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The Doctrine of Judicial Deference and the Independence of the Federal Mine Safety and Health Review Commission

R. Henry Moore

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THE DOCTRINE OF JUDICIAL DEFERENCE AND
THE INDEPENDENCE OF THE FEDERAL MINE
SAFETY AND HEALTH REVIEW COMMISSION

R. Henry Moore*

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* Henry Moore has practiced in the area of mine safety and health and occupational safety and health law since 1978.
I. INTRODUCTION

When the Federal Coal Mine Health and Safety Act of 1969 ("1969 Coal Act")\(^1\) was amended and expanded by the Federal Mine Safety and Health Act of 1977 ("1977 Mine Act"),\(^2\) rulemaking and enforcement activities were assigned to the Federal Mine Safety and Health Administration ("MSHA") within the Department of Labor.\(^3\) The authority to adjudicate cases was assigned to the Federal Mine Safety and Health Review Commission ("Review Commission") and its administrative law judges.\(^4\) Such an arrangement is known in administrative law as a "split-enforcement" model.\(^5\)

This model may be contrasted with the more usual arrangement in which all the functions, rulemaking, enforcement and adjudication are housed within a single agency.\(^6\) The single agency model was, in fact, the model utilized in the 1969 Coal Act where all the functions were consolidated within the Department of Interior.\(^7\)

When the 1977 Mine Act was passed, the change in administrative model was seen as an improvement over the single agency approach because it created an independent body to review MSHA's actions. The Senate Subcommittee that drafted the provision of the 1977 Mine Act creating the Review Commission believed that an independent review body was essential to a fair process of regulation:


\(^{3}\) References herein to MSHA include the Secretary of Labor. Litigation under the 1977 Mine Act is conducted by the Secretary on behalf of MSHA but MSHA will be used in this Article for consistency of reference.


\(^{6}\) Johnson, supra note 5, at 315.

\(^{7}\) See, e.g., Lastowka & Sapper, supra note 4, at 112-13.
The bill provides a right to contest orders and proposed penalties before the Commission.

The Committee realizes that alternatives to the establishment of a new independent reviewing body exist. For example, under the present Coal Act, review of contested matters is an internal function of the Secretary of the Interior who has established a Board of Mine Operations Appeals to separate his prosecutorial and investigative functions from his adjudicatory functions.

The Committee also recognizes that there are organizational and administrative justifications for avoiding the establishment of new administrative agencies. However, the Committee believes that the considerations favoring a completely independent adjudicatory authority outweigh these arguments.

The Committee believes that an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program.\(^8\)

Senator Williams, one of the chief architects of the 1977 Mine Act, also commented on the independent role of the Commission:

One of the essential reforms of the mine safety program is the creation of an independent Federal Mine Safety and Health Review Commission charged with the responsibility for assessing civil penalties for violations of safety or health standards, for reviewing the enforcement activities of the Secretary of Labor, and for protecting miners against unlawful discrimination.

It is our hope that in fulfilling its responsibilities under the Act, the Commission will provide just and expeditious resolution of disputes, and will develop a uniform and comprehensive interpretation of the law. Such actions will provide guidance to the Secretary in enforcing the [Act] and to the mining industry and miners in appreciating their responsibilities under the law. When the Secretary and mine operators understand precisely what the law expects of them, they can do what is necessary to

protect our Nation's miners and to improve productivity in a safe and healthful working environment.\(^9\)

The independence of a body such as the Review Commission is in direct conflict with the doctrine of judicial deference to administrative interpretations of the statutes an agency enforces that is embodied in *Chevron USA Inc. v. Natural Resources Defense Council*\(^{10}\) and the doctrine of deference to administrative interpretations of the regulations an agency promulgates that is embodied in *Bowles Price Administrator v. Seminole Rock & Sand Co.*\(^{11}\) The application of these doctrines has resulted in an erosion of the independence of the Review Commission.

This Article will discuss that conflict and examine the application of these doctrines in the context of regulation under and enforcement of the 1977 Mine Act. It may also serve as a counterbalance for the opinions set out in the article by W. Christian Schumann, the Department of Labor's Counsel for Appellate Litigation in the Mine Safety and Health Division, "The Allocation of Authority Under the Mine Act: Is the Authority to Decide Questions of Policy Vested in the Secretary of Labor or in the Review Commission."\(^{12}\)

The author here has represented mine operators and individuals subject to the enforcement of the 1977 Mine Act before the Review Commission and its administrative law judges as well as the United States Circuit Courts of Appeal and views the deference doctrines from a different perspective than MSHA's Counsel for Appellate Litigation. This Article will also suggest a different model for reviewing MSHA's interpretations of the 1977 Mine Act and the regulations developed under it and its predecessor, the 1969 Coal Act.

II. DEFERENCE TO AGENCIES' INTERPRETATIONS

A. Chevron Deference to Agencies' Interpretations of Statutes

In 1984, the United States Supreme Court decided *Chevron* and altered the concept of review of the interpretations by administrative agencies of the laws they administer and, consequently, the regulations they promulgate. It "expanded the sphere of mandatory deference," made it "a ubiquitous formula governing court-agency relations" and "effected a fundamental transformation in the relationship between courts and agencies under administrative law."\(^{13}\)

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9 Lastowka & Sapper, supra note 4, at 115-16 (quoting Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Commission before the Senate Committee on Human Resources, 95th Cong. 2d Sess. 1 (1978)).
11 325 U.S. 410 (1945).
12 Schumann, supra note 5.
13 Thomas W. Merrill & Kristen E. Hickman, Chevron's Domain, 89 GEO. L.J. 833, 833-34
In *Chevron*, an environmental group sought the invalidation of a rule promulgated by the Environmental Protection Agency which embodied the agency's interpretation of the Clean Air Act. The United States Court of Appeals for the District of Columbia Circuit had overturned the regulation but the Supreme Court reversed the Court of Appeals. It defined the issue in reviewing the agency’s interpretation of the statute as to whether the EPA had adopted a “reasonable” interpretation of the Clean Air Act, stating:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

The Court found that EPA’s view was “permissible” because it was “reasonable.” The core assumptions in the *Chevron* decision were that interpretation of ambiguous statutes was a matter of policy, not law, and that Congress expressly or implicitly delegated to agencies the authority to make policy decisions through interpretation.

The Court in *Chevron* set out a two-step process for courts to follow in determining whether to defer to agency interpretations. First, a court must determine whether, using traditional tools of statutory construction, Congress had

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17 *Id.* at 845.
18 "The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).
“directly addressed the precise question at issue.”

If a court concludes that Congress had a “specific intention” with respect to the issue, it is to adopt and enforce that intention. The determination of whether Congress addressed the issue before a court and its intent is clear based on a reading of the particular statutory language, as well as “the language and design of the statute as a whole,” and the application of traditional tools of statutory construction. If a court fails to uncover Congress’s intention, it must then determine whether the agency’s position was “a reasonable interpretation” of the statute.

In *Chevron*, the United States Supreme Court appeared to resolve an inconsistency between two lines of case law that one commentator had termed “schizophrenic.” In one line of cases, a court could adopt the interpretation it thought correct after giving the agency’s interpretation “weight;” the degree of that weight varied with such factors as the technical complexity of the issue, and the agency’s expertise. For example, in *Skidmore v. Swift & Co.*, the Court stated that while the agency’s interpretations were “not controlling,” they did “constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance.” “The weight” given to the agency’s interpretation, would “depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade.”

In the other line of cases, the Supreme Court held that “the reviewing court’s function is limited,” and that it must accept an agency interpretation that has “a reasonable basis in law.” Other cases in this line upheld the agency interpretation “unless there are compelling indications that it is wrong.” Since the criterion for interpretation under this line of cases was the reasonableness of

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19 Id. at 845.
20 Id.
22 *Chevron*, 467 U.S. at 844.
26 Id. at 140.
27 Id.
the agency's interpretation, not its correctness, it appeared to bar courts from interpreting statutes *de novo*. The decision in *Chevron* followed this second line of cases and has been "widely considered to be a watershed in the courts' review of statutory interpretation by agencies."\(^{30}\) It has also been said to have achieved the status of a "canonical statement" about deference.\(^{31}\)

Until recently, the application of *Chevron* has been one of "steady expansion" at the urging of government lawyers.\(^{32}\) In recent terms, however, the Supreme Court appears to have retreated to some extent from the *Chevron* holding in deciding *United States v. Mead Corp.*\(^{33}\) and *Christensen v. Harris County*.\(^{34}\)

In *Christensen v. Harris County*, with virtually no discussion, the Court found that an agency's interpretive letter did not warrant *Chevron* deference; instead it was entitled to the respect described in *Skidmore v. Swift & Co.*\(^{35}\) In *Christensen*, the Court indicated that interpretations of statutes made in notice-and-comment rulemaking or formal adjudication were entitled to *Chevron* deference, but interpretations contained in interpretive rules, policy statements, agency manuals, and enforcement guidelines all were not. This case was followed in the next term by the decision in *United States v. Mead* that more directly addressed the reach of the *Chevron* decision.

The Court held that, while a ruling letter by the United States Customs Service was not entitled to *Chevron* deference, it was entitled to *Skidmore* deference. At issue in *Mead* was a Customs' ruling letter on the tariff classification for certain imported goods that was not a formal adjudication and that had not been issued after notice-and-comment rulemaking. The Customs' ruling letter decided what tariff was applicable to the items; it was a decision binding upon both the agency and the importer of the particular goods, but not on third parties.

To resolve the case, the Court engaged in a discussion of the nature of the *Chevron* doctrine. The Court said that the statute gives "no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law."\(^{36}\) Having found that *Chevron* did not apply, the Court explained that *Chevron* had not eliminated the underpinnings for other forms of


\(^{31}\) Merrill & Hickman, *supra* note 13, at 838.

\(^{32}\) One commentator described government attorneys as "relentlessly" pursuing the expansion of *Chevron*. Merrill & Hickman, *supra* note 13, at 835. See also, Schumann, *supra* note 5, at 1099.


\(^{34}\) 529 U.S. 576 (2000).


\(^{36}\) *Mead*, 533 U.S. at 231-32.
deference, such as in *Skidmore*. The Court commented on the variety of types of administrative authority and rejected an absolutist approach to deference:

> Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety. If the primary objective is to simplify the judicial process of giving or withholding deference, then the diversity of statutes authorizing discretionary administrative action must be declared irrelevant or minimized. If, on the other hand, it is simply implausible that Congress intended such a broad range of statutory authority to produce only two varieties of administrative action, demanding either *Chevron* deference or none at all, then the breadth of the spectrum of possible agency action must be taken into account. Justice Scalia’s first priority over the years has been to limit and simplify. The Court’s choice has been to tailor deference to variety. This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect *Chevron* deference.\(^{37}\)

Because neither of the lower courts had considered the effect of *Skidmore* on the case, the Court remanded the case for them to apply it in the first instance.

Justice Scalia dissented, stating that the decision made “an avulsive change in judicial review of federal administrative action” and suggested the Court would be sorting out the consequences of the decision “for years to come.”\(^{38}\) While the change may not be this dramatic, the *Mead* decision does, in fact, suggest that the Court is retreating from the absolutist approach of *Chevron* and resurrecting *Skidmore* as a useful viable alternative.

### B. Deference to Agencies’ Interpretations of Regulations

*Chevron* addressed interpretations by an agency of a statute that it is charged with enforcing and not the interpretation of regulations promulgated by that agency. The Supreme Court had, prior to *Chevron*, articulated what appeared to be a different test for deference to agency interpretations of regulations.

In *Bowles v. Seminole Rock & Sand Co.*, the Court stated that it owed an agency’s interpretation of its own regulation “controlling weight unless it is

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\(^{37}\) *Id.* at 236-37 (footnotes omitted).

\(^{38}\) *Id.* at 239 (Scalia, J., dissenting).
plainly erroneous or inconsistent with the regulation. This had been read to mean that the agency’s interpretation prevails so long as it is “reasonable,” in similar fashion to Chevron. This approach is logical in that many agency regulations are based on statutory provisions.

In a case involving a use of the split-enforcement model, the Occupational Safety and Health Act of 1970 (“OSH Act”), the Supreme Court applied such a deferential approach to a conflict between the Occupational Safety and Health Administration (“OSHA”) and the Occupational Safety and Health Review Commission (“OSH Review Commission”). There the Court was confronted with two possible interpretations of a regulation that the Secretary of Labor had promulgated under the OSH Act. The Court of Appeals had deferred to the interpretation of the OSH Review Commission. The Supreme Court reversed:

It is well established “that an agency’s construction of its own regulations is entitled to substantial deference . . . .” In situations in which “the meaning of [regulatory] language is not free from doubt,” the reviewing court should give effect to the agency’s interpretation so long as it is “reasonable . . . ” that is, so long as the interpretation “sensibly conforms to the purpose and wording of the regulations . . . .” Because applying an agency’s regulation to complex or changing circumstances calls upon the agency’s unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regu-

40 See, e.g., Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (giving “controlling weight” to agency’s interpretation); Shalala v. Guernsey Mem’l Hosp., 514 U.S. 87, 94-95 (1995) (“It is a reasonable regulatory interpretation and we must defer to it.”); see also Paralyzed Veterans of Am. v. D.C. Arena, 117 F.3d 579, 584 (D.C. Cir. 1997). Some commentators have suggested that a different standard of deference exists for interpretations of regulations as applied to statutes. See Robert A. Anthony & Michael Asimow, The Court’s Differences - A Foolish Inconsistency, 26 ADMIN. & REG. L. NEWS 10 (2000). If this is correct, it would appear that the Supreme Court is evolving away from separate doctrines or that the doctrines are so similar they cannot be distinguished.
41 This is especially true of the 1977 Mine Act. See 30 U.S.C. §§ 841-878 (2000) (interim mandatory regulations set out in the statute and later adopted as regulations in 30 C.F.R. § 75 (2001)).
44 Id. at 149-50.
lations is a component of the agency's delegated lawmaking powers. 45

The Court held that the OSH Review Commission possessed no more power other than to perform a role as a neutral arbitrator. 46 But it did specifically limit its holding:

We emphasize the narrowness of our holding. We deal in this case only with the division of powers between the Secretary and the Commission under the OSH Act. We conclude from the available indicia of legislative intent that Congress did not intend to sever the power authoritatively to interpret OSH Act regulations from the Secretary's power to promulgate and enforce them. Subject only to constitutional limits, Congress is free, of course, to divide these powers as it chooses, and we take no position on the division of enforcement and interpretive powers within other regulatory schemes that conform to the split-enforcement structure. 47

This limitation appears to leave open how the principle of deference to an agency's interpretations of its regulations will be applied to MSHA and the Review Commission to the extent that the OSH Act and the 1977 Mine Act are different. 48 When read in conjunction with Christenson's and Mead's restrictions on the application of Chevron deference to less formal interpretations, such as would be in MSHA's Program Policy Manual, its Program Policy Letters Compliance Guides, citations or litigation documents, it would appear that this area of deference may be subject to reevaluation also.


46 Id. at 155 (quoting Cuyahoga Valley Ry. Co. v. United Transp. Union, 474 U.S. 3, 7 (1985)).

47 Id. at 157-58.

48 The Court did not discuss the portions of the legislative history of the OSH Act that would have called into question its ruling as to the scope of the OSH Review Commission's authority. See Lastowka & Sapper, supra note 4, at 109. The OSH Review Commission has narrowly applied this decision, holding that it did not require deference if the Commission was interpreting the OSH Act, as opposed to regulations. Sec'y of Labor v. Arcadian Corp., 17 O.Sh. Cas. (BNA) 1345, 1360-61 (Apr. 27, 1995), aff'd on other grounds, 110 F.3d 1192 (5th Cir. 1997). But see Herman v. Tidewater Pac. Inc., 160 F.3d 1239, 1241 (9th Cir. 1998) (extending Martin to statutory interpretations).
III. DEFERENCE UNDER THE 1977 MINE ACT

A. Case Law Development

When Congress created the Review Commission in the 1977 Mine Act, they made it an agency wholly independent of MSHA. Congress addressed the amount of consideration that the Review Commission should give to MSHA's statutory and regulatory interpretations:

Since the Secretary of Labor is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts.49

The language in the legislative history in reference to “weight” according to MSHA's interpretations appears to mimic that of Skidmore, but not the “controlling” language of Bowles v. Seminole Rock or the subsequent absolutist approach of Chevron. This would suggest that Congress intended a different model than the absolutist one set out in those cases. The Review Commission's early decisions followed this approach, holding that MSHA's interpretations were not entitled to “controlling weight,” i.e., the sort of deference the Courts have given in Chevron and Bowles.

In Old Ben Coal Co.,50 the Commission was addressing the issue of whether the operator of a mine could be cited for a violation caused by its independent contractor. MSHA argued that the Review Commission had no authority to review its decision to cite the operator instead of the contractor. The Commission made it clear that it had an independent role in reviewing MSHA's actions:

Second, we reject the Secretary's attempt to equate the Commission with a court of appeals and have the judicial review provisions of the Administrative Procedure Act, including 5 U.S.C. § 701, applied to Commission proceedings by analogy. The Commission stands in a fundamentally different position in relation to the Secretary than does a court of appeals. The Commission was established as the “ultimate administrative review body” under the Act due to the recognition that “an independent Commission is essential to provide administrative ad-


50 1 F.M.S.H.R.C. 1480, 1483-1485 (1979), aff'd on other grounds, No. 79-2367 (D.C. Cir. 1980).
judication which preserves due process and instills much more confidence in the program.\textsuperscript{51}

In \textit{Helen Mining Co.},\textsuperscript{52} the Review Commission was again asked to defer to MSHA’s interpretation of the 1977 Mine Act which was contained in the Federal Register. Again, the Commission asserted its independence:

We examine at the outset the Secretary’s objection that Judge Merlin failed to accord “proper deference” to MSHA’s interpretative bulletin. The Secretary relies primarily on \textit{Certified Color Manufacturers Ass’n v. Mathews}, 543 F.2d 284, 294 (D.C. Cir. 1974), where the court stated that “review is guided by the considerable deference traditionally owed the interpretation of a statute by the head of the agency charged with its administration”, and \textit{NYS Department of Social Services v. Dublino}, 413 U.S. 405 (1973), where the Supreme Court observed that “the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . .”

The difficulties with the Secretary’s argument are that it ignores the language and structure of the 1977 Act, that it fails to recognize the proper roles of the Commission and the Secretary, and that it would, if adopted, frustrate the purposes for which Congress established the Commission as a wholly independent agency. Under the Secretary’s view, the Commission could not study a problem afresh and make an independent judgment on matters of law and policy. Its task would be little more than to find the facts, accord considerable deference to the Secretary’s position, and determine whether there are compelling indications that his construction of the 1977 Act is wrong. Congress, however, invested the Commission with the authority to decide questions of both law and policy (sections 113(d)(2)(A)(ii) and (d)(2)(B)), and it intended that the Commission do so independently.\textsuperscript{53}

\textsuperscript{51} \textit{Id.} at 1484. \textit{See also LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977}, \textit{supra} note 8, at 635.

\textsuperscript{52} 1 F.M.S.H.R.C. 1796, 1799 (1979), \textit{rev’d on other grounds sub nom.} United Mine Workers of Am. v. F.M.S.H.R.C., 671 F.2d 615, 618 (D.C. Cir. 1982).

\textsuperscript{53} \textit{Id.} at 1798-99 (quoting NYS Dep’t of Soc. Serv. v. Dublino, 413 U.S. 405 (1973); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 381 (1969); and Dandridge v. Williams, 397 U.S. 471, 481-482 (1970)). On appeal, the majority did not resolve the issue of deference but the dissent discussed the issue at some length. United Mine Workers of Am. v. F.M.S.H.R.C. (Helen Mining Co.), 671
But, these decisions predate the decision in *Chevron*, although not that in *Seminole Rock*.

The Review Commission also had, for a number of years, held that MSHA’s policies and guidelines were not binding upon it. This would, of course, suggest that the Review Commission was still free to make its own evaluations of the merits of a particular interpretation or a particular policy. As recently as 1992, the Review Commission reiterated its assertion of independence, distinguishing the Supreme Court’s decision in *Martin v. OSHRC* and asserting its own policy jurisdiction.

But not long after that, the Commission began to withdraw from this position. In 1994, it held that it had independent general policy authority but it also had held previously that its job was not to determine if MSHA’s interpretation was correct but simply to determine if MSHA’s interpretation was “reasonable.”

This change in position was solidified after the decision in *Energy West Mining Co. v. F.M.S.H.R.C.* by the United States Court of Appeals for the District of Columbia Circuit. There, the Review Commission had determined that MSHA’s interpretation of its own regulations on accident reporting was “reasonable” and, despite the fact that the regulation required the reporting of non-work related injuries on mine property and was not necessarily the best method of tracking work-related injuries, it upheld the regulation. The Court of Appeals then upheld MSHA’s interpretation and addressed the issue of the standard of review by the Review Commission of MSHA’s interpretation. It held that the Commission was simply to determine if MSHA’s interpretation was “reasonable” i.e., the *Chevron* standard.

The Commission has continued its retreat from a position as an independent reviewing body in the face of other decisions by the United States Court of Appeals that where MSHA and the Review Commission are in conflict, the

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F.2d at 622-23 & n.26. The dissent indicated that the policy authority of the Review Commission suggested its interpretations should be accorded weight even if it disagreed with MSHA. *Id.* at 635 (Tamm, J., dissenting).

55 Drummond Co., Inc., 14 F.M.S.H.R.C. at 675 n.15.
58 40 F.3d 457 (D.C. Cir. 1994).
60 *Id.*
61 *Energy W. Mining Co.*, 40 F.3d at 462.
Review Commission must defer to MSHA.\(^6\) Perhaps the most extreme extension of the doctrine in these cases occurred in *Secretary of Labor obo Wamsley v. Mutual Mining Inc.*,\(^6\) where MSHA sought deference to its position that unemployment compensation benefits should not be deducted from backpay awards to miners when received under the discrimination provision under Section 105(c) of the 1977 Mine Act. The evaluation of judicial-style remedies for discrimination would appear to be logically within the province of the agency with adjudication responsibility, just as the imposition of civil penalties are within the expertise of the Review Commission.\(^6\) The Review Commission’s administrative law judge had ruled, based on Review Commission precedent,\(^6\) that such benefits were deductible. This ruling was based, in part, on the Review Commission’s authority under the 1977 Mine Act to decide what relief is appropriate in discrimination cases.\(^6\)

Despite this statutory delegation of authority, the Court of Appeals deferred to the Secretary’s “interpretation.” The Court relied upon the fact that the Secretary was given rulemaking authority under the 1977 Mine Act, although MSHA had promulgated no rules on the issue of back pay or even civil penalties in discrimination suits.\(^6\) But even if it had, the Commission assesses penalties *de novo* despite MSHA civil penalty regulations and was clearly viewed by Congress as having the ability to freely adjudicate remedies.\(^6\) The Court also relied upon the Supreme Court’s decision in *Martin v. OSHRC*\(^6\) to support its decision.\(^7\)

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\(^6\) 80 F.3d 110 (4th Cir. 1996).

\(^6\) 30 U.S.C. § 820(k) (2000) (stating that no contested penalty shall be compromised, mitigated or settled without approval of Commission); *see also Sellersburg Stone Co.*, 5 F.M.S.H.R.C. 287, 290 (1983), *aff’d* 736 F.2d 1147, 1153 (7th Cir. 1984) (stating that penalties will be assessed *de novo* by the Review Commission).


\(^6\) *Cf. Reich v. Arcadian Corp.*, 110 F.3d 1192, 1199 (5th Cir. 1997) (declining to accept OSHA’s interpretation of penalty provisions).


\(^7\) *Sec’y of Labor obo Wamsley v. Mut. Mining Inc.*, v. 80 F.3d 110, 114. As discussed below, that decision is distinguishable because of the different language in the OSH Act. *See United Mine Workers of Am. v. F.M.S.H.R.C.*, 671 F.2d 615, 635 (1982) (Tamm, J., dissenting); Drum-
The Review Commission generally has now come to follow the application of Chevron deference with respect to both statutory and regulatory interpretation. There have been occasions, however, when various Commission members have set forth a position which does not accept an absolutist Chevron deference, but such instances have been relatively rare.

Recently, one member questioned the application of the deference doctrines to the Review Commission. In a case where the Review Commission's administrative law judge squarely confronted the issue and rejected deference, one Commissioner, in dissent also adopted such approach:

I believe that the reasoning set forth in Helen Mining is as valid today as when written, and was not superseded by Chevron when that decision was handed down in 1984. Chevron deference principles were tailored by the Supreme Court for other federal courts of general jurisdiction. The Chevron decision itself drives this point home, a decision in which the federal courts were faced with the task of reviewing a highly complex regulatory program promulgated by the Environmental Protection Agency. . . . In Chevron, the Court recognized that the federal courts must not become mired in detailed review of such programs. . . .

The Commission, however, is not a federal court of general jurisdiction, as the judge correctly pointed out. Under the plain terms of the Mine Act, the Commission is a specialized body, 30 U.S.C. § 823(a), charged by Congress with the specialized tasks of "assessing civil penalties for violations of safety and health standards, [of] reviewing the enforcement activities of the Secretary of Labor, and [of] protecting miners against unlawful discrimination." Nomination Hearing Before the Senate Committee on Human Resources, 95th Cong. at 1 (1978). It is at the very heart of our statutorily mandated purpose to con-

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cern ourselves with detailed review of the Secretary’s programs, and even more so, interpreting the Mine Act.\textsuperscript{74}

\textbf{B. Application of the Deference Doctrines Ignores the Language and Structure of the 1977 Mine Act}

There are a number of problems with the reasoning that has resulted in an absolutist approach to deference under the 1977 Mine Act. It ignores the unique nature of the Commission under the Mine Act. It ignores the policy-making authority of the Review Commission and the Supreme Court’s recognition of that policy-making authority and the Review Commission’s independent status.

The 1977 Mine Act confers a policy role on the Review Commission, which is inconsistent with deference to MSHA under the \textit{Chevron} model of deference based on the theory of delegation of policy making authority to an agency. Section 113(d)(2) of the 1977 Mine Act states several times that the Review Commission is to review questions of “Commission policy” and “novel questions of policy,” as well as questions of “law.”\textsuperscript{75} Congress even authorized the Review Commission to review cases when no party has sought review.\textsuperscript{76}

The legislative background and history of the 1977 Mine Act confirm the implication that Congress did not expect the Review Commission to simply be a neutral arbitrator of facts. The 1969 Coal Act had given all administrative functions to the Secretary of the Interior, who had established an enforcement arm, the Mining Enforcement Safety Administration, and an adjudication arm, the Interior Board of Mine Operations Appeals which acted independently and did not defer to the enforcement arm.\textsuperscript{77} When amendment of the 1969 Coal Act was considered in 1977, the House and Senate approached it differently, with the House passing a bill where all the functions were contained within the Department of Labor and the Senate adopting a split enforcement approach.\textsuperscript{78} The House, in fact, rejected a proposal to establish an independent body with policy-

\textsuperscript{74} Cyprus Cumberland Res. Corp., 21 F.M.S.H.R.C. 722, 737 (1999) (Verheggen, J., dissenting) (footnote omitted). Helen Mining Co., 1 F.M.S.H.R.C. 1796, 1801 (“Resolution of . . . questions [of statutory interpretation] is a primary role of the Commission.”). In addition to the Judge in \textit{Cyprus Cumberland Resources}, at least one of the Commission’s administrative law judges has questioned the rote application of the doctrine. \textit{See, e.g.}, Tilden Mining Co. L.C., 24 F.M.S.H.R.C. 53 (2002).


\textsuperscript{76} \textit{Id}.

\textsuperscript{77} \textit{See Lastowka & Sapper, supra} note 4, at 113.

\textsuperscript{78} \textit{Id}. at 113-14.
review authority.\textsuperscript{79} The Senate version was accepted in conference by both Houses of Congress.\textsuperscript{80}

As discussed earlier, the Senate committee stated the reasons for the establishment of an independent review body — "an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program."\textsuperscript{81}

The Supreme Court evaluated the role of the Commission in Thunder Basin Coal Co. v. Reich.\textsuperscript{82} Thunder Basin involved an attempt by the United Mine Workers of America ("UMWA") to designate two of its miners who did not work for a mine operator, to serve as miners’ representatives under Section 103(f) of the 1977 Mine Act.\textsuperscript{83} This was permissible under MSHA’s regulations.\textsuperscript{84} Such representatives exercise certain rights, including the right to accompany inspectors and to point out safety violations.\textsuperscript{85} The UMWA was engaged in organizing efforts in the area. Thunder Basin sought an injunction barring MSHA’s enforcement of the regulations concerning such representatives, and the Supreme Court was asked to rule on the issue of whether Thunder Basin could bring suit outside the Review Commission process.

In rejecting Thunder Basin’s position that it need not accept a citation to challenge MSHA’s position, the Court found that the Commission was "established as an independent-review body to ‘develop a uniform and comprehensive interpretation’ of the Mine Act,"\textsuperscript{86} cited Congress’s authorization to the Commission to review policy questions,\textsuperscript{87} and stated that the Commission could bring its expertise to bear on statutory questions under the 1977 Mine Act.\textsuperscript{88} It even held that the Commission, unlike the typical administrative agency, was uniquely situated to adjudicate the constitutionality of its enabling legislation.\textsuperscript{89}


\textsuperscript{82} 510 U.S. 200, 209-11 (1994).


\textsuperscript{84} See, e.g., 30 U.S.C. § 813(f-g) (2000); Thunder Basin Coal Co. v. F.M.S.H.R.C., 56 F.3d 1275, 1278 (10th Cir. 1995); Utah Power & Light Co., 897 F.2d at 447.

\textsuperscript{85} Utah Power & Light Co. v. Sec’y, 897 F.2d 447 (10th Cir. 1990); 30 C.F.R. § 40.1 (2001).

\textsuperscript{86} Id. at 214 (quoting Senator Williams’ remarks at the nomination hearings).

\textsuperscript{87} Thunder Basin Coal Co., 510 U.S. at 208 & n.9.

\textsuperscript{88} Id. at 214-15.

\textsuperscript{89} Id. at 215.
Thunder Basin appeared to presage the end of Chevron-style deference under the 1977 Mine Act. But it did not.

The Court of Appeals and the Review Commission have ignored Thunder Basin in favor of the decision under the OSH Act in Martin v. OSHRC. But that ruling may not be automatically transferable to the Commission because the OSH Act does not expressly grant any comparable policy jurisdiction to the OSH Commission.

Judge Tamm in his dissent in United Mine Workers v. FMSHRC noted the inapplicability of decisions under the OSH Act to situations under the 1977 Mine Act:

The Congress clearly divided the lawmaking and policymaking functions between the Secretary of Labor and the Commission, and it is apparent that some deference is owed a decision of the Commission even when it diverges from the position of the Secretary. The analogy noted by the Commission between the policymaking structure under the FMSA and that under the Occupational Safety and Health Act (OSHA) is distinct, and cases articulating the relationship between the Secretary of Labor and the Occupational Safety and Health Review Commission are accordingly apposite in the FMSA context. The Commission concluded that the Secretary's views were to be accorded “special weight,” and that standard seems about right, albeit a bit amorphous. The critical point, however, is that the Commission's construction of its governing statute must be accorded some weight, even when its position differs from that of the Secretary's; otherwise, the Commission would be “little more than a specialized jury, an agency charged only with fact finding.” I believe that Congress intended a more active role for the Commission.

90 The Review Commission's then-General Counsel L. Joseph Ferrara argued that Thunder Basin supported an independent role for the Review Commission. Ferrara, supra note 4, at 6.07. See also 1 Mine Safety and Health News 240 (May 20, 1994) (Interview of the commission chairman).

91 See Southwest Gas Corp. v. F.E.R.C., 40 F.3d 464 (1994).


93 Id. at 152-56.

94 671 F.2d 615, 627 (1982).

95 Id. at 635 (footnotes omitted).
Judge Tamm’s discussion of the issues is, of course, consistent with the Supreme Court’s recognition of the “multifarious administrative action” in *United States v. Mead Corp.*

C. The Problems with Deference Under the 1977 Mine Act

1. Concerns About Deference Generally

There are a myriad of problems with the application of the deference doctrines generally that have been discussed and commented upon at length. For example, there are several other important conceptual and constitutional issues raised by *Chevron* and *Bowles v. Seminole Rock*. One is the extent to which the *Chevron* approach is consistent with the premise of *Marbury v. Madison* that the courts have the primary role in interpreting statutes. One may also question the implicit assumption in *Chevron* that Congress has unfettered authority to require the courts to defer to and enforce an agency’s view of the statute, a concept with separation-of-powers implications.

*Chevron* raises fundamental issues as to the balance of power among the three branches of government. The fact that a statute is ambiguous does not necessarily mean that there is no role for a court in reviewing the statute and legislative history to determine whether the agency’s action is contrary to the intent of Congress. While *Chevron* assumes that policy issues should be left to elected officials, it is arguable that modern administrative agencies are subject to effective controls by either the President or Congress. Presidential administrations come and go while agency employees do not. By tilting so heavily in favor of deference to the administrative agencies, *Chevron* may fail to provide needed safeguards against agency abuses of power and, in the process, may denigrate the role of both the judicial and the legislative branches of government.

The use of the absolutist doctrines of *Chevron* or *Bowles* ignores the fundamental nature of administrative agencies. They are not unbiased impartial

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99 *See Chevron*, 467 U.S. at 865.
100 *But see* Merrill & Hickman, supra note 13, at 861. The authors asserted that agencies are more politically accountable than the courts. This is arguable since the decisions of lower court judges are held up to the scrutiny of higher courts while agencies’ actions increasingly are not. Agencies, however, are far less accountable than the Congress or a presidential administration.
101 *See, e.g.*, Merrill & Hickman, supra note 13, at 866.
arbiters. They are advocates, and they seek to expand their own authority and responsibility on a continual basis. This is especially true of the agencies, such as MSHA, which have a relatively narrow scope of regulation.

Judge Weis of the Third Circuit commented upon the bias inherent in the regulatory process:

Nor is the Director a completely objective interpreter of the regulation. His role is multi-faceted—he must draft regulations, apply them to individuals, and as their opponent, defend his construction on appeal. The bias of his position must be placed on the scales, as would that of any other litigant.

Lewis Carroll’s Alice in Wonderland is a frequently cited source of authority on and about the judicial process, an association with tempting opportunities for digression that I shall resist here. But the Director’s position is similar to that of Alice’s friend:

“When I use a word,” Humpty Dumpty said, in a rather scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.” 102

In an interview with Judge A. Raymond Randolph of the District of Columbia Circuit of the Court of Appeals,103 the Judge104 questioned the widespread use of the deference doctrines:

To me, the abiding principle for American democracy and American law is that no government official, under any circumstances, in any place, always has unfettered discretion to do whatever he wants. Everybody operates under some constraints. Administrative agencies are therefore constrained. And the role of the courts is to make sure the agencies keep within proper bounds. This is where you begin to get into some controversy,

102 Dep’t of Labor v. Mangifest, 826 F.2d 1318, 1334 (3d Cir. 1987) (Weis, J., concurring) (quoting L. CARROLL, ALICE’S ADVENTURES IN WONDERLAND (1865)).


104 Judge Rudolph was appointed in 1990 by President George H.W. Bush.
at least in my mind, because the effectiveness of the judicial check is dependent upon such things as theories of statutory interpretation.

For example, there is the idea that we ought to defer to administrative agencies in a very broad range. To the extent we do, the judicial check on agency action is weakened. And to that extent, it seems to me, we are antidemocratic. It is true that the agencies may be policy-making bodies while the courts generally are not, but the ultimate policy-making body is the one that's responsive to the electorate, which is Congress.

*And so we get cases that make me wonder about the way the system is moving.* To give you a non-specific example, take a case where an administrative agency has to interpret a statute. And what you see is the work of what appears to be a young lawyer on the staff, who has read the legislative history, analyzed committee reports, and perhaps looked at some letters congressmen sent — although they are not in the record. A conclusion is then reached by this lawyer about what a particular phrase or statute means, and that becomes adopted by the agency as part of a particular regulation or in some adjudication.

Then it comes before us, and we are told that maybe we shouldn’t even look at the legislative history or we’re told that we have to defer to the administrative agency’s interpretation. Frankly, I’m troubled by this. I think that after some period of time the judges on our court are probably far more expert in interpreting statutes than a particular staffer for an administrative agency. And besides, that’s what we’re supposed to be doing. That’s what federal courts are for. *So I wonder whether we have gone far too far in terms of the principle of deference to the agencies.* In my judgment, fidelity to our office does not require deference to a particular construction of a statute merely because it comes from an administrative agency.

Another problem is that agencies often reach an interpretation without articulating any basis for it at all. In fact, they don’t even know they reached an interpretation. They just assume something in terms of writing an adjudication with an adjudicatory response to a particular problem or promulgating a regulation. There is no rule that requires any kind of long explanation of why or how a particular result was reached.
To my mind, uncritical deference poses a danger to the democratic system.  

The application of a deference standard essentially authorizes agencies to make law through policy and guidelines without resort to notice and comment rulemaking.  

Deference may well be in violation of the Administrative Procedures Act’s direction that a reviewing court shall determine the meaning and applicability of agency action. It creates a powerful incentive for an agency to issue vague regulations. The doctrines permit an agency to create, in effect, a new regulation by simply reinterpreting a vague or general regulation. Whether intentional or not, agencies are encouraged by the doctrines to promulgate vague, general regulations, regulatory “mush” in one court’s view, since there will be limited review of what they decide is a proper “interpretation.”

2. Concerns About Deference to MSHA

The problems are compounded under the 1977 Mine Act and many of the hypothetical concerns of commentators are, in fact, present in the MSHA context. MSHA has been as aggressive as any agency in trying to extend the scope of the application of the deference doctrine before the Commission. For example, an agency’s jurisdiction is one of the areas where deference is not necessarily considered appropriate. On any number of occasions, MSHA has

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105 Cole, supra note 103, at 53-54 (emphasis added).
106 Anthony & Asimow, supra note 40, at 21.
108 Anthony & Asimow, supra note 40, at 10-11; Lastowka & Sapper, supra note 4, at 125-26; Merrill & Hickman, supra note 13, at 900.
109 Anthony & Asimow, supra note 40, at 11; Molot, supra note 97, at 105-07. One Court described this as creating “perverse incentives for an agency to draft vague regulations that give inadequate guidance.” Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997).
111 Paralyzed Veterans of Am., 117 F.3d at 584.
sought to expand its jurisdiction into areas which arguably are not within its scope.\textsuperscript{113}

MSHA has also gone so far as to pursue deference in areas that are clearly within an adjudicator's scope of responsibility. It has argued that the Commission should defer to its concept of remedies under the anti-discrimination provisions of the 1977 Mine Act.\textsuperscript{114} It has argued that the Review Commission should defer to its interpretation of what is an "agent" under the 1977 Mine Act under a multi-factor test developed by the Commission,\textsuperscript{115} seeking, in effect, to take over the adjudicative function of applying the Commission's test.

\begin{itemize}
\item \textit{a. There Needs to be an Adequate Check on MSHA's Authority}
\end{itemize}

MSHA has extraordinary enforcement authority. It is usually exercised, not at an upper level of the agency, but at the inspector level.\textsuperscript{116} An individual inspector has authority to issue immediately effective orders requiring the withdrawal of miners from an area or a whole mine when certain preconditions are met, such as the perception by an individual inspector that an imminent danger exists,\textsuperscript{117} a failure to abate a previously cited condition exists,\textsuperscript{118} or when certain other events have occurred, including some where no significant hazard exists.\textsuperscript{119}

\begin{itemize}
\item \textsuperscript{115} Martin Marietta Assoc., 22 F.M.S.H.R.C. 633, 637 (2000).
\item \textsuperscript{116} A citation which changes a longstanding enforcement practice may be the product of the "thought processes of one individual" and may be contrary to MSHA's longstanding practice and MSHA may still adopt it in litigation. Tilden Mining Co. L.C., 24 F.M.S.H.R.C. 53, 61 (2002). The inspector there was not even following MSHA's guide to equipment guarding. The inspector's position was "not in harmony with MSHA's long-standing agency practice." \textit{Id}.
\item \textsuperscript{117} 30 U.S.C. § 817(a) (2000).
\item \textsuperscript{118} 30 U.S.C. § 814(b) (2000).
\item \textsuperscript{119} 30 U.S.C. § 814(d)(1) and (d)(2) (2000). By way of contrast, OSHA inspectors exercise no such authority. Individual OSHA inspectors do not issue citations and OSHA has no withdrawal
Citations, which do not require the immediate withdrawal of miners, are based only upon an inspector's "belief" that a violation occurred. Abatement of such citations is required long before any review of the enforcement action can realistically take place. Even an expedited hearing before an administrative judge of the Review Commission requires four-day notice to MSHA. Temporary relief is only available on a limited basis and is not available for citations, as opposed to withdrawal orders.

In addition, MSHA's inspectors' presence at mines, especially underground coal mines, is constant. Four inspections of underground mines and two of surface are required each year, and such inspections usually involve multiple days. Frequent spot inspections also occur. There are no search warrant requirements that apply to mines.

The omnipresent nature of MSHA's inspections and the potential for immediate order of cessation of operation require a different perspective from a reviewing tribunal, not only to properly afford due process but also to prevent the perception of arbitrariness from developing. If a regulatory system is perceived as arbitrary and unfair, it loses its effectiveness. Unless effective review of the agency's actions is provided, the perception that the regulatory system is unfair and arbitrary cannot be avoided. The use of the doctrines of deference makes it appear that the system is arbitrary and undermines the goal of protecting miners. If the system is arbitrary, it undermines voluntary compliance which is essential to achieving the 1977 Mine Act's goals because even if inspectors are at a mine every day, they cannot watch every miner and every supervisor.

When the OSH Act was passed, there was a concern about concentrating powers within one agency. Senator Jacob Javits, another one of the architects of the OSH Act, noted that:

order authority. An employer can stay abatement of any citation if it contests it. See Mark A. Rothstein, Occupational Safety and Health Law §§ 251, 292, 318 (1998).

121 29 C.F.R. § 2700.52(b) (2001).
122 29 C.F.R. § 2700.46(a) (2001).
123 See, e.g., Cyprus Cumberland Res., Corp., 20 F.M.S.H.R.C. 285 (1998), rev'd 21 F.M.S.H.R.C. 722 (1999) (stating that in a 90-day period MSHA inspectors traveled the main haulage at this underground mine over 200 times). MSHA routinely spends 2000 inspection hours at underground coal mines as shown by a compilation it develops each year called "National-500 Mines with Most 104(a) S&S Citations" which includes on-site inspection hours.
127 Johnson, supra note 5, at 318.
Hearing and determination of enforcement cases by an independent panel more closely accords with traditional notions of due process.\textsuperscript{128}

A similar concern also exists with respect to MSHA except there is greater cause for it. MSHA has far more enforcement powers than OSHA and actually inspects all worksites. The additional enhancement of the authority in this one agency that is permitted by the deference doctrines creates a great potential for arbitrariness and unfairness.

\textit{b. The General Nature of MSHA’s Regulations and MSHA’s Inconsistent Enforcement Require Independent Review}

In addition to the omnipresence of the inspection force and MSHA’s extraordinary enforcement authority, there are difficulties created by the vagueness of the regulations MSHA has promulgated and how MSHA enforces them, especially the inconsistency of MSHA’s interpretations that suggest that an absolutist approach is not appropriate.

Many of the regulations MSHA has promulgated are vague and general. A number of commentators have expressed concern that applications of deference permit an agency to misuse its rulemaking authority by promulgating vague regulations that it then interprets.\textsuperscript{129} This concern is very realistic when MSHA’s regulations are considered.

For example, MSHA has regulations that require identification of “hazardous” conditions,\textsuperscript{130} “safe access” to worksites\textsuperscript{131} or maintenance of equipment free of “defects,”\textsuperscript{132} without defining those terms or providing any indication as to what conditions constitute a violation or what abatement is required. These regulations give MSHA wide latitude in interpretation and enforcement. For example, the regulations concerning absence of “defects” are interpreted to require the maintenance of manufacturers’ provided safety devices, even if MSHA itself does not specifically require the devices.\textsuperscript{133} Many of the regula-

\textsuperscript{128} Id. (quoting S. REP. No. 91-1282, reprinted in 1970 U.S.C.C.A.N. 5177, 5218 (1970)).

\textsuperscript{129} See, e.g., Molot, supra note 97, at 105-07. See also Shalala v. Guernsey Mem’l Hosp., 514 U.S. 87, 108 (1995) (O’Connor, J., dissenting) (stating that Secretary of Labor’s interpretations suggest she failed to fulfill her statutory rulemaking obligation).

\textsuperscript{130} 30 C.F.R. § 75.360 (2001).

\textsuperscript{131} 30 C.F.R. § 56.11001 (2001).

\textsuperscript{132} 30 C.F.R. §§ 56.14100(b), 75.1725(a) (2001).

tions have been read to require the use of a "reasonably prudent person" test to preclude a finding of unconstitutional vagueness.134

But the more troubling aspect of such regulations is the latitude they permit MSHA for inconsistency of enforcement. For example, in a case involving one of MSHA's guarding regulations,135 MSHA argued that the equipment in question should be guarded to prevent all possible contact, not just inadvertent or accidental contact. The standard is a generic one that reads as follows:

Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.136

The inspector believed that a guard should even protect against deliberate attempts to circumvent it, which of course, is not possible.

The guards that were in place on some of the equipment that was cited had been constructed at the direction of an MSHA inspector in the 1980s. While the operator ultimately prevailed in that case, it had to abate the citations long before its case was heard and decided. Adding the attempted use of the deference doctrine onto this sort of scenario only creates the belief that the regulatory system is unfair.

Another example of MSHA's inconsistent and unfair enforcement approach can be found in The Doe Run Co..137 There the standard issue required the provision of two escapeways from the lowest "levels" of an underground lead mine. The case involved three mines which had been in existence for a number of years and which had been inspected by MSHA four times a year throughout their existence. In September 1999, MSHA developed a new interpretation of what was meant by the term "level" and issued citations to the mines which required them to redesign how they provided escapeways at substantial cost. The judge found the standard ambiguous and deferred to MSHA's interpretation.138 He stated as follows:

138 Id. at 1249, 1251.
In adhering to this policy [of deference], we occasionally defer to "permissible" regulatory interpretations that diverge significantly from what a first-time reader of the regulations might conclude was the "best" interpretation of their language. Cf. American Fed. Gov't Employees v. FLRA, 778 F.2d 850, 856 (D.C. Cir. 1985) ("As a court of review . . . we are not positioned to choose from plausible readings the interpretation we think best." (internal punctuation and citation omitted)). We may defer where the agency's reading of the statute would not be obvious to "the most astute reader." Rollins, 937 F.2d at 652. And even where the petitioner advances a more plausible reading of the regulations than that offered by the agency, it is "the agency's choice [that] receives substantial deference." 139

He held that both the operator and MSHA's interpretations were reasonable, but accepted MSHA's, despite the fact that such interpretation was not necessarily evident in a first reading of the standard or even the best interpretation. 140 Such an approach can only create the impression of arbitrariness and unfairness in the use of deference as well as in the regulatory system generally.

The judge further held that MSHA had not given the operator notice of its interpretations and, in fact, had two prior formulations of its interpretation and had arrived at the one he accepted only during the course of the litigation. 141 This too cannot impress upon the operator the validity of the regulatory system.

If it is thought that case was an isolated occurrence, in Akzo Nobel Salt, Inc. v. FMSHRC, 142 MSHA argued that the Court of Appeals should defer to its interpretation of another portion of the regulation with respect to escapeways in underground metal/nonmetal mines when it had only adopted that interpretation after the Review Commission rejected the interpretation MSHA espoused before the Commission. 143 In addition, the Secretary there offered up at least one other previous interpretation of the standard. While the consistency of an agency's interpretation is supposed to be a factor in determining if an agency's interpretation is reasonable, 144 the Court in Akzo Nobel simply remanded the case so MSHA could make up its mind. 145

139 Id. at 1251-52 (quoting Gen. Elec. v. EPA, 53 F.3d 1324, 1327 (D.C. Cir. 1995)).
140 Id. at 1252.
141 Id. at 1254-55.
142 212 F.3d 1301 (D.C. Cir. 2000).
143 Id. at 1304.
Such inconsistency is not isolated and bedevils regulation under the 1977 Mine Act. But the problems with MSHA’s use of regulations do not end with the general vagueness or its inconsistency. On occasion, it does exactly what the commentators were concerned with: it changes the meaning of a generally worded standard radically without resorting to rulemaking. In *Hibbing Taconite Co.*, it tried to do it by policy memorandum. In *Keystone Coal Mining Corp.*, it sought to do so by internal memorandum and enforcement procedures.

IV. CONCLUSION

The legislative history of the 1977 Mine Act shows that it was Congress’s intention to create an independent agency that would review MSHA’s actions and interpretations. Congress also delegated policy making authority to the Commission as well as to MSHA. Such an arrangement is unusual and defies easy characterization as coming within the deference parameters set out in *Chevron, Bowles v. Seminole Rock* or *Martin v. OSHRC*.

It appears that, despite Congress’s clear intention to make the mine regulatory system credible and fair by requiring independent review of MSHA’s actions, the application of deference doctrines has resulted in the Review Commission having less independence than its predecessor captive tribunal.

The Supreme Court has indicated in *United States v. Mead* that it will address the various types of administrative constructs that Congress might create on a case-by-case basis. In the modern world of the administrative state, there is a need for courts and other tribunals to serve as a check-and-balance upon administrative agencies who otherwise have little reason to curb their excesses. In MSHA’s case, the application of deference doctrines increases the power of a regulatory agency that already has extraordinary authority. All MSHA has to do is argue that there is ambiguity in the regulations it promulgates and it can rely


145 212 F.3d at 1305.

146 See also Air Prods. & Chems., Inc., 15 F.M.S.H.R.C. 2428, 2435 & n.2 (1993) (recognizing that identical cogeneration facilities were treated differently by MSHA in that it asserted jurisdiction at one but not the other).


149 Lastowka & Sapper, supra note 4, at 117.

150 Johnson, supra note 5, at 345 (independent adjudication may balance the over aggressiveness of rulemaking); Molot, supra note 97, at 105-07.
upon showing that its interpretation is "reasonable," which is not a very difficult task.\footnote{Lastowka & Sapper, supra note 4, at 118.}

It is appropriate for the Review Commission and the Courts of Appeals to re-evaluate what has become an automatic invocation of deference. It can be argued that no deference and no weight should be accorded MSHA's interpretations before the Commission. The Review Commission has the expertise, experience, and policy authority to evaluate cases on a "level playing field."

But if that is not acceptable, it would seem appropriate to adopt the middle ground used by the Supreme Court in United States v. Mead in applying the principles outlined in Skidmore v. Swift: assign the agency's interpretation weight only to the extent that the agency can demonstrate that its interpretation is persuasive, that it is, in fact, the "best" interpretation. If an agency is unable (or unwilling) to do that, then it should be treated like any other litigant.

The oft-repeated argument that the agency is uniquely qualified to make policy or interpret a law in an area that is complex and technical simply does not pertain to the 1977 Mine Act. The Review Commission has a body of experience and knowledge because of the backgrounds of its Commissioners, as well as the fact that all of its work is carried out within the narrow confines of the mining industry. This confirms that it is properly positioned to serve as a proper check and balance to MSHA's statutorily-driven regulatory zeal. The Review Commission is not in the same position as a court that may be afraid to try to understand a complex technical subject area.\footnote{See Merrill & Hickman, supra note 13, at 861 (stating that the 1977 Mine Act applies to "discrete" employment sector whose membership is "homogenous").}

The Commission deals with the same sorts of issues as MSHA, and there is no evidence that it is incapable of understanding mine safety and health regulation.

Even use of a Skidmore-type principle would provide an independent interpretive check on the agency because it places the burden of persuasion on the agency, and it would encourage regulatory clarity by placing or emphasis over clear accounts of regulatory meaning.\footnote{Johnson, supra note 5, at 343 ("The health and safety hazards to which mining exposes its workers tend to be the same, wherever the mine is located."). It should be noted with regard to the technical complexity argument that if an agency cannot explain its policy choices to an intelligent lay person, one is caused to wonder if that policy should be adopted or that the agency truly understands its own position.}

Some method of balancing MSHA's authority must be in place. The Review Commission should not be permitted to abdicate its role as an independent reviewer of the agency's action, and the Courts should not be permitted to overlook the vital role the Commission plays.\footnote{Manning, supra note 110, at 687-88, 695.}