

Should courts defer to the "Chevron deference" in telecom cases? An interview with Andrew Jay Schwartzman

by Matthew Lasar
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In January of this year a group of New Yorkers decided that they'd had it with unsolicited phone calls, particularly calls from Clear Channel station WLTW. The station ran a prerecorded message campaign that urged land line owners to tune into the frequency for Motown, Elton John, and prizes.

So they filed a [class action lawsuit](#) against the giant. "These calls are an intrusion," their attorney Todd C. Bank told LL-FCC. "What is worse is that, unlike a regular telemarketing call, you can't tell the prerecorded message to please take you off their list. Imagine if everybody did this? You wouldn't be able to own a phone."

Bank's suit charged that the calls violated the 1991 Telephone Consumer Protection Act. But the judge hearing the case noted that the Federal Communications Commission had made an exception to the law. The Commission decided that such messages were acceptable if their purpose was "merely to invite a consumer to listen or to view a broadcast." rather than to sell a product.

The judge, citing a legal principle called the "Chevron deference," said he would go along with the FCC's interpretation of the statute, albeit with misgivings. "I have serious questions as to whether this is the type of phone call Congress intended to exempt when it granted such authority to the FCC," he noted.

More recently, a consortium of consumer groups, educators, and telcos sued to stop the FCC from applying the Communications Assistance for Law Enforcement Act (CALEA) to Internet telephone and broadband. The move would require schools, ISPs, and even the big regional Bell companies to open up their Internet systems to the FBI and Department of Justice.

But on June 9th, the U.S. Court of Appeals for the District of Columbia Circuit, by a vote of 2 to 1, [backed the FCC](#), again citing the "Chevron deference."

The dissenting judge filed an angry dissent. "What we see in this case is an agency attempting to squeeze authority from a statute that does not give it," Judge Harry T. Edwards wrote, declaring that the FCC's interpretation of CALEA "manufactures broad new powers out of thin air."

As President and CEO of the [Media Access Project](#), Andrew Jay Schwartzman deals with the Chevron deference on a regular basis. Schwartzman has argued crucial broadcasting regulation cases before the courts and Congress since the 1970s. LL-FCC asked him for an assessment of the Chevron deference's impact.

LL-FCC: Could you explain where the "Chevron deference" came from?

Andrew Jay Schwartzman: Chevron deference is named for a [Supreme Court case](#), one of the parties was Chevron, and it was an environmental case. But it established a principle of administrative law that has become extremely influential over the last twenty years and has particular application on FCC cases.

LL-FCC: What is that principle?

Schwartzman: In essence, Chevron gives the Federal Communications Commission the benefit of the doubt when it is interpreting laws passed by Congress. Specifically where there is any ambiguity in the words of Congress, the courts will defer to a reasonable construction by the agency. Even if the reviewing court might think that there is a better or more persuasive interpretation, the FCC's judgment will stand as long as it reaches minimal levels of reasonableness.

LL-FCC: Does this establish a hierarchy? In other words: How federal agencies interpret laws are better than the ways that courts interpret laws?

Schwartzman: It's not that it's better, it's that the courts will ordinarily defer to the expertise of the agency. It's an acceptance that the agency knows the law and the statute involved more thoroughly than the courts do. The courts do not give up their ultimate authority to reverse any decision of the FCC. So I can't say that it really says the agency is better in the end. It's the middle range of cases where there's a gray area, where the agency gets the benefit of the doubt.

LL-FCC: Did the Chevron deference spread quickly after that original decision through telecom law?

Schwartzman: Yes. It did as it should as a Supreme Court precedent. But it has become the dominant influence in review of FCC decision making over the last twenty years.

LL-FCC: Do you think that that's good?

Schwartzman: The principle is as good as any I could come up with, which is not to say that I am happy with the ways that it has been applied. There has been a tendency on the part of reviewing courts to accept very questionable interpretations under the Chevron deference. This is less a criticism of the Chevron principles than its application.

LL-FCC: The Chevron deference was recently used in the United States Court of Appeals for the District of Columbia Circuit to approve the FCC's interpretation of the Communications Assistance Law Enforcement Act. The Media Access Project is involved with this dispute. Why did you disagree with that decision?

Schwartzman: In that case the majority found ambiguity in the law where I think there was none. And once they found the ambiguity, then they applied the Chevron deference principle. The problem in this case was the first step, the interpretation of the law, and taking what I think was the plain language of the statute and misreading it. The plain language of the CALEA statute pertains to what "communications by wire" is. The Communications Act uses the same phrase elsewhere in a different way, which leads me to believe that the Court of Appeals was

misconstruing it.

LL-FCC: Will the Media Access Project appeal this case?

Schwartzman: We are, frankly, bit players in this litigation. A [petition for rehearing](#) asking the full membership of the court to review the decision has been filed. As is sometimes the case, the court has asked the government, the FCC, for a written response to our petition for rehearing. While this does not guarantee that a full rehearing will be held, it's a very positive sign. In the vast majority of cases when a rehearing petition is filed, the court simply dismisses the rehearing petition without asking the government for a written response.

LL-FCC: So the government will respond and then the court will make a decision about whether to rehear this CALEA case?

Schwartzman: That's correct.

LL-FCC: Do you see ways to turn the trend around what you see as the lenient way that the Chevron deference is used?

Schwartzman: Actually in the last few years the Supreme Court has started to reign in lower courts on Chevron. If anything the trend in the Supreme Court is to tell the lower courts to give a little less deference than they have in the past. So I think that that trend is underway.

LL-FCC: Are there any other telecom cases in which the Chevron deference has played an important role in the recent past?

Schwartzman: Almost every major telecommunications case involves Chevron to some degree. So the answer is yes—all of them.

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