

## APPENDIX

### QUESTIONS AND ANSWERS

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN

EDWARD M. KENNEDY, MASSACHUSETTS

HOWARD M. METZGER, OHIO

DENNIS DECONCINI, ARIZONA

PATRICK J. LEAHY, VERMONT

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ALAN K. SIMPSON, WYOMING

CHARLES E. GRASSLEY, IOWA

ARLEN SPECTER, PENNSYLVANIA

HANK BROWN, COLORADO

WILLIAM S. COMER, MARYE

LARRY PRESSLER, SOUTH DAKOTA

CYNTHIA C. HOGAN, CHIEF COUNSEL

CATHERINE W. RUSSELL, STAFF DIRECTOR

HARRI A. DODD, MINORITY STAFF DIRECTOR

SHARON PROST, MINORITY CHIEF COUNSEL

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

July 27, 1993

The Honorable Ruth Bader Ginsburg  
United States Court of Appeals for  
the District of Columbia Circuit  
333 Constitution Avenue, N.W.  
Washington, D.C. 20001

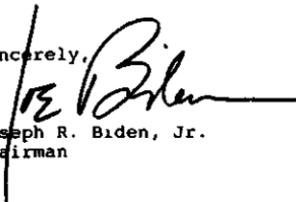
Dear Judge Ginsburg:

Following your testimony before the Judiciary Committee from July 20, 1993, to July 23, 1993, I respectfully request that you respond in writing to the attached additional questions that I have submitted as well as those of Senators Thurmond, Kohl, and Pressler. Your responses will be included in the hearing record as part of your sworn testimony.

Please direct your responses to the attention of Cathy Russell, Staff Director of the Committee. Your timely response is appreciated. Should you have any questions, please contact her at 224-5706.

Thank you for your assistance.

Sincerely,



Joseph R. Biden, Jr.  
Chairman

Enclosures

(567)

WRITTEN QUESTIONS FOR RUTH BADER GINSBURG  
FROM JOSEPH R. BIDEN, JR.  
July 27, 1993

1. At the hearings, you discussed the *Chevron* doctrine of statutory interpretation. See *Chevron USA v. NRDC*, 467 U.S. 837 (1984). Following the Supreme Court's decision, some courts have applied the "*Chevron* rule" to require deference to the agency's reasonable policy view unless Congress has resolved the precise matter at issue in a contrary way. Ready deference to the administrative agency whenever a statute is ambiguous or silent on a specific point stands in tension with a court's duty to reason from broad congressional statements of purpose to the particular issue before the court.

How should *Chevron* be applied in light of this tension?

What are the limits on this doctrine, and what sort of factors would you take into account in determining the proper deference owed to agency interpretation?

2. In your written response to the Committee's questionnaire, you stated that:

It is inappropriate, in my judgment, to seek from any nominee for judicial office assurance on how that individual would rule in a future case. That judgment was shared by those involved in the process of selecting me. No such person discussed with me any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

During the six months prior to the announcement of my nomination, I had no communication with any member of the White House staff, the Justice Department, or the Senate or its staff referring or relating to my views on any case, issue or subject that could come before the United States Supreme Court.

For the record, was any attempt made by anyone associated with the Administration to obtain a commitment concerning, or to determine, how you would decide any issue or case?

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT  
WASHINGTON, DC 20001

RUTH BADER GINSBURG  
UNITED STATES CIRCUIT JUDGE

July 27, 1993

Senator Joseph R. Biden  
Senate Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Senator Biden:

Enclosed, please find my responses to the written questions  
you forwarded to me today.

With appreciation for your interest.

Sincerely,



Ruth Bader Ginsburg

Enclosures

Responses by Ruth Bader Ginsburg to Written Questions  
by Senator Joseph R. Biden, Jr., received July 27, 1993

1. The doctrine of deference to agency constructions of statutes applies when "Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policy-making authority to an administrative agency." *Pauley v. Betheneroy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991). The first step in deciding whether deference is due, therefore, is to determine if the statute itself answers the question, leaving no gap for the agency to fill. This step requires the courts to "employ[] traditional tools of statutory construction." *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984). The courts must examine "the language and structure of the Act as a whole" (*Dole v. United Steelworkers of America*, 494 U.S. 26, 41 (1990)) and any other pertinent evidence of the statute's proper meaning, including its legislative history (*id.* at 41-42) and "its object and policy" (*id.* at 35 (internal quotation marks omitted)).

In short, the task of statutory construction for the courts is neither mechanical nor narrow. Statutory language that might seem ambiguous in isolation, presenting a "gap" for the agency to fill, can take on a clear meaning in the light of full judicial consideration of congressional intent. Only if the reviewing court concludes that more than one answer is consistent with the congressional will expressed in the statute, having fully considered the relevant materials, is the agency charged with administering the statute owed deference.

Even then, deference is limited, because the reviewing court must determine whether the particular construction advanced by the agency is a "reasonable interpretation." *Chevron*, 467 U.S. at 844. Lack of a single congressionally determined meaning does not give the agency license to adopt any view it pleases. The agency view must itself be consistent with statutory language and congressional policy. *Chevron*, 467 U.S. at 843-45; *Pauley*, 111 S. Ct. 2534-35. Beyond that, the agency position must -- whether treated as a matter of statutory interpretation or as a matter of administrative policymaking subject to normal APA-review standards -- be internally reasonable. It must reflect reasoned decisionmaking, judged in light of such factors as the thoroughness of the agency's consideration of evidence and policies, the need for expertise on the question, and the consistency of the agency position with earlier views or the presence of articulated reasons for changing such views. *Id.* In this respect as in the initial task of statutory construction, the judicial role is anything but mechanical.

In the end, the courts' task is to ensure rational administration consistent with governing law, giving full weight to authoritative guidance from Congress. The "tensions" you describe are always present in determining where congressional constraint leaves off and agency discretion begins. The process demands sometimes-difficult judgment calls about when Congress has spoken with sufficient clarity. Greater legislative clarity, of course, reduces the difficulty of these judgments.

2. This is to confirm the response I gave to the Committee's questionnaire: No attempt was made by anyone associated with the Administration to obtain a commitment concerning, or to determine, how I would decide any issue or case.