with the statute’s plain language, we need not consider whether the Commission’s construction is the only—or the best—interpretation in order to warrant our deference.” *Tex. Citizens*.

6 Steps to Agency Deference

- Step 6: Courts will generally uphold agency interpretation.
- Courts will “generally uphold” or give “serious consideration” to the agency interpretation. *Health Care Servs. Corp.*

Example: *Texas Citizens*

- Railroad Commission in *Texas Citizens*: The Texas Water Code allowed the Commission to grant an injection-well permit if it was in the “public interest.”
- Opposing parties argued that the Commission should factor in traffic safety (arising from concerns about large trucks).
- The Commission argued that traffic safety was beyond its authority based on a half-century old rule.
- The Court found the phrase “subject to multiple interpretations” and deferred to the Commission.

So What Should I Argue?

- Our interpretation of the law is correct.
 - Text
 - Context
 - Canons

Text: Small Points Matter

- “Let’s eat, John”
- “Let’s eat John”

Text: Small Points Matter

- *Odyssey 2020 Academy, Inc. v. Galveston Central Appraisal District*, 624 S.W.3d 535, 550 n.19 (Tex. 2021):
 - Does “public grounds and all other property devoted exclusively to the use and benefit of the public” give rise to one exemption or two separate exemptions?
 - Court relied on other considerations but “f[ound] it significant that these nouns are not separated by a comma.”

Text: "A" versus "any"

Ex parte R.P.G.P., 623 S.W.3d 313 (Tex. 2021)

Question: "[W]hether an arrest involving multiple offenses is divisible for purposes of expunging arrest records under [Article 55.01 of the Texas Code of Criminal Procedure](#)."

Court's reasoning: "Reading 'a misdemeanor' as '**any** misdemeanor,' as the State urges, would not honor the precise language the Legislature enacted" (emphasis added)

Text or purpose?

- The Court often says that it relies on plain statutory text, not arguments about the purpose behind the text. *E.g., BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76 (Tex. 2017).
- But it's not always that simple. *In re Oncor Elec. Delivery Co. LLC*, 630 S.W.3d 40, 46 (Tex. 2021):
 - Court relied on “the Legislature's original guiding purpose” as expressed in original codification, even after amendment changed the operative text.
- Lesson: Argue text – but also how text effectuates good policy.

Step 2: Context

- *Jaster v. Comet II Construction, Inc.*, 438 S.W.3d 556 (2014):
 - When the “plaintiff” files “an action” against an engineer or architect, the law requires an affidavit.
 - The statute did not define either “plaintiff” or “action.”
 - Q: Does the law require an affidavit for counterclaims or third-party claims?

Step 2: Context

- *Jaster v. Comet II Construction:*

- The Court looked to:
 - a variety of contemporary dictionaries, and
 - use of the undefined terms in other laws.
- The Court held that the affidavit was required by the one who initiated the action, not the one who filed a counterclaim or third party claim.

Step 3: Canons



Step 3: Canons

- Where to find the canons:
 - The Code Construction Act, Texas Government Code chapter 311, and also chapter 312.
 - Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 53–336 (2012).

Step 3: Canons

- *University of Texas at Arlington v. Williams*, 459 S.W.3d 48 (Tex. 2015):
 - *Ejusdem generis*: in a list of two or more things that has a catch-all phrase, we read the catch-all to only include the same general kind of things in the list.

Step 3: Canons

- *University of Texas at Arlington v. Williams*: the Recreational Use Statute defines “recreation” to be:
 - (A) hunting;
 - (B) fishing;
 - (C) swimming;
 - (D) boating;
 - (E) camping;
 - (F) picnicking;
 - (G) hiking;
 - (H) pleasure driving, including off-road motorcycling and off-road automobile driving and the use of all-terrain vehicles and recreational off-highway vehicles;

Step 3: Canons

- *University of Texas at Arlington v. Williams:*
- ...
 - (I) nature study, including bird-watching;
 - (J) cave exploration;
 - (K) waterskiing and other water sports;
 - (L) any other activity associated with enjoying nature or the outdoors;
 - (M) bicycling and mountain biking;
 - (N) disc golf;
 - (O) on-leash and off-leash walking of dogs; or
 - (P) radio control flying and related activities.

What About Legislative History?

Code Construction Act, Tex. Gov't Code § 311.023:

In construing a statute, **whether or not the statute is considered ambiguous on its face**, a court may consider among other matters the:

- (1) object sought to be attained;
- (2) circumstances under which the statute was enacted;
- (3) **legislative history**;
- (4) common law or former statutory provisions, including laws on the same or similar subjects;
- (5) consequences of a particular construction;
- (6) **administrative construction of the statute**; and
- (7) title (caption), preamble, and emergency provision.

What About Legislative History?

- “[S]ection 311.023[3] . . . permits courts to consider a statute's legislative history ‘whether or not the statute is considered ambiguous on its face.’ Although this section may grant us legal permission, not all that is lawful is beneficial.” *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 136 (Tex. 2018) (citation and footnotes omitted).
- “We do not resort to extrinsic aids, such as legislative history, to interpret a statute that is clear and unambiguous.” *KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 183 (Tex. 2019) (quotation marks omitted).

Why Does the Court Avoid Deference?

- The Court will put in a lot of work – based on text, context, and canons – before it gives up and declares ambiguity. Why?
- Separation of powers
 - The Legislature crafts the law.
 - *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803): “It is emphatically the province and duty of the judicial department to say what the law is.”

Speak the Court's Language

- Argue:
 - Text
 - Precise/narrow
 - Context
 - Big picture
 - Canons
- But don't neglect common sense.
 - Explain how the proposed construction furthers policy objectives, including those reflected in the original codification.

Speak the Court's Language

- Is there room for deference?
 - Only if all of those other arguments fail.
 - So any argument for deference should come last.
 - The Court will consider embracing it only if it find ambiguity – which, as already noted, it almost never will.