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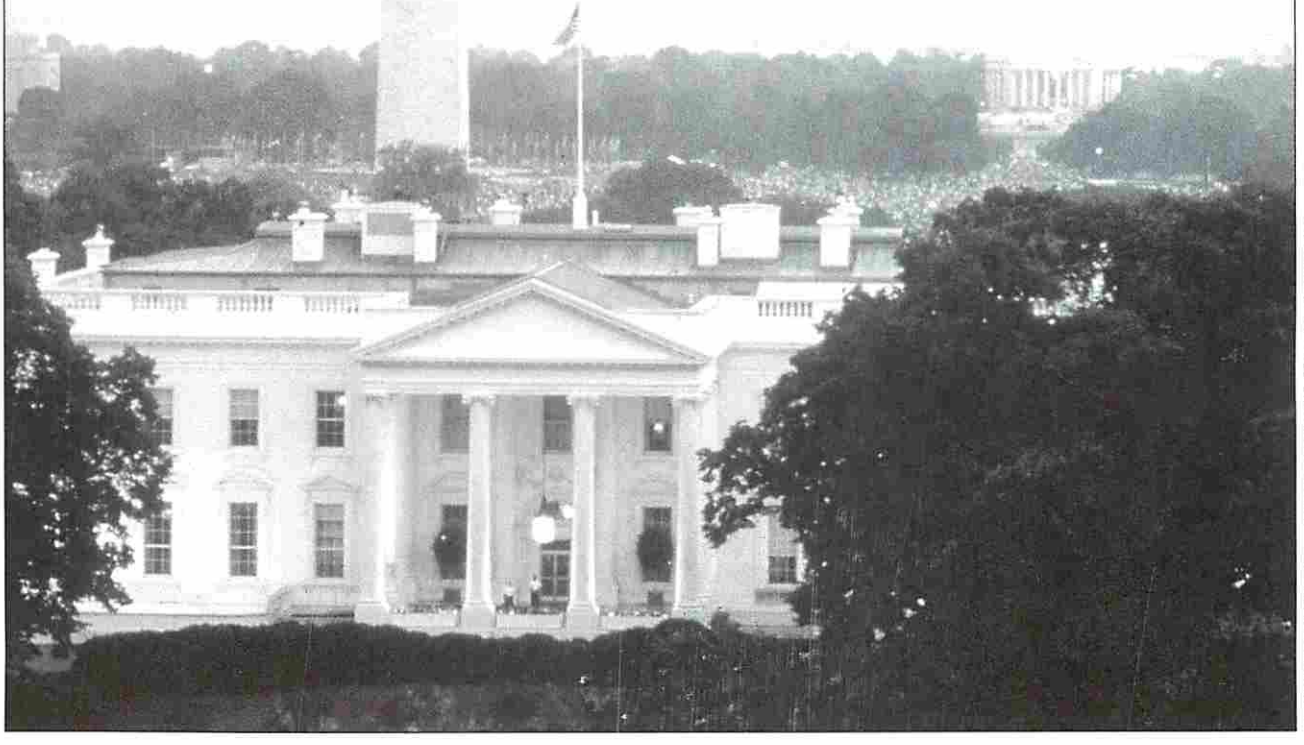

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In This Issue

Re-reading *Smiley*: What Constitutes An "Official Agency Position"?

*by Eric H. Singer**

A shift in an agency's interpretation of a statute that the agency fails to acknowledge or explain is unlawful. But if that is elementary doctrine, what exactly are the threshold formats in which an agency's interpretation must first appear before an unexplained switch from that interpretation can be deemed unlawful? Undoubtedly, an agency decision that is based on one set of facts and that contradicts, without justification, an agency interpretation contained in an earlier formal adjudication based on the same or substantially similar facts will be successfully challenged as arbitrary. Far less certain is whether earlier interpretations contained in more casual formats like agency opinion letters and memoranda are sufficiently "official" such that unexplained deviations from *them* might be viewed as unlawful as well.

That these more casual formats "do not warrant *Chevron*-style deference, " as decided in *Christensen v. Harris County*, 529 U.S. 576, 586 (2000), is a separate matter. Regardless of how much deference they may qualify for, they can still prove "official" for purposes of judging whether an unexplained shift away from any interpretation they may contain is permissible under *State Farm*. The only question is: "When?"

"Official Agency Position"

The Supreme Court's decision in *Smiley v. Citibank, N.A.*, 517 U.S. 735 (1996), now five years old, sheds some important light on this question, although that light is obscured by that case's broader application of *Chevron*. The question in *Smiley* was whether section 30 of the National Bank Act of 1864, 12 U.S.C. § 85, authorized national banks to charge late payment credit card fees, as distinguished from "interest," that were lawful in the bank's home state but prohibited in the state where the cardholders reside. The statute spoke to "interest" only, not to late fees. As the related litigation against the national banks coursed its way through the divided state courts below, the Office of the Comptroller of the Currency (OCC), pursuant to notice and comment, proposed and later adopted regulations indicating that the term "interest" did encompass credit-card late fees.

Petitioner argued against according the OCC rule *Chevron* deference on several grounds, two of which bear noting here. The first was that the interpretation contained in the rule was prompted by litigation, including the very suit before the Court. Writing for a unanimous Court, Justice Scalia found that did not matter, because the interpretation was, at the end of the day, embodied in a regulation:

> Of course we deny deference to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice . . . . The *deliberateness* of such positions, if not indeed their *authoritativeness*, is suspect. But we have before us here a full- dress regulation, issued by the Comptroller himself and adopted pursuant to the notice- and-comment procedures of the Administrative Procedure Act designed to assure due deliberation . . . *Id.* at 741 (emphasis added) (internal citations and quotations omitted).

Second, Petitioner argued against *Chevron* deference because the OCC regulation deviated with the Comptroller's prior letter interpretations on the credit card late fee charge matter. The Court instructed, following *State Farm*, that only sudden and unexplained change may prove invalid, but not change *per se*. In any event, and most important, the Court rejected Petitioner's view that the OCC's regulations represented a change *at all*.

In the Court's more precise words, "[W]e do not think anything which can be accurately described as a change of *official agency position* has occurred here." *Id.* at 742 (emphasis added). The OCC regulation, the Court believed, faithfully reflected other, and more recent, OCC interpretative letters and OCC positions "taken in amicus curiae briefs in litigation pending in many state and Federal courts." *Id.*

The Court's statement carries at least two, related implications. They are not shocking, but they are not unimportant either. First, documents like interpretative correspondence and *amicus curiae* briefs *must* constitute "official agency position" before the courts can consider whether an agency has irrationally embraced other interpretations. Second, such "lesser" formats *can*, in principle, constitute "official agency position." In *Smiley*, the ones the Court looked to *did* constitute official agency position; those to which the Petitioner referred did not.

Deliberateness and Authority

But by what standards are courts to determine whether

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these informal formats *do* constitute "official agency position"? The Court's rejection of Petitioner's arguments against *Chevron* deference, noted above, implies a broad, two-dimensional framework.

Petitioner in *Smiley* introduced two older OCC letters in support of her view that the new OCC regulation was impermissibly inconsistent with past interpretations: 1) a 1964 letter from the Comptroller to the President's Committee on Consumer Interests and 2) a 1988 opinion letter from the OCC's Deputy Chief Counsel for Policy. The opinion letter was in response to an inquiry from the Iowa Attorney General's office, which had concluded that late fees provided for in credit card agreements with certain banks violated Iowa usury laws.

According to the Court, neither of these interpretations passed muster as "official agency position." Neither statement, the Court stated,

> was sufficient in and of itself to establish binding agency policy – the former because it was *too informal* and the latter because it only *purported to represent the position of the Deputy Chief Counsel* in response to an inquiry concerning *particular* banks.

Id. (emphasis added).

The Court's language and analysis suggest that two central elements determine whether an agency's interpretation constitutes an "official agency position": deliberateness and authoritativeness. These are the very elements that the Court found *lacking* in these letters. And these are also the very same elements, which, because of their presence, made the OCC's regulation so bulletproof from Petitioner's first contention that it was just an opportunistic litigation position in disguise.

First, the format in which an interpretation is embedded *is* significant in and of itself, inasmuch as it reflects the extent of deliberation that the agency has exercised regarding its interpretation. Recall that a "full-dress regulation," adopted pursuant to notice and comment, maximizes agency deliberation, as the Court stated in *Smiley*. However, dress that is too "informal," like the 1964 letter, as the Court termed it, suggests that the agency may not have deliberated thoroughly enough on its position to be considered "official," even though the letter was signed by the Comptroller himself

Second, *Smiley* noted that whether agency interpretation in lesser formats constitutes official agency position turns on the dimension of *authoritativeness*. The Court did not elaborate, but suggested, through example, that courts would be wise to look at three possible sub-elements: 1) the institutional decision-making or interpretive authority of the document's author; 2) indicia that the views expressed are the agency's, not the author's alone; and 3) indicia that the views expressed apply generally. Thus, the letter from OCC's Deputy General Counsel fell short on this dimension apparently because it emanated from only the Deputy Chief Counsel, not the Chief Counsel or a relevant higher-ranking officer; because it, admittedly, professed to be only "my position," not that of the agency's; and because, addressed as it was to an Iowa audience, it did not even purport to express a view of general or national applicability. Similarly, the Court reaffirmed that "agency litigation positions that are wholly unsupported by regulations, rulings, or administrative practice" are suspiciously non-authoritative, presumably because agency trial counsel do not necessarily speak for the agency's higher ranking decision-makers in charge of daily policy and conduct.

Precedents

As of August 2001, only one lower court has cited to or quoted *Smiley* for its apparent proposition that official agency position must be gauged along the axes of deliberateness and authoritativeness. *See Dunbar v. Glickman*, 90 F.3d 681, 687 n. 11 (2d Cir. 1996) ("undated, unsigned, two-sentence fragment" in a regional USDA office's question-and-answer document could not stand for official USDA policy, which was better "expressed in its regulations and in the other offiical documents in the record").

Still, *Smiley's* implicit approach is consistent with earlier lower court decisions. *New York State Dep't of Social Servs. v. Bowen*, 835 F.2d 360 (D.C. Cir. 1987), offers one early example. There, the Court concluded that New York State could not complain about an apparently unexplained switch in a Department of Health and Human Services (HHS) interpretation because, as in *Smiley*, the Court could not properly say there had been an earlier "official agency position" to begin with. New York contended that pre-1981 internal memoranda within HHS and letters from a HHS regional office "officially interpreted" a statutory scheme to allow for federal reimbursement of the state's foster care services costs. *Id.* at 364. The Court roundly rejected these sources as too informal to constitute official HHS interpretation, viewing one memorandum in particular as informal "in the extreme," in that it "contained no statement of the statutory or regulatory basis for its stated conclusion." *Id.* at 365. This was in stark contrast to what the Court *did* view as the official HHS interpretation articulated in 1981 and contained in an "Action Transmittal," which disallowed reimbursement:

> The 1981 interpretation was predicated on a lengthy memorandum setting forth a thorough analysis of the arguments for and against each position ... After reviewing the various interpretive options, the Acting Commissioner of Social Security opted in favor of the now- challenged interpretation, which was then forwarded to the

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> Office of General Counsel for review and approval. The Commissioner of Social Security duly informed the Secretary of HHS in writing of his position. Finally, and most importantly, the interpretation was thereafter memorialized in an Action Transmittal, which we are informed is one of the established vehicles for the formal memorialization and communication of official agency policy.

Id. at 365-66.

Even agency counsel's litigating position, the D.C. Circuit has suggested, can constitute "official agency position" — provided that position was also expressly embraced by the agency head and done so under the agency's "usual procedures" (or their equivalent) for arriving at agency interpretations so as to assure normal deliberation. In *Federal Labor Relations Authority v. Dep't of Treasury*, 884 F.2d 1446 (D.C. Cir. 1989), the Court ruled that the Office of Personnel Management's (OPM) *amicus* brief embodied the agency's official interpretation of the Privacy Act's "routine use" exception to non- disclosure of personnel information. The Court ruled that it did so, first, because OPM's director "explicitly adopted the view of the amicus brief." *Id.* at 1455. Second, the Court was assured that the Director's adoption reflected normal deliberation. The agency's "interpretive process" in that case – with the OPM legal staff preparing the brief, and the Director reviewing it and adopting it in a letter to the Assistant Attorney General as the OPM's official interpretation — "*was [no] . . . less thorough, less formal or less open than it would normally be.*" *Id.* (emphasis added).

Similarly, although *Smiley* did not articulate the elementsof authoritativeness, the Court's implicit emphasis on rank, on recognized interpretive powers of the issuing decision-makers, and on institutionality was hardly new — either for itself or for the lower courts. *See, e.g., Miller v. Youakim*, 440 U.S. 125, 146 n.25 (1979) (where correspondence by regional Assistant General Counsel for HEW was not approved by HEW General Counsel or by any national HEW office, it could not be treated as agency's official interpretation); *Marine Engineers' Beneficial Ass'n No. 13 v. NLRB*, 202 F.2d 546, 550 (3d Cir. 1953) ("interpretation given by an individual member of a Board or by its attorney is not . . . to be taken as that official kind of interpretation to which courts must pay attention").

Connection to Finality

Finally, *Smiley's* implicit focus on deliberateness and authoritativeness in evaluating an "official agency position" squares neatly with older, perhaps less remembered doctrine on finality. The touchstone is Judge Leventhal's comprehensive opinion in *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971). After an initial exchange of letters with the Department of Labor's (DOL) Wage and Hour Division, counsel for an association of coin- operated laundries challenged an interpretation contained in an opinion letter, signed by the division's Administrator, stating that those laundries' employees were subject to the minimum wage requirements of the Fair Labor Standards Act ("FSLA"), 29 U.S.C. § 201 *et seq.* The government moved to dismiss, in part because it maintained the letter was too "informal" a vehicle for its interpretation to be considered "final," hence reviewable, under the APA.

The D.C. Circuit decided that was not the case. Finality had to be predicated, in part, on "authoritative determination." Here, although the Administrator may technically have been a subordinate official within DOL, his voice had to be taken as sufficiently authoritative, because, under FSLA case law, good-faith reliance on letter opinions from the Administrator could provide employers with a defense against liability. *Id.* at 700.

The Court also acknowledged that finality had to be predicated to some extent on formality, too, because the latter signaled the thoroughness of agency *deliberativeness*:

> [A] ruling made without that kind of assurance of deliberativeness that is presented by a hearing, or a structured controversy, may be the kind of ruling that is more truly subject to reconsideration.
>
> ***
>
> The matter of formality in the agency process helps show that the agency action involved is the product of the agency's process for assuring deliberation for this kind of action . . . .

Id. at 701-02.

But in the case before it, no one even challenged that the agency staff and outside counsel had been afforded an opportunity to consider and exchange their views thoroughly. Moreover, a strong mark of careful agency consideration was that the letter at issue was one of the few thousand, out of several hundred thousand answers to inquiries, that the Administrator had signed himself. Here, then, "informality in the communication [did] not negative the substance of what has been done and the reality that it is the 'final' such action of the agency." *Id.* at 702. In short, notwithstanding alleged informality, the letter bore all the indicia of authoritativeness and deliberation the court needed to consider it final – the same markers of "official agency position" in *Smiley*.

Conclusion

Smiley offers an implicit and simple (and, some might

argue, oversimple) framework for the courts to determine if and when an interpretation contained in an informal agency formats constitutes "official agency position": How authoritative is it, if at all? What quality of deliberation, if any, took place in the channels from which it emerged? Lower courts may wish to adopt the framework explicitly and articulate it further when they decide challenges that an agency has, suddenly and without explanation, deviated from an interpretation contained in those formats. The framework may make eminent sense as a starting point, because it parallels that set forth by Judge Leventhal for deciding whether interpretations contained in such formats would be final and reviewable in the first place. ◆

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technologies, or use of the Internet by agencies in a specific manner.

FURTHER RESOLVED, that federal agencies should explore means to maximize the availability and searchability of existing law and policy on their websites. Departments comprising several agencies should work with those agencies to assure the predictability of site content, and uniformity in the search mechanisms made available by: a) including organizational charts and personnel directories to facilitate public understanding and access. b) including in their own searchable data bases their governing statutes, all agency rules and regulations, and all important policies, interpretations, and other like matters on which members of the public are likely to request; c) posting materials where practicable in a form directly accessible to electronic searching by the search engine they provide, and organize internal web pages and data in a way that permits ready use by citizens dealing with the agency easily; d) assuring the possibility of sophisticated as well as simple searches; e) minimizing the need to refer out to other data-bases, for example the GPO's, and providing prominent notice of any need to do so, with appropriate links and help; and f) providing ready access, in downloadable format, to forms whose use is required by the agency.

FURTHER RESOLVED, that federal agencies should encourage public participation in rulemaking and policy formulation on the Internet by: a) making the agency's periodic Unified Regulatory Agenda prominently available and searchable on the agency's own site; b) providing a means for interested persons to enroll for electronic notification of further developments in a matter, beginning with its announcement in the Unified Regulatory Agenda; c) posting notices of proposed rulemaking on the agency's own site, and providing opportunities for electronic comment there; d) posting required analyses, public comments, and other constituent elements of a rulemaking docket on the agency's web site as far as practicable in readily searchable form at least in rulemakings likely to draft substantial public interest; and e) posting guidance documents and other matters not requiring notice and comment rulemaking procedures, and providing opportunities to seek revision or further information.

FURTHER RESOLVED, that given the fluid character of the Internet and its use, federal agencies should consider means by which the possibility of access to important materials placed on the Internet can be preserved, once those materials are no longer posted there.

OMBUDS STANDARDS

RESOLVED, that the American Bar Association supports the greater use of "ombuds" to receive, review, and resolve complaints involving public and private entities.

FURTHER RESOLVED, that the American Bar Association endorses the Standards for the Establishment and Operation of Ombuds Offices dated August 2001. ◆

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intended to delegate to agencies the power to resolve certain ambiguities. The Court's opinion in *Mead*, which seems to lay some emphasis on the actual textual bases for perceiving such an intent, perhaps reduces the fictional basis of *Chevron* somewhat compared to Justice Scalia's dogmatic presumption of such an intent whenever ambiguity is found. However, it achieves this at the cost of simplicity. Bright-line tests are easy to administer; an across-the-board presumption of a delegation to an agency to make an interpretation whenever its statute is ambiguous is easy to administer, a point that Justice Scalia hammers home in his dissent. The Court's test, which Justice Scalia derides as "th'ol' 'totality of the circumstances' test," necessarily results in the indeterminancy that accrues to such a test. The extent of the indeterminancy is unclear. While the Court seems to acknowledge that even rules adopted after notice and comment do not *necessarily* qualify for *Chevron* deference, at the same time it seems to suggest that such rules are highly likely to qualify for *Chevron* deference, and only unique