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The Supreme Court's Decisions Regarding Validity and Influence of ADA Regulations

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In the modern American governmental system, Congress often shares some of its lawmaking powers with the executive branch. Congress commonly delegates to executive agencies the power to fill in gaps and to develop more precise standards for carrying out the laws it enacts. A primary way in which executive branch agencies exercise this delegated authority is by issuing regulations. In the Americans with Disabilities Act (ADA), Congress assigned several federal agencies the task of issuing regulations for carrying out the Act's requirements. The Equal Employment Opportunity Commission (EEOC) was directed to issue regulations for implementing Title I, the employment provisions of the ADA.[1] As the head of the Department of Justice (DOJ), the Attorney General was charged with issuing regulations both for carrying out Title II's requirements regarding state and local government entities,[2] and for implementing the requirements Title III places on public accommodations.[3] The Secretary of Transportation was made responsible for issuing regulations for the implementation of the ADA's transportation requirements both for state and local government entities under Title II[4] and public accommodations under Title III..[5] The Federal Communications Commission (FCC) was directed to issue and enforce regulations for carrying out Title IV's requirements regarding telephone relay services.[6]

The Supreme Court has fluctuated greatly in the degree of respect it has accorded the regulations these agencies have issued in fulfillment of their ADA responsibilities. This policy brief in the National Council on Disability's (NCD) *Righting the ADA* series examines the status the Court has conferred on the various sets of ADA regulations and how solicitous or dismissive it has been in following the standards established in the regulations. It is important at the outset to understand the difference between the level of deference the Court deems appropriate for a particular set of regulations and the extent to which the Court follows or applies a particular regulatory requirement or interpretation.

Traditionally, courts have recognized that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer ...."[7] In its decision in the case of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[8] in 1984, the Supreme Court offered more specific guidance regarding the extent to which courts should defer to policy choices in regulations. The Court said that whenever Congress, in enacting a statute, expressly directs an executive agency to issue regulations to fill in gaps in the statutory provisions, the regulatory provisions issued by the agency are to be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[9] In situations where the congressional delegation to an executive agency to fill in a statutory gap is only implicit, the agency's regulatory provisions are still entitled to considerable weight. According to the Court in *Chevron*, courts may not substitute their own construction of a statutory provision "for the reasonable interpretation made by the administrator of an agency."[10] These high degrees of authoritativeness of regulations have subsequently come to be called "*Chevron* deference."

But even if a provision in regulations is entitled to *Chevron* deference, courts still do not always have to follow it. A court should not defer to a regulatory provision that is contrary to the statute;

that is unreasonable, arbitrary, or capricious; or that is beyond the scope of the jurisdiction of the agency that issued the regulation. Accordingly, although the two are often interrelated, the level of deference a court assigns to a regulation is a separate issue from whether the court ultimately accepts and applies a regulatory provision's position on a specific policy matter.

The Supreme Court's treatment of ADA regulatory provisions interpreting the definitions found at the beginning of the Act has been dramatically different from its treatment of provisions addressing substantive requirements of the Act. For this reason, these two categories of regulations will be discussed separately in this policy brief.

REGULATORY INTERPRETATION OF ADA DEFINITIONS

After preliminary sections of the Act presenting the short title of the Act, a table of contents, congressional findings, and a statement of the purposes of the law, the first provisions of the ADA are definitions of three important terms used in the statute: "auxiliary aids and services," "disability," and "state.[11] As many of the prior policy briefs in NCD's *Righting the ADA* series have discussed, the Supreme Court has devoted considerable attention to the definition of the term "disability." In doing so, the Court has been highly inconsistent in its attitude toward regulations implementing this definition.

Level of Deference

In *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Court considered whether asymptomatic HIV infection met the Act's definition of disability. Among other authorities that the Court looked to to resolve this issue were the regulations issued by the Department of Justice under Title III of the ADA. The Court said that these regulations should be accorded *Chevron* deference.[12] The specific regulatory provisions the Court was referring to in *Bragdon* were those addressing the definition of disability. The Court also was able to "draw guidance from the views of the agencies authorized to administer other sections of the ADA," and cited EEOC's Title I regulations, DOJ's Title II regulations, and DOT's regulations implementing the transportation-related provisions of Titles II and III.[13] In each instance, the Court was discussing the regulations and regulatory guidance of those agencies clarifying elements of the definition of disability.

In *Sutton v. United Airlines*, 527 U.S. 471 (1999), on the other hand, the Court accorded considerably less value to the provisions in EEOC's ADA regulations addressing the definition of disability. The Court discussed the various delegations of authority to issue regulations under Titles I to V of the ADA, and then declared that "[n]o agency, however, has been given authority to issue regulations implementing the generally applicable provisions of the ADA, ... which fall outside Titles I-V. Most notably, no agency has been delegated authority to interpret the term `disability.'"[14] However, because both parties in *Sutton* accepted the EEOC regulations defining

"disability" as valid, and the Court determined that the validity of the regulations was not necessary to decide the case, it declined to determine "what deference they are due, if any."[15]

In his dissenting opinion in *Sutton*, Justice Breyer contended that the majority's questioning of EEOC's authority was unnecessarily and inappropriately technical:

> There is no reason to believe that Congress would have wanted to deny the EEOC the power to issue such a regulation, at least if the regulation is consistent with the earlier statutory definition and with the relevant interpretations by other enforcement agencies. The physical location of the definitional section seems to reflect only drafting or stylistic, not substantive, objectives. And to pick and choose among which of [Title I's] words the EEOC has the power to explain would inhibit the development of law that coherently interprets this important statute.[16]

Actually, the placement of the ADA's definitions section at the beginning of the Act rather than within one of the substantive Titles serves what one would have thought is a fairly obvious purpose. The terms defined there are ones that are used in more than one of the substantive Titles of the Act; this is in contrast to other terms, such as "employer," "public entity," "public accommodation," "TDD," and a number of others that are defined within the particular Title in which they are used. The term "disability" in particular is used in various provisions throughout the Act. Rather than repeating the identical statutory definition of disability within each of the Titles in which it is used, Congress considered it much more efficient to include the definition at the beginning.

At the same time, since the term "disability" is used within different Titles with differing contexts, histories, and complexities, it was appropriate for Congress to authorize the agency charged with issuing regulations implementing each of the Titles to include within its regulations provisions making the definition of disability clear to covered entities, and to add regulatory clarifications or interpretive guidance that might arise from the differing contexts and purposes of the particular Title. This approach had the advantage of adopting a single definition of disability while leaving open the possibility of variations on its application tailored to the particular regulatory setting. The conclusion of the Court in *Sutton* that Congress did not delegate authority for regulations interpreting the definition of disability to any agency seems to ignore the seemingly evident congressional objective in organizing the statute the way it did.

In *Murphy v. United Parcel Service*, 527 U.S. 516 (1999), the Court followed the *Sutton* opinion in assuming without deciding that EEOC's Title I regulations are valid.[17] Likewise, in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), the Court declared:

> As the parties have not questioned the regulations and interpretive guidance promulgated by the EEOC relating to the ADA's definitional section, for the purposes of this case, we

> assume, without deciding, that such regulations are valid, and we have no occasion to decide what level of deference, if any, they are due, see *Sutton v. United Airlines, Inc.*[18]

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002), the Court again followed its approach in *Sutton*, *Murphy*, and *Kirkingburg* in reiterating that the ADA did not assign any agency authority to issue regulations interpreting the term "disability," but deciding, since the parties had accepted the EEOC ADA regulations as reasonable, to assume without deciding that they were valid, without deciding "what level of deference, if any," they were due.[19] Ironically, the Court stated that regulations interpreting the Rehabilitation Act of 1973 were entitled to considerable persuasive authority in interpreting the ADA. The Court noted that the ADA's definition of disability was drawn nearly verbatim from the definition of "handicapped individual" in the Rehabilitation Act, 29 U.S.C. § 706(8)(B), and observed that "Congress' repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."[20] But having recognized the significance of Rehabilitation Act regulations in interpreting the ADA, the Court considered the persuasive authority of the EEOC's ADA regulations regarding the definition of disability as "less clear."[21]

In its *Sutton*, *Murphy*, *Kirkingburg*, and *Williams* decisions, the Court took pains to declare that it was assuming, without deciding, that the regulatory provisions interpreting the definition of disability were valid, and that, if valid, it was not deciding what level of deference, if any, they should be accorded. This dubious, begrudging recognition of the regulations' authority is in sharp contrast to the Court's opinion in *Bragdon* where the Court held the regulations entitled to a high level of judicial deference.

Acceptance and Application of Regulatory Standards

The Court has been equally variable in the extent to which it has followed the specific standards issued by the ADA regulatory agencies interpreting the definition of disability. It has flatly rejected the agencies' position on mitigating measures. In its decision in the *Sutton* case, the Court repudiated the position taken in regulatory guidance of both the EEOC and DOJ — that persons are to be evaluated in their uncorrected state without taking mitigating measures into account. The Court ruled that "by its terms, the ADA cannot be read in this manner" and concluded that the agencies' view was "an impermissible interpretation of the ADA."[22] The Court's decisions in *Murphy* and *Kirkingburg* followed the *Sutton* ruling in rejecting the EEOC's and DOJ's position on mitigating measures.[23] The Court's problematic analysis of the mitigating measures issue is discussed in another policy brief in NCD's *Righting the ADA* series; it is found at http://www.ncd.gov/newsroom/publications/mitigatingmeasures.html.

Ironically, in its *Sutton* decision, after questioning the EEOC's authority to issue regulations implementing the definition of disability and rejecting the EEOC's position on the mitigating

measures issue, the Court accepted (though without ruling on their validity) EEOC's regulatory provisions and regulatory guidance providing (as part of the disability determination) that inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.[24] Likewise, in the *Murphy* case, the Court followed the EEOC's position on the necessity of demonstrating inability to perform a broad range or class of jobs.[25] In *Williams*, the Court again recited the EEOC not-just-one-job standard, but held that the criterion of inability to perform a class or broad range of activities should not be applied to major life activities other than working.[26] The Court's treatment of this issue is discussed in another policy brief in NCD's *Righting the ADA* series; it is found at **http://www.ncd.gov/newsroom/publications/notjustonejob.html**.

The Court has been indecisive and somewhat inconsistent about whether it will accept the position of the ADA regulatory agencies on a third issue — recognition of working as a major life activity. In *Bragdon v. Abbott*, all the members of the Court, in various opinions, discussed working as a major life activity.[27] Yet in *Sutton* the Court indicated that it was "[a]ssuming without deciding that working is a major life activity ....," and added that it had certain misgivings:

> We note, however, that there may be some conceptual difficulty in defining "major life activities" to include work, for it seems "to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] ... then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap." Tr. of Oral Arg. in *School Bd. of Nassau Co. v. Arline*, O.T. 1986, No. 85-1277, p. 15 (argument of Solicitor General).

In *Murphy v. United Parcel Service*, 527 U.S. 516, 523 (1999), the Court again stated that it would assume without deciding that regulations delineating "working" as a major life activity are valid. And in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002), although the Court initially stated that it would "express no opinion" on the contention that working was a major life activity,[28] the Court again asserted its reluctance to recognize working as a major life activity. The Court declared:

> Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much, and we need not decide this difficult question today.
> *Id.* at 692.

The Court's wavering and skeptical positions on the issue of working as a major life activity is discussed in another policy brief in the National Council on Disability's *Righting the ADA* series; it is found at **http://www.ncd.gov/newsroom/publications/limitation.html**.

On a fourth issue arising under the definition of disability — the meaning of the term "substantially limits" — the Court has substituted its own formulation for the one established in the Title I regulations issued by the EEOC. In its decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court announced that to have a disability an individual must have an impairment that "prevents or severely restricts" the individual from performing major life activities. The Court's phrasing represents a more restrictive standard than the EEOC phrasing that required only a "significant restriction" which the Court had previously accepted in *Kirkingburg*. This redefinition is discussed in more detail in another policy brief in NCD's *Righting the ADA* series; it is found at **http://www.ncd.gov/newsroom/publications/limitation.html**.

Accordingly, while the Court has fluctuated somewhat, particularly in retrenching from its initial broad view of the definition of disability in *Bragdon*, it ultimately has tended not to follow the administrative agencies on issues in which they have taken a more inclusive view of the definition. In four issues arising under the definition, the Court has rejected the regulatory agencies' position on one (mitigating measures), questioned their stance on a second (working as a major life activity), adopted its own more restrictive definition in preference to the EEOC's definition in a third (substantial limitation), and accepted the regulatory agencies' position on the fourth (EEOC's restrictive one-job-is-not-enough standard).

SUBSTANTIVE AND PROCEDURAL REQUIREMENTS

The Court has usually accorded the ADA regulations relatively favorable treatment when the regulatory provisions at issue are ones issued to implement the substantive and procedural mandates of the Act.

Level of Deference

In a few cases, the Court has expressly considered the question of *Chevron* deference for such regulations. As noted previously, in *Bragdon v. Abbott* the Court declared that the regulations issued by the Department of Justice under Title III of the ADA should be accorded *Chevron* deference.[29] While the particular provisions at issue in *Bragdon* involved the definition of disability, the Court's statements regarding *Chevron* deference were worded in terms of the regulations as a whole.

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Court gave a degree of respect to the integration provision of DOJ's Title II regulations, but did not quite recognize them as entitled to *Chevron* deference. The Court declared: "We need not inquire whether the degree of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* is in order; '[i]t is enough to observe that the well-reasoned views of the agencies implementing a statute' constitute a body of

experience and informed judgment to which courts and litigants may properly resort for guidance."[30] Thus, the Court looked for guidance to the Title II regulations without deciding whether they qualified for *Chevron* deference.

In *Chevron U.S.A. Inc. v. Echazabal*, 122 S.Ct. 2045 (2002), the Court expressly gave *Chevron* deference to the Title I regulations of the EEOC.[31]

Acceptance and Application of Regulatory Standards

For the most part, the Court has accepted and been guided by the regulations issued under the ADA (apart from regulatory provisions interpreting the definition of disability, as discussed above). In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Court looked for guidance to the DOJ regulatory provisions dealing with integration and reasonable accommodation, even though it would "not here determine their validity" because the state parties had not challenged the regulatory formulations as outside the congressional authorization.[32] In *U.S. Airways, Inc. v. Barnett*, 122 S.Ct. 1516, 1522-23 (2002), the Court quoted and interpreted the definition of "reasonable accommodation" provided by the EEOC in its Title I regulations. In *Chevron U.S.A. Inc. v. Echazabal*, the Court considered the validity of a provision of the EEOC regulations that permits an employer to refuse to hire an individual with a disability because the person's performance on the job would endanger his or her own health. Mr. Echazabal argued that the ADA precluded such a provision as contrary to the statutory language and that the provision was an unreasonable interpretation, but the Court upheld the provision as reasonable and valid.[33]

In *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), dissenting Justice Scalia, with whom Justice Thomas joined, cited to the Department of Justice's Title III regulatory guidance regarding the purpose of the public accommodations provisions of the ADA.[34]

In a footnote to its decision in the *Kirkingburg* case, the Court expressed some hesitation regarding the position taken by the EEOC in the Interpretive Guidance accompanying its Title I regulations that all safety-related standards are subject to the ADA's direct threat standard. The Court declared, "Although it might be questioned whether the Government's interpretation, which might impose a higher burden on employers to justify safety-related qualification standards than other job requirements, is a sound one, we have no need to confront the validity of the reading in this case."[35] With this inconclusive exception, however, the Court to date has shown a strong tendency to accept and follow the regulatory agencies' positions on obligations and defenses under the ADA.

CONCLUSION

In regard to provisions of the ADA regulations interpreting elements of the definition of disability, the Supreme Court initially indicated (in its *Bragdon* decision) that such regulations were entitled to the high level of judicial deference termed "*Chevron* deference." In later decisions (*Sutton*, *Murphy*, *Kirkingburg*, and *Williams*), however, the Court went out of its way to declare that it had doubts that the ADA authorized any of the federal agencies to issue regulations to implement the Act's provisions regarding the meaning of "disability." Accordingly, the Court said it would only assume, without deciding, that the regulatory provisions interpreting the definition of disability were valid, and it was not deciding what level of deference, if any, they should be accorded.

Similarly, regarding its inclination to accept and follow the agencies' positions on the interpretation of the components of the definition of disability, the Court has retreated from its initial broad view (in *Bragdon*) of the definition of disability. Consequently, the Court has tended not to follow the administrative agencies on issues in which they have taken an inclusive view of elements of the definition. The Court has rejected the regulatory agencies' position on mitigating measures, questioned their stance on working as a major life activity, and adopted a more restrictive definition in lieu of the EEOC's definition of "substantial limitation." The Court has accepted the EEOC's position in creating a one-job-is-not-enough standard that serves to make it harder for potential ADA plaintiffs to establish they have a disability that entitles them to ADA protection.

In regard to non-definition-of-disability regulations, the Court has generally been willing to grant *Chevron* deference for such ADA regulations. Likewise, the Court has for the most part accepted and been guided by such regulations, although it did question (in a footnote) the EEOC's position that every safety-related standard is subject to the ADA's direct threat standard.

Overall, the Court has appeared to be considerably more favorably inclined toward the positions of the regulatory agencies on issues not pertaining to the definition of disability than toward those that do interpret the definition. And in regard to regulatory agency positions on elements of the definition of disability, the Court's decisions have been particularly hostile toward provisions and regulatory commentary that take a broad or inclusive view of what constitutes a disability.

This policy brief was written for the National Council on Disability by Professor Robert L. Burgdorf Jr. of the University of the District of Columbia, David A. Clarke School of Law.

ENDNOTES

1. 42 U.S.C. § 12116.

2. 42 U.S.C. § 12134(a).

3. 42 U.S.C. § 12186(b).

4. 42 U.S.C. §§ 12149(a) & 12164.

5. 42 U.S.C. § 12186(a).

6. 47 U.S.C. § 225(d).

7. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

8. *Id.*

9. *Id.* at 843-44.

10. *Id.* at 844.

11. 42 U.S.C. §§ 12102(1), (2), & (3).

12. Specifically, the Court in *Bragdon* declared in regard to the Title III regulations: "As the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the Department's views are entitled to deference. See *Chevron*, 467 U.S., at 844, 104 S.Ct., at 2782-2783." 524 U.S. at 646 (statutory citations omitted).

13. 524 U.S. at 647.

14. 527 U.S. at 479 (citing 42 U.S.C. § 12102(2)).

15. *Id.* at 480.

16. *Id.* at 514-15.

17. 527 U.S. at 523.

18. 527 U.S. at 563 n. 10 (citations omitted).

19. 122 S.Ct. at 689.

20. *Id.*

21. *Id.*

22. 527 U.S. at 482.

23. 527 U.S. at 521; 527 U.S. at 565-66.

24. 527 U.S. at 491-92.

25. 527 U.S. at 523-24.

26. 122 S.Ct. at 692-93.

27. The majority opinion for the Court in *Bragdon* recognized that "the ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act," and cited the ADA provision that requires consistency with Section 504 regulations. 524 U.S. 624, 638 (1998), citing 42 U.S.C. § 12201(a). The Court then recited the Section 504 list of examples of major life activities that includes "working." The Court ultimately reasoned that the activity of reproduction should be deemed a major life activity "since reproduction could not be regarded as any less important than working and learning." *Id.* at 639. The majority of the Court thus clearly accepted that working constitutes a major life activity. Justices Stevens, Souter, Ginsburg, and Breyer joined in Justice Kennedy's opinion for the Court. In separate opinions, the other justices acknowledged that working is a major life activity. *See* 524 U.S. at 656 (Ginsburg, J., concurring) ("HIV infection should be considered a disability because it is 'a physical ... impairment that substantially limits ... major life activities,' or is so perceived, including [*inter alia*] the ... individual's employment potential....") (citations omitted); 524 U.S. at 664-65 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("the act of giving birth to a child, while a very important part of the lives of many women, is not generally the same as the representative major life activities of all persons -- `caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working' -- listed in regulations relevant to the Americans with Disabilities Act of 1990"); 524 U.S. at 659, 660 (Rehnquist, C.J, concurring in the judgment in part and dissenting in part, joined by Justices Scalia and Thomas) (the majority "makes no attempt to demonstrate that reproduction is a major life activity in the same sense that

`caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working' are") ("There are numerous disorders of the reproductive system ... which are so painful that they limit a woman's ability to engage in major life activities such as walking and working").

28. 122 S. Ct. at 689 ("We express no opinion on the working, lifting, or other arguments for disability status that were preserved below but which were not ruled upon by the Court of Appeals.").

29. Specifically, the Court in *Bragdon* declared in regard to the Title III regulations: ""As the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the Department's views are entitled to deference. See *Chevron*, 467 U.S., at 844, 104 S.Ct., at 2782-2783." 524 U.S. at 646 (statutory citations omitted).

30. 527 U.S. at 598, quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (additional citations omitted).

31. In this case, it was the defendant, Chevron, who relied on the regulation and argued for the Court to give *Chevron* deference to the regulation, as one issued under authority explicitly delegated by Congress. 122 S.Ct. at 2049. The Court ruled that "[s]ince Congress has not spoken exhaustively on threats to a worker's own health, the agency regulation can claim adherence under the rule in *Chevron*, so long as it makes sense of the statutory defense for qualification standards that are `job-related and consistent with business necessity.'" *Id.* at 2051-52 (citation omitted). Ultimately the Court ruled the regulatory provision at issue was a valid, reasonable interpretation of the statute. *Id.* at 2052.

32. 527 U.S. at 592.

33. 122 S.Ct. at 2047, 2049.

34. 532 U.S. at 661, 693 (Scalia, J, dissenting) (citing 28 C.F.R., Ch. 1, pt. 36, App. B, p. 650 (2000)).

35. 527 U.S. at 569 n. 15.